

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GAIL WATSON,

COMPLAINT

Plaintiff,

No.

-against-

MILTON ARON, as Acting Executive Director of
NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,
TRUSTEES of the NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM, and VERA EGGLESTON, as
Administrator of the HUMAN RESOURCES
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants.
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PRELIMINARY STATEMENT

1. This action seeks (1) a declaration of Plaintiff's right to a retirement pension and other benefits available to vested members of the New York City Employees' Retirement System ("the Retirement System"), and (2) an injunction requiring the Acting Executive Director and Trustees of the Retirement System ("Defendants") to restore Plaintiff's membership in the Retirement System and to provide all of the benefits that are available to its retired vested members.

2. Defendants paid Plaintiff's sister all of Plaintiff's

contributions to the Retirement System. Defendants, without inquiry, made the payment pursuant to a patently defective power of attorney and other papers that, on information and belief, had been forged or obtained through fraud.

3. Defendants have refused to restore Plaintiff's membership, claiming that they had no duty to investigate before making payment, and also claiming that, even if the payment had not been made, Plaintiff's pension would have been ultimately forfeited pursuant to a five-year break-in-service rule that applies to members who stop working before having accumulated 25 years of pension credit. Plaintiff, according to Defendants, had only 24.37 years of pension credit when she stopped working. Defendants insist they may apply this rule to Plaintiff even though, for Plaintiff, a return to work within five years would have been impossible due to her disability.

4. Plaintiff challenges this forfeiture as (a) a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment; (2) an impairment of her contractual rights in violation of Article I § 10 of the United States Constitution; (3) a failure to make reasonable accommodation to her as required by the Americans with

Disabilities Act; and (4) under New York law, a breach of fiduciary duty, a violation of Plaintiff's contractual and due process rights, unjust enrichment, and inconsistent with the purposes for which the Retirement System was created.

PARTIES

5. Plaintiff Gail Watson joined the Retirement System on January 7, 1970, and was still a member, more than 28 years later, when a stroke forced her to stop working on June 28, 1998. Since then her sole income has been Disability Insurance Benefits, which the Social Security Administration pays to her based on its finding that she is unable to engage in any form of substantial gainful activity.

6. Defendant Milton Aron, the Acting Executive Director of the Retirement System, and Defendant Trustees of the Retirement System are fiduciaries, obligated to execute their duties in the sole interest of its members and beneficiaries and in accordance with the purposes for which the Retirement System was created: to insure that those who have served the public are not rendered destitute when unable to continue their service due to age or infirmity.

7. Defendant Verna Eggleston is the Administrator of HRA,

Plaintiff's former employer, an agency of the City of New York, at which, by virtue of her service to it, she accumulated at least 24.37 years of pension credit. Eggleston is included as a party because her cooperation might be needed for Plaintiff to receive full relief. Unless indicated, the word "Defendants," as used in the body of this Complaint, does not refer to her.

JURISDICTION

8. This is an action arising under the laws and Constitution of the United States; accordingly this Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331. Because this action includes civil rights claims, jurisdiction is also conferred by 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

9. Supplemental jurisdiction over the state claims is provided by 28 U.S.C. § 1367, and declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

VENUE

10. The Eastern District of New York, the location of the principal offices of the Retirement System, the home of Plaintiff, and where a substantial part of the events giving rise to this action took place, is a proper venue pursuant to 18 U.S.C. § 1391.

FACTS

11. In 1969 HRA hired Plaintiff, and on January 7, 1970, she exercised her right, as an employee of that agency, to join the Retirement System.

12. As a condition of membership, in the subsequent years of her employment, Plaintiff made contributions to the Retirement System through deductions from her salary. At or about the time she reached retirement age, these contributions, on information and belief, had a pre-tax value of only \$2,852.

13. Plaintiff had a right to withdraw her contributions, but doing so would have removed her from membership in the Retirement System and would have required her to forfeit benefits, which, on information and belief, would have had substantially greater total value.

