DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202 P: 303-861-1111	▲ COURT USE ONLY ▲
TRACEY LAWLESS, **Plaintiff,** **v.** **STANDARD INSURANCE COMPANY; COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION; COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION BOARD OF TRUSTEES; CAROLE WRIGHT, in her Official Capacity only; MARYANN MOTZA, in her Official Capacity only; and RICK LARSON, in his Official Capacity only;** **Defendants.**	**No. 2010-cv-9848** **Division 7** **Courtroom:**

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STANDARD INSURANCE COMPANY'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, STANDARD INSURANCE COMPANY ("Standard"), by its attorneys, Swift & Bramer, LLP, submits its Response to Plaintiff's Motion for Partial Summary Judgment pursuant to C.R.C.P. 56.

INTRODUCTION

PERA is an instrument of the State of Colorado responsible for providing welfare and pension programs to public employees. C.R.S. §24-51-201. Prior to 1999, Colorado's disability welfare program paid public employees who were permanently disabled from their assigned jobs with the equivalent of their salary through retirement age. The old program created perverse incentives by financially encouraging public employees to remain out of the workforce and collect full salary from the State, even though they were fully capable of working in another job.

The General Assembly took corrective action by passing the PERA Statute.[1] The Statute authorizes PERA to design (by promulgating rules) and provide (by procuring an insurance policy that conforms to PERA's rules) a short-term disability program. PERA adopted rules that provide income replacement benefits to public employees whose disability prevents them from working in their assigned jobs and in any other occupation, calculated at 60% of predisability earnings for a maximum period of 22 months. PERA's rules, specifically Rule 7.45(E), provide no benefit to employees who are able to work in another occupation. PERA submitted its rules to the Attorney General of Colorado in compliance with the Administrative Procedures Act, C.R.S. §24-4-103. The Attorney General found no legal deficiency in the form or substance of PERA's rules. With the Attorney General's stamp of approval, PERA purchased a Group STD Policy that conforms to PERA's rules as directed by C.R.S. §24-51-703.

[1] For ease of reference, C.R.S. §24-51-702 *et seq.* is referred to as the "PERA Statute" or "Statute."

Tracey Lawless, while unable to perform some of the duties specific to her State job, is fully able to work in another gainful occupation based on her education, training, and experience. She fails to qualify for a benefit under PERA's rules and the Group STD Policy. Lawless claims that Rule 7.45 is *ultra vires* and unconstitutional, because PERA allegedly lacked authority to adopt a rule that provides no benefit to public employees who are able to work in another gainful occupation. Lawless declares that she has a "statutorily guaranteed" right to receive income replacement benefits calculated at 60% of predisability earnings for a maximum period of 22 months. She wants the Court to fix PERA's disability program by judicially editing PERA's rules and crossing-out Rule 7.45(E). She wants the Court to perform the same judicial edits to the Group STD Policy under the umbra of contract reformation.

Lawless misreads the PERA Statute. The Statute does not guarantee income replacement payments to disabled public employees. The Statute does not mandate a 22-month maximum benefit period. And the Statute does not mandate that employees who are disabled from their assigned jobs yet are fully able to work in another occupation (but choose not to) must receive precisely the same benefit as employees who cannot work at all in their assigned jobs or in any other occupation. The Statute contains a menu of benefit options that PERA may choose to provide, and not all of them are monetary. PERA may choose to provide reasonable income replacement, or rehabilitation services, or retraining services, either alone or in some combination. C.R.S. §24-51-702(1)(a). The General Assembly delegated its legislative powers to PERA to make these choices in order to design and implement a short-term disability program within the general framework of the Statute.

If PERA's rules are valid and enforceable, as Colorado's Attorney General declared, then Lawless and the putative class have no claims against PERA or Standard. But if PERA's rules are *ultra vires*, the judicial task is to strike down the rules and void the insurance contract, not to judicially redesign Colorado's disability welfare program. The process of choosing what type of benefit to provide to public employees who are able to work in another occupation entails a balancing of public policy interests and budgetary constraints, which is a core legislative function. Lawless's entreaty for the Court to design a substitute disability program that "fixes" PERA's rulemaking mistake, and to implement that program retrospective to January 1, 1999 by judicial *force majeure* under the guise of contract reformation, runs afoul of the separation of powers. If PERA adopted rules that are no good, and the safeguards of the Administrative Procedures Act failed the people of Colorado, then the Court can strike down PERA's rules. But the separation of powers leaves the task of fixing PERA's program to the legislature.

