

From: Robertson Baldwin <brobertson@iaff.org>
Subject: RE: Montana
Date: February 17, 2011 4:32:51 PM MST
To: "jsands@mscopff.org" <jsands@mscopff.org>
Cc: Duffy Rich <rduffy@iaff.org>, Woodley Tom <taw@wmlaborlaw.com>, Griffiths Stephanie <sgriffiths@iaff.org>
▶ 1 Attachment, 3.3 KB

Brother Sands:

Regarding the email below ... My understanding is that some members of the legislature have expressed a concern that, if fire fighters are afforded a presumptive disability right in the State, the presumption would be required to be applied to all public employees. I think the reasoning is as follows: once fire fighters are allowed to claim a presumption that a certain disease is a disability, other public employees (public works, teachers, etc.) would be able to go to court to claim the same right for themselves.

This argument is made under the equal protection clause of either the U.S. Constitution or a state constitution. I am pretty sure every state constitution has an equal protection clause. (I remember now that I misspoke when I told Rich that the NC constitution does not have one.) In fact, given the level of review employed by courts when applying equal protection analysis to this question, I have little doubt that **no** court in Montana would require a disability presumption – even one afforded only fire fighters (or only police and fire fighters, as the case may be) – be extended to other public employees.

First of all, all statutes “carry with them a presumption of constitutionality and we construe statutes narrowly to avoid an unconstitutional interpretation if possible.” Farrier v. Teacher's Ret. Bd., 120 P.3d 390 (Mont. 2005) (rejecting equal protection claim filed by schoolteacher against retirement system that prohibited re-employed teachers from earning pension from previous schoolteaching employment during period of re-employment). Moreover, the standard applied by courts in considering these kinds of challenges (called “rational basis” review) is highly unlikely to result in forcing the state to give this limited benefit to all public employees. See, e.g., Gulbrandson v. Carey, 901 P.2d 573 (Mont. 1995) (applying rational basis test to reject challenge to statute increasing retired judge's retirement benefits).

Mont. Const. art. II, § 4 guarantees equal protection of the laws requires that “all persons be treated alike under like circumstances.” Where a law creates a different classification (in this case, fire fighters versus other public employees), courts will examine the classification to determine if it is a “suspect” classification (such as race or national origin) or whether it impinges on a fundamental right (such as a right to due process). Where it does not do so, courts will review the classification and consider whether “similarly situated” individuals are treated differently, and, if so, whether the different treatment is “rationally related to a legitimate governmental objective.”

Thus, the analysis applied by courts would be to consider first whether non-fire fighter, public employees are “similarly situated” to fire fighters when applying for disability retirement benefits. I do not think that a court would ever consider fire fighters, applying for disability retirement, to be similarly situated to (say) teachers or other public employees, merely because they are both employed by governments. There are a lot of differences between them: most fire fighters in Montana are covered by a different retirement system (FURS) than that applied to other public employees (PERS); they are engaged in an obviously different occupation, with radically different hazardous exposures; have different (i.e., lower) life expectancies; and so on.

Moreover, even it could be shown that a fire fighter and a public works employee were “similarly situated” with respect to an entitlement to a disability presumption, courts in Montana would also be highly unlikely to conclude that the distinction applied to fire fighters by the proposed legislation was not “rationally related to a legitimate governmental objective.” I know this from hard experience. About five years ago I filed a suit on behalf of some fire fighters employed by the National Guard who were not allowed into FURS, and stuck in the far less beneficial PERS system. The Supreme Court rejected the equal protection suit filed on their behalf. Bean v. State, 179 P.3d 524 (Mont. 2008).

In that suit, the Court concluded that two groups of fire fighters (one group employed by the National Guard and hired before October 1, 2001; the other employed after that date) could be participants in two completely different retirement

systems (PERS and FURS) even though they worked in the same fire department, right next to each other. The Court concluded that the legislature had a rational basis for this distinction (i.e., saving money).

Here, there is a clear rational basis for creating a disability presumption for fire fighters and not for other public employees: fire fighters have substantially higher hazardous exposures than other public employees (certainly teachers, etc.). Fire departments have vigilant wellness-fitness programs that maintain fire fighter health; have rigorous training standards and demanding standards for applicants in terms of physical health; and most importantly, the presumption addresses a substantial need when it comes to encouraging fire fighters to take on extremely hazardous emergencies for the benefit of the public.

In short, as I have said, it is extremely unlikely that a non-fire fighter public employee would be able to force the state retirement system to give him or her a presumption on a certain disability claim just because fire fighters are statutorily entitled to the same.

179 P.3d 524

Arneson v. State of Montana, 864 P.2d 1245, 1248 (Mont. 1993). Moreover, where

Baldwin Robertson
IAFF Legal Counsel
1750 New York Ave, NW
Washington, DC 20006
(202) 824-1508
(202) 783-4570 (fax)

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From: Duffy Rich
Sent: Thursday, February 17, 2011 2:00 PM
To: jsands@mscopff.org
Cc: Robertson Baldwin
Subject: Montana

Joe

As we discussed, our Legal Counsel, Baldwin Robertson, will provide you a quick opinion regarding Montana's equal protection clause and its relationship to coverage of fire fighters under our proposed fire fighter presumptive bill in Montana. As we briefly discussed, and as Baldwin informed me before I called you back, all states (except NC) have such constitutional clauses. However, Baldwin will provide you the legal argument.

If you have anything you need to send on this, please email to the both of us. Thanks.

Baldwin, if needed, Joe's cell number is 406-697-8597.

Rich



Richard M. Duffy
Assistant to the General President
Occupational Health, Safety and Medicine
International Association of Fire Fighters
1750 New York Avenue, NW
Washington, DC 20006
(O) 202-824-1571; (C) 202-549-5081
rduffy@iaff.org