14. As a consequence of her work for HRA, by June 1998, Plaintiff had accumulated at least 24.37 years of pension credit.¹

¹Plaintiff does not concede that she has fewer than 25 credits. She recalls that she when she worked she did so as a full-time employee and took two leaves: two years when she had a child and a 2-3 months when she had an operation, a work history that would have put her well over the 25-year credit minimum. Moreover, it would seem likely that at least some credit was earned during the leaves. This is obviously an issue for discovery.

15. On or about June 28, 1998, Plaintiff suffered a stroke and was admitted to Long Island College Hospital.

16. On or about July 23, 1998, Plaintiff was released to the Palm Gardens Center for Nursing and Rehabilitation, where she was confined until sometime in February 1999.

17. The stroke caused and continues to cause marked limitation in Plaintiff's capacity to walk. The stroke has also caused permanent limitations in the use of her right hand, and, for several months immediately following the stroke, rendered her incapable of writing.

18. Plaintiff is currently separated, but at the time of her stroke she was still living with her husband, who was with her when the stroke took place and took her to the hospital. Throughout the period of her hospitalization and nursing home confinement, Plaintiff authorized and relied solely on her husband to pay bills and otherwise take care of her finances.

19. Plaintiff has an identical twin sister, Elizabeth Watson ("the sister"), who lives in Plaintiff's building, who knew of her disabling stroke, and who, in its aftermath, made visits to her at the hospital and nursing home. The sister also had access to Plaintiff's apartment.

20. On September 8, 1998, during Plaintiff's confinement at the Center for Nursing and Rehabilitation, the sister submitted to the Retirement System a form captioned "Durable General Power of Attorney." (Annexed hereto as Exhibit A.)

21. Among the readily discernible peculiarities of this document are:

a. Above the line provided for the signature of the person granting the power, the spaces clearly provided for entry of the date are left unfilled;

b. Although the words "Her Mark," which appear below this line are handwritten and obviously not part of the original form, this notation is not accompanied by Plaintiff's initials;

c. On the signature line itself are three shapes, bearing no resemblance to the letters of any known alphabet and bearing no resemblance to any signatures Plaintiff had hitherto provided the Retirement System;

d. Neither on the form nor annexed to it is any explanation offered as to why these shapes are supplied instead of Plaintiff's signature;

e. Beneath the signature line, there appears a date, apparently stamped on top of another stamp of a date, in the

form "SEP 02 1998", whereas below the line there is a notarized "Acknowledgment," purporting to have been made fifteen days earlier, on August 18, 1998;

f. The form does not include an explanation of this discrepancy;

g. In the section captioned "Affidavit that Power of Attorney is in Full Force," both the place designations and space provided for the name of the person "being duly deposed" have been left blank;

h. The third paragraph absurdly states that the sister "make[s] this affidavit for the purpose of inducing Elizabeth Watson [i.e. the sister herself] to accept delivery of the following Instrument(s)"; and

i. The space then provided for listing "the following Instrument(s)" is left blank.

22. On the same day, the sister submitted to the Retirement System a form titled "Application for Return of Member's Accumulated Salary Deductions." (Annexed hereto as Exhibit B.)

23. Notwithstanding her claimed status as Plaintiff's attorney-in-fact, in no place on the form does the sister's name

appear.

24. Instead the form includes a notarized signature purporting to be that of Plaintiff.

25. Although notarized only three days after the Durable Power of Attorney form, the signature purporting to be that of Plaintiff does not consist of undecipherable shapes, but is entirely legible.

26. Beneath that signature and above that of the notary, the form includes the words: "On the 21st day of August 1998, personally appeared before me the said Gail Watson to me known to be the individual described in and who executed the foregoing, and he/she acknowledged that he/she executed the same."

27. On September 17, 1998, the sister submitted another form (annexed hereto as Exhibit C), whose caption is identical to the Application for Return submitted nine days before except that the word "Refund" is substituted for the word "Return."

28. In contrast to the Application for Return, in the Application for Refund, the signature line is explicitly labeled "Signature of Member."

29. Despite this, and unlike the Application for Return, the signature line on the Application for Refund contains the

sister's signature.

30. No notation or other indication on the form is given acknowledging that the "signature of member" line does not contain Plaintiff's signature but instead that of a person purporting to be her attorney-in-fact.