ARGUMENT

I. The PERA Statute Does Not Provide "Statutorily Guaranteed" Monetary Benefits.

Lawless portrays her motion for "partial" summary judgment as a simple request for the Court to enforce her statutorily vested rights to collect monetary benefits conferred by the PERA Statute. Lawless assumes that §702(1)(a) of the Statute creates vested rights to "guaranteed" minimum benefits. (Pl. Motion, pgs. 10, 11). She proclaims that §702(1)(a) "unambiguously provides" that members who cannot perform their assigned jobs shall be given short-term disability payments for a statutory maximum period of 22 months. (Pl. Motion, pgs. 9, 10). Professing to seek enforcement of the PERA Statute's unambiguous terms, Lawless declares that

she and the putative class are "entitled to receive short term disability benefits calculated at 60% of their Predisability earnings." (Pl. Motion, pg. 9). She also declares that Standard is legally obligated to pay those benefits under a judicially "reformed" Group STD Policy. (Pl. Motion, pg. 16).

But the statutory guarantees Lawless asks the Court to enforce as a matter of law are nowhere in the PERA Statute. The Statute establishes a general framework for Colorado's short-term disability program, and calls upon PERA to exercise its rulemaking authority to design and assemble the specific components of that program. The Statute manifests the General Assembly's delegation of legislative authority to PERA to design (by enacting rules) and implement (by purchasing an insurance policy) a short-term disability program. But the Statute does not mandate specific benefits that the Court can simply identify and "enforce" by judicial decree, as Lawless contends. The Statute leaves the details of the program's design, including the choice of benefits and the duration of those benefits, to PERA as the General Assembly's legislative proxy. Section 702(1) delegates to PERA the duty to provide a short-term disability program. Section 702(1)(a) describes the general framework of that program. Section 703 authorizes PERA to promulgate rules establishing the substantive and procedural standards for disability, and to purchase an insurance contract that "shall conform to rules adopted by the board." C.R.S. §24-51-703.

Section 702(1)(a)—on which Lawless bases her claim for payment of statutorily guaranteed monetary benefits—does not grant to public employees an inalienable right to receive monetary benefits for a maximum period of 22 months. Section 702(1)(a) provides PERA with a menu of general benefit options that PERA may choose to provide:

> (1) The association shall provide for two types of disability programs for disabilities incurred on or before termination of employment:
>
> > (a) Short-term disability. A member who is found by the disability program administrator to be mentally or physically incapacitated from performance of the essential functions of the member's job with reasonable accommodation as required by federal law, but who is not totally and permanently incapacitated from regular and substantial gainful employment, *shall be provided with reasonable income replacement, or rehabilitation or retraining services, or a combination thereof*, under a program provided by the disability program administrator for a period specified in the rules adopted by the board. The cost of the program shall be funded by the association.

C.R.S. §24-51-702(1)(a) (emphasis added).

The Statute gives PERA significant flexibility in designing the State's disability program, including selecting the type of benefit to be offered. PERA may choose to provide "reasonable income replacement," or "rehabilitation" services, or "retraining" services, "or a combination thereof." C.R.S. §24-51-702(1)(a). The Statute also leaves the duration of benefits to PERA's discretion. The General Assembly never mandated payment of *monetary* benefits to public employees who cannot perform their assigned jobs, and the General Assembly never mandated a 22-month maximum benefit period. See *Dawson v. Public Employees' Retirement Ass'n*, 664 P.2d 702, 707 (Colo. 1983) ("When the meaning of a statute is plain and unambiguous, a court cannot substitute its opinion as to how the law should read in place of the law already enacted.").

Lawless's claim that she and the putative class are *statutorily guaranteed* payment of monetary benefits for 22 months has no foundation in the language of the PERA Statute. See *Alderton v. State*, 17 P.3d 817, 819 (Colo. Ct. App. 2000) ("A statute or ordinance will be considered a contract only if its language and surrounding circumstances manifest a legislative intent to create private contractual rights enforceable against the state or municipality."); *Colo.*

Springs Fire Fighters Ass'n, Local 5 v. City of Colo. Springs, 784 P.2d 766, 773 (Colo. 1989). ("It is presumed that a law 'is not intended to create private contractual vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'") (quoting *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79 (1937)).