31. In fact, the form not only lacks any signature purporting to be that of Plaintiff but is devoid of any reference to Plaintiff. The same is true of the Election of Payment form submitted on October 30, 1998. (Annexed hereto as Exhibit D.)

32. Soon thereafter, the Retirement System paid the sister all of Plaintiff's contributions, whose total value before taxes amounted to \$2,852.

33. In 2003, after Plaintiff reached retirement age, she informed the Retirement System that she wished to apply for her pension.

34. Upon consulting its records, an employee of the Retirement System told Plaintiff that she was not entitled to a pension because of the aforementioned withdrawals.

35. By letter dated May 12, 2005 (annexed hereto as Exhibit E), Plaintiff, through her counsel, asked the Retirement System to reinstate her membership because the withdrawals had been

unauthorized and, in fact, a consequence of fraud.

36. Counsel also asked to be informed "immediately if there are any other and further procedures required or available" or if "there are no administrative procedures required or available."

37. By letter dated May 20, 2005, postmarked June 2, 2005 (annexed hereto as Exhibit F), Karen Mazza, counsel for the Retirement System, replied that if Plaintiff was a victim of fraud by the notaries, her remedy was to sue those individuals. Mazza contended that the Retirement System itself was absolved of liability by virtue of the terms of the boilerplate third-party liability waiver contained on the power of attorney. Although Mazza acknowledged that the liability waiver applies only to a "duly executed" power of attorney, she did not address Plaintiff's central contention that the documents were not duly executed. Other than referring to the fact that the forms had been notarized, Mazza did not address Plaintiff's contention that the notarizations were patently defective.

38. Mazza further stated that, even if the withdrawals had not been made, Plaintiff would have been automatically removed from membership because she failed to request reinstatement as an employee within five years of the termination of her employment.

39. Mazza offered no explanation as to why a completely disabled member was required to request reinstatement to a job she could not perform. Mazza stated that if Plaintiff had accumulated 25 years of pension credit, instead of 24.37, no such request would have had to be made and no forfeiture would have been made.

40. Mazza did not describe any further administrative procedures that were required of or available to Plaintiff.

CLAIMS FOR RELIEF

I. CLAIMS MADE UNDER FEDERAL LAW

FIRST CLAIM FOR RELIEF

41. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Plaintiff has a property interest in her retirement benefits and may not be deprived of them without due process of law.

42. Defendants have deprived Plaintiff of her benefits on the ground that they had paid out her contributions.

43. The payment, however, although made under color of law, was not actually made in accordance with due process of law, which would have only permitted the contributions to be paid to Plaintiff or to a person duly authorized by Plaintiff.

44. By basing their deprivation of Plaintiff's benefits on an action taken by themselves without legal authority, Defendants have caused Plaintiff to be deprived of property without due process of law in violation of the Fourteenth Amendment.

SECOND CLAIM FOR RELIEF

45. At the time they caused her to be deprived of her pension, Defendants had a fiduciary relationship with Plaintiff. As such, Defendants were required to protect her interests by exercising the reasonable care and due diligence imposed by law on fiduciaries holding property in express trust.

46. The three documents that the sister presented to Defendants, purportedly on behalf of Plaintiff, included numerous characteristics indicating that the documents were facially defective, improperly executed, and/or the consequence of fraud or a comparable irregularity including, but not limited to the fact that:

a. The form purporting to make the sister Plaintiff's attorney-in-fact does not include Plaintiff's signature; is not accompanied by any explanation of why, instead of Plaintiff's signature, there are three unintelligible shapes, whereas the authorization of withdrawal form submitted the same day, and

notarized only three days later than the power of attorney, includes a legible cursive signature purporting to be that of Plaintiff; and

b. The power of attorney form leaves unfilled various date spaces, but includes, in other parts, different dates whose significance is unexplained; and instead of indicating, in the space provided, that the power is granted for the purpose of inducing the Retirement System to recognize the sister's authority, indicates that the power is granted for the purpose of inducing the sister to recognize the sister's authority; leaves blank the space provided for listing the document or documents that the attorney-in-fact intends to execute.

47. The aforementioned characteristics were or should have been readily apparent to Defendants and gave the Retirement System due notice that the forms were defective.