II. Lawless's Call For Judicial "Reformation" Violates The Separation Of Powers.

By delegating rulemaking authority to PERA, the General Assembly entrusted PERA to perform the legislative task of balancing public policy interests and State budgetary constraints. "Rulemaking is a derivative of lawmaking," and thus "rulemaking is a legislative function." *Whiley v. Scott*, -- So.3d --, 2011 WL 3568804, at *5 (Fla. Aug. 16, 2011). "The Legislature delegates rulemaking authority to state agencies because they usually have expertise in a particular area for which they are charged with oversight." *Id.* PERA's rulemaking authority entails discretionary policy choices, which is a core legislative function.

Balancing public policy interests and State budgetary considerations, PERA enacted rules that provide for payment of monetary benefits to employees who are unable to perform their assigned jobs and cannot work in any other occupation. PERA's rules provide no benefit—whether monetary or non-monetary "retraining" or "rehabilitation" services—to employees who are able to work in another gainful occupation. PERA's rules reflect public policy and economic choices that rectified the abuses of the pre-1999 program, by discouraging employees who are able to work in another occupation from choosing instead to remain at home and collect disability payments.

Lawless's and the putative class's dispute properly lies with PERA, PERA's Board, and the State of Colorado, but not with Standard. The Statute does not direct private insurers like

Standard to offer specific benefits to public employees. The Statute delegates to PERA the legislative authority to select the type of benefit and the duration of benefits from the Statute's menu of options. Because the PERA Statute does not impose a statutory duty upon Standard to provide specific benefits, Lawless and the putative class cannot use the PERA Statute as the touchstone for rewriting the Group STD Policy's terms. The PERA statute does not give Lawless legal authority to compel Standard to provide a type of coverage that Standard never contracted to assume and that Standard is not statutorily required to provide. "A court may not make a contract for the parties and then order it to be specifically performed." *Ballow v. Phico Ins. Co.*, 878 P.2d 672, 680 (Colo. 1994).

When an instrument of the state enters a contract that exceeds its statutory charter, the remedy is to void the contract, not "reform" it. If PERA exceeded its statutory authority when it adopted Rule 7.45 and purchased an insurance policy that conforms to Rule 7.45, the legal recourse is to declare the Rule *ultra vires* and void the Group STD Policy. "Any contract which will disable a public or quasi public corporation from performing the duty which it has undertaken, or has been imposed upon it, for public weal, … is void." *Colburn v. Bd. of Comm'rs of El Paso County*, 61 P. 241, 243 (Colo. Ct. App. 1900). See also *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 958 P.2d 515, 519 (Colo. Ct. App. 1998) ("Contracts executed by municipal corporations are void when there is a failure to comply with the mandatory provisions of the applicable statutes or charters."); *Normandy Estates Metro. Recreation Dist. v. Normandy Estates Ltd.*, 534 P.2d 805, 807 (Colo. Ct. App. 1975), modified in part on other grounds, 553 P.2d 386 (Colo. 1976) ("We recognize that a contract with the District is void if the District fails to comply with statutory requirements governing such a contract.").

In seeking reformation, Lawless asks for a remedy that the Statute does not provide and that the Court is not empowered to deliver. She wants payment of "statutorily guaranteed" benefits calculated at 60% of predisability earnings for a period of 22 months. But the Statute does not mandate payment of income replacement benefits, provide a formula for calculating benefits, or establish a 22-month maximum benefit period. So Lawless wants the Court to rewrite PERA's rules to provide an income replacement benefit that she thinks PERA *should have chosen* to give to public employees like her, who are fully able to work in another occupation. She wants the Court to reform PERA's Rule 7.45, then reform the Group STD Policy to conform to PERA's judicially reformed Rule, and then order Standard to specifically perform under the reformed Policy retroactive to January 1, 1999. Lawless's elaborate process of judicial reformation runs afoul of the separation of powers.

The separation of powers is foundational to our tripartite system of government. "The separation of powers doctrine is founded on mutual respect of each of the three branches for the constitutional prerogatives and powers of the other branches." *Whiley*, 2011 WL 3568804, at *3. Article III of the Colorado Constitution directs that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." (Colo. Const. art. 3).[2]

[2] The Distribution of Powers clause provides, "The powers of the government of this state are divided into three distinct departments,---the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Colo. Const. art. 3.

The separation of powers imposes limitations on the exercise of power that the branches of government may not transgress. The judiciary holds a particularly solemn position, because courts possess the authority to strike rules and directives of the other branches that violate the Constitution. That authority does not license courts to substantively improve or "fix" those rules and directives. Adherence to the separation of powers maintains the public's confidence in a restrained judiciary.

Lawless tries to portray her request for judicial reformation as a minor editorial correction of PERA's rules and the Group STD Policy. She wants the Court to rewrite PERA's disability program by crossing out Rule 7.45(E) and the corresponding provision of the Group STD Policy. That editorial prerogative belongs to the legislature, not the judiciary. Courts do not have license "to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters out to be resolved." *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005). See also *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think … is the preferred result.") (internal quotation and citation omitted).

The General Assembly entrusted PERA with innumerable choices in designing the State's disability program. PERA, exercising its legislative powers delegated by the General Assembly, chose to design a program that provided income replacement benefits (calculated at 60% of predisability earnings for 22 months) to public employees who are disabled from their assigned jobs and cannot work in any other occupation. Lawless erroneously assumes that the same income replacement benefit must be provided to public employees who are able to work in another occupation. Nothing in the Statute requires that PERA must provide the same benefit to

both groups of public employees. Nothing in the Statute precludes PERA from providing one type of benefit to employees who are disabled from their current jobs and all other occupations, and a different type of benefit to employees who are able to work in other occupations. See *Dubois v. Abrahamson*, 214 P.3d 586, 588 (Colo. Ct. App. 2009) (Courts presume that if General Assembly intended the statute to achieve a particular result, it would have employed terminology clearly expressing that intent) (citing *Mason v. People*, 932 P.2d 1377, 1380 (Colo. 1997)).

If the Court finds that the PERA Statute requires that a benefit must be provided to public employees even though they are fully able to work in another occupation, PERA might choose to provide retraining or rehabilitation services to that group of employees, while giving income replacement benefits to employees who cannot work at all. Or PERA might choose to provide a lower monetary benefit for a shorter duration (say 6 months rather than 22 months) for employees who can work in another occupation. Maybe PERA would choose to provide the same monetary benefit to all public employees, but shorten the benefit period, or diminish the benefit calculation formula, to ensure that the program does not become too costly for Colorado to maintain. These are quintessentially legislative choices shaped by public policy and the State's financial resources, from which the Court must abstain. "'It is not up to the court to make policy or to weigh policy.' Such action must be left to the General Assembly." *Estate of Keenan v. Colo. State Bank & Trust*, 252 P.3d 539, 546 (Colo. Ct. App. 2011) (quoting *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000); citing *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000)) (internal citation omitted). See also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases,

reconcile competing political interests, but not on the basis of the judges' personal policy preferences.").

PERA is tasked with deciding how to allocate the State's resources to provide a fiscally viable disability program that fulfills the policies of the General Assembly. If PERA exceeded its statutory authority, the Court may declare PERA's rules *ultra vires* and the Group STD Policy void. But it is not the judiciary's constitutional role to institute a fix by taking over PERA's legislative responsibilities and making discretionary decisions about disability program design. "[W]hat judges deem a 'correction' or 'fix' is from another perspective a deliberate interference with the legislative power to choose what makes for a good rule." *Jaskolski*, 427 F.3d at 462. Admit the propriety of "fixing" legislative rules and you allow a general power to create the substance of those rules, which is a legislative function that courts must abjure. "[I]t is up to the General Assembly, not the courts, to determine the remedy." *Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010).