48. Despite this, Defendants honored all of the forms.

49. On information and belief, the Retirement System did so without making any investigation of the propriety and authenticity of the forms.

50. Under the circumstances described above, in honoring the forms and in paying out all of Plaintiff's contributions,

Defendants failed to exercise the reasonable care and due diligence imposed by law as her fiduciaries.

51. By causing Plaintiff to be deprived of her pension because of their own failure to adhere to the standard of conduct imposed upon them by law, their deprivation of her pension was made, although under color of law, without due process of law.

52. As a consequence, Defendants have caused her to be deprived of property without due process in violation of the Fourteenth Amendment.

THIRD CLAIM FOR RELIEF

53. Defendants claimed the power to deprive Plaintiff of her pension because she did not return to work within five years of the termination of her employment and had stopped working before she earned 25 years of pension credit. Although not cited in the letter of Karen Mazza, Defendants were presumably acting under color of the authority of the Retirement System's five-year break-in-service rule codified at N.Y.C. Admin. Code § 13-146.

54. This rule does not relieve or reduce Defendants' obligations as fiduciaries; it only permits them to apply the rule in a manner consistent with their duty to protect

Plaintiff's interests and otherwise act in a manner consistent with the purpose for which it was created.

55. Applied literally, the rule would force Defendants to impose complete forfeiture on a member even when it was impossible for the member to avoid the break. This inherently unjust rule is facially invalid because its enforcement is inconsistent with Defendants' legally-mandated fiduciary duty to protect the interests of each individual member. At a minimum the rule should not be applied to Plaintiff because it makes her receipt of a pension based more than 24 years of public service contingent on her meeting a requirement that she cannot possibly fulfill. See Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1971).

56. Basing the forfeiture of Plaintiff's pension on this rule is therefore without legal sanction and as a consequence would cause Plaintiff to be deprived of her property without due process of law.

FOURTH CLAIM FOR RELIEF

57. Defendants also acted unlawfully in that, as a consequence of the foregoing, they caused her to forfeit her pension in violation of rights secured to her by Article I of the New York Constitution, which provides that "[n]o member of this state shall be . . . deprived of any of the rights or privileges secured to any citizen thereof . . . unless by the law of the land," and in violation of Article V § 7 of the New York Constitution, which provides that "membership in any Retirement System of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

58. By causing Plaintiff to be deprived of her pension as a consequence of the violation of the New York Constitution, Defendants have caused Plaintiff to be deprived of property without due process of law in violation of the Fourteenth Amendment.

FIFTH CLAIM FOR RELIEF

59. Under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., "no qualified individual

with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

60. Under the ADA, an individual with a disability is a person who has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or [is] regarded as having such an impairment." 28 C.F.R. § 35.104.

See 42 U.S.C. § 12102.

The phrase "physical or mental impairment" means:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 35.104.

61. A "public entity" is defined as "any department, agency . . . or other instrumentality of a State or States or

local government..." 42 U.S.C. § 12131(1).

62. A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. 12131(2).

63. The Attorney General, in implementing Title II, has stated that:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7).

64. The Attorney General has further provided that:

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied benefits of the services, programs, or other activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit,

or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability--

- (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
- (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
- (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

* * * *

- (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

* * * *

- (b) (3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:
 - (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

28 C.F.R. § 35.130. And according to the Department of Justice's Title II Technical Assistance Manual:

A public entity may not impose eligibility criteria for participation in its programs, services, or activities that either screen out or tend to screen out persons with disabilities, unless it can show that such requirements are necessary for the provision of the service, program, or activity.

U.S. Department of Justice, Title II Technical Assistance Manual, Sec. 3.5100.

65. The policy and practice of the Retirement System of denying pension benefits to employees who do not complete 25 years of service and do not apply for their pension within 5 years of the termination of their employment excludes qualified individuals with disabilities from participation in and denies them the benefits of the Retirement System by reason of their disabilities. The Retirement System' policy automatically strips disabled persons of all pension rights if they become disabled prior to completing 25 years of service. In contrast, members who are not disabled always have the option of completing their 25 years and thus are not subject to the involuntary loss of their pensions.

66. Plaintiff is a disabled person within the meaning of the ADA because her capacity to walk is markedly impaired due to permanent and severe damage to her left leg as well as

limitation in the use of her right hand.