Lawless's reformation theory, therefore, is not a simple claim to reform an insurance policy to conform to statutory minimum coverage requirements. It is a request for the Court, under the guise of reformation, to assume PERA's legislative rulemaking authority, make discretionary public policy decisions about what benefits the State should offer to PERA members who are able to work in another occupation, and seize Standard's financial assets for the public good so the State can pay those judicially legislated benefits retroactive to January 1, 1999. Lawless's request for reformation of PERA's rules and reformation of the Group STD Policy circumvents the safeguards of the Administrative Procedures Act and is inimical to the Constitution's separation of powers. See *Whiley*, 2011 WL 3568804, at *10 ("The Legislature retains the sole right to

delegate rulemaking authority to agencies, and all provisions in [the governor's executive orders] that operate to suspend rulemaking contrary to the APA [Administrative Procedures Act] constitute an encroachment upon a legislative function.").

Lawless's reformation theory not only disregards the separation of powers, but also violates Colorado's constitutional prohibition on retrospective legislation. "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." Colo. Const. art. 2, §11. Courts apply Colorado's proscription against any law "retrospective in its operation" to prohibit any act "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already (past)." *McClenahan v. Metro. Life Ins. Co.*, 621 F.Supp.2d 1135, 1142 (D. Colo. 2009) (quoting *Cont'l Title Co. v. Dist. Court*, 645 P.2d 1310, 1314 (Colo. 1982); *Moore v. Chalmers-Galloway Live Stock Co.*, 10 P.2d 950, 952 (Colo. 1932)).

Retrospective laws are unjust because they violate fundamental principles of fairness. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). But that's precisely what Lawless endeavors to accomplish through reformation of the Group STD Policy. She seeks to create new duties and financial obligations to pay monetary benefits that are not contained in the Group STD Policy and that are not mandated by the PERA Statute, and foist them on Standard retroactive to January 1, 1999. The legislature cannot pass a law retroactive to January 1, 1999 that would require Standard to pay greater benefits than Standard contracted to provide.

The Court cannot accomplish the same result under the guise of retroactive reformation. See *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) ("Retroactivity is generally disfavored in the law, in accordance with 'fundamental notions of justice' that have been recognized throughout history.") (internal citations and quotations omitted).

Retrospective "reformation" of the Group STD Policy to January 1, 1999 also violates the Takings Clause of the Colorado Constitution. (Colo. Const. art. II, §15, "Private property shall not be taken or damaged, for public or private use, without just compensation."). If a state instrumentality enacts a legislative rule that is *ultra vires*, the state cannot seize private property to obtain the funds to pay for its violation. Lawless and PERA cannot use the judicial system to achieve the same objective. "It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2601 (2010). Lawless proposes to obtain by judicial fiat the private property of Standard for public use without just compensation, to pay Colorado employees for PERA's alleged *ultra vires* acts. The Takings Clause "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The State's appropriation of Standard's funds would amount to an unconstitutional taking of private property, in violation of the Takings Clause.

Finally, Lawless asserts that the court in *Nunez v. Standard Ins. Co., et al.*, No. 2008-cv-57, considered the same issues asserted here and determined that Defendants' argument was "disingenuous." (Pl. Motion, pg. 14). The *Nunez* court considered and rejected a "timing" explanation for Rule 7.45 presented by PERA. The *Nunez* court did not hold that Rule 7.45 is *ultra vires* or reform the Group STD Policy. The *Nunez* court did not consider that the PERA

Statute provides numerous benefit options and does not statutorily guarantee payment of monetary benefits. The *Nunez* court did not consider the impropriety of reformation in light of the terms of the PERA Statute, the separation of powers doctrine, the Takings Clause, and the prohibition on retrospective laws. This Court is tasked with deciding momentous issues of constitutional importance that were never elucidated in *Nunez*.

CONCLUSION

The PERA Statute authorizes PERA to design a program that offers any number of benefit options, but does not mandate the payment of monetary benefits. Nor does the PERA Statute mandate that employees who are unable to perform their assigned jobs but are fully capable of working in another occupation must receive the same benefit package as employees who cannot work at all. The PERA Statute provides PERA with a menu of options, not mandatory coverage terms. If PERA Rule 7.45 is valid and enforceable, then Lawless and the putative class have no claims against PERA or Standard. But if PERA's rules are *ultra vires*, the judicial task is to strike down the rules and void the Group STD Policy, and not to judicially redesign Colorado's disability welfare program under the guise of reformation of contract. Because Lawless's theory of reformation fails as a matter of law, judgment should be entered in favor of Standard on all claims of the Third Amended Complaint.