67. After completing at least 24.37 years of public service, Plaintiff was prevented from working an additional 0.63 years and completing 25 years of service solely due to these disabling conditions. In violation of the ADA, the policy and practice of the Retirement System operated to divest Plaintiff of all accumulated credits for her at least 24.37 years of service, solely because Plaintiff became disabled before what, according to Defendants, would have been her 25th year.

68. The Retirement System further violated the ADA by failing to make a reasonable modification in its policy and practice, such as permitting disabled persons like Plaintiff to draw a pension proportional to their years of service notwithstanding their inability to avoid a five-year break-in - service or their inability to earn at least 25 years of pension credit.

SIXTH CLAIM FOR RELIEF

69. In 1970, when Plaintiff joined the Retirement System, she entered into a contractual relationship with the Retirement System whereby, upon reaching retirement age, she had the

reasonable expectation she would receive a pension commensurate with her years of work as well as other retirement benefits.

70. By working as a civil servant for almost the whole of her adult life and, indeed, up until the very day a stroke made it impossible for her to continue, Plaintiff substantially performed her obligations under the contract.

71. The legally binding rules explicitly or implicitly invoked by Defendants have the effect of relieving them, at Plaintiff's expense, of their obligations under the contract.

72. As such, these authorities would have to be deemed an impairment of Plaintiff's contractual rights in violation of Article 1 § 10 of the United States Constitution.

II. CLAIMS MADE UNDER NEW YORK LAW

SEVENTH CLAIM FOR RELIEF

73. Under Article I § 1 of the New York Constitution, "[n]o member of this state shall be . . . deprived of any of the rights or privileges secured to any citizen thereof . . . unless by the law of the land"

74. The phrase "'law of the land' is equivalent to the phrase 'due process of law.'" People v. New York Cent. & Hudson River R.R. Co., 206 N.Y. 274, 289 (1912) (citing Davis v. New Orleans, 96 U.S. 97 (1877)).

75. Therefore, in depriving Plaintiff of her property without due process as described in her first four claims, Defendants also deprived her of rights and privileges secured to her by the New York Constitution.

EIGHTH CLAIM FOR RELIEF

76. In acting without reasonable care and due diligence, as described in Plaintiff's second claim for relief, Defendants failed to fulfill their fiduciary duty to Plaintiff as required under New York law.

NINTH CLAIM FOR RELIEF

77. Under article V § 7 of the New York Constitution, "membership in any Retirement System of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

78. By depriving Plaintiff of her pension rights as described in her sixth claim for relief, Defendants have also violated Petitioner's rights under Article V § 7 of the New York Constitution.

TENTH CLAIM FOR RELIEF

79. If granted retirement benefits, Plaintiff will receive her monthly annuity and allowance, as well access to other benefits, from the time she reached retirement age of fifty-five until her death.

80. On information and belief, the total lifetime value of all of these benefits would substantially exceed the \$2,852 in contributions that Defendants paid out.

81. If Plaintiff's benefits are forfeited, Defendants would therefore, on information and belief, be enriching themselves substantially at Plaintiff's expense, even though Plaintiff is without fault.

82. Under all of the circumstances of this case, such an enrichment would have to be deemed unjust and a violation of equity.

ELEVENTH CLAIM FOR RELIEF

83. Under the circumstances of this case, Defendants, by causing the forfeiture of Plaintiff's entire pension, have frustrated the purposes for which the Retirement System was created and breached their duty to administer the Retirement System in furtherance of those purposes.

84. In light of this subversion of the purposes of the Retirement System, equitable relief should be granted to ameliorate the hardships it has caused Plaintiff.

CONCLUSION

WHEREFORE Plaintiff respectfully requests that this Court issue a judgment and order:

1. Declaring Plaintiff's right to a pension and the other benefits available to vested members of the Retirement System;
2. Enjoining the Acting Executive Director and the Trustees of the New York City Employees' Retirement System to restore Plaintiff's membership and to provide all of the benefits that

are available to its retired vested members.

3. Granting such other and further relief as may be just,
equitable, and proper.

Dated New York, New York
September 19, 2005

Respectfully,

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