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**IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY**

JOSEPH BOVA,  
Plaintiff,  
vs.  
CITY OF MEDFORD, an incorporated  
Subdivision of the State of Oregon, and  
MICHAEL DYAL, City Manager of the City  
of Medford, as an Individual, and in his official  
capacity,  
Defendants.

**CASE NUMBER: 08-1663-E7**

**OPINION AND ORDER ON  
PLAINTIFF'S MOTION FOR CLASS  
ACTION CERTIFICATION**

This matter comes before the court on the motion of plaintiff Joseph Bova for class action certification and the court having reviewed said motion, plaintiffs' memorandum and affidavit in support of said motion, defendants' legal memorandum, exhibits and affidavits in opposition to said motion, and plaintiffs' reply memorandum in support of said motion, and the parties presentation at oral argument on July 21, 2008, the court now sets forth its Opinion and Order.

**OPINION**

**PROCEDURAL CONTEXT**

This action was commenced on April 7, 2008, against the City of Medford, Oregon and its city manager Michael Dyal ("Defendants") by a current employee of the City, Joseph Bova, who alleges under a variety of legal theories that he and a class of other current employees will be improperly denied health insurance when they retire. Shortly thereafter, Bova filed a motion for certification of his lawsuit as a class action. Defendants answered and filed a motion for summary judgment.

1 By order dated July 24, 2008, the court placed in abeyance the motion for class  
2 certification in order to allow for the disposition of those portions of the summary judgment  
3 motion that could be determined as a matter of law and undisputed fact.

4 By order of today's date, the court has ruled on the pending motion for summary  
5 judgment and, as pertinent to the motion for class certification, has held that defendants did not  
6 meet their burden to prove that Bova's statutory tort claims (Claims 1-3) are time-barred.

7 **THE PROPOSED CLASS**

8 Bova seeks certification for a class consisting of current employees of the City of  
9 Medford who have been employed by the City for at least three years and whose health insurance  
10 plan provided by Medford (not including PERS benefits) does not include a provision providing  
11 them with the option to continue participation in that insurance plan when they retire.

12 **THE APPLICABLE LEGAL STANDARDS**

13 Plaintiffs have the burden to show that all elements of ORCP 32A are met in this case,  
14 and that a class action is superior to other available methods for the fair and efficient  
15 adjudication of the controversy based upon a consideration of all the factors set out in ORCP  
16 32B. *Safeway, Inc. v. Oregon Public Employees Union*, 152 Or App 349, 358, 954 P2d 196, 201  
17 (1998); *Joachim v. Crater Lake Lodge, Inc.*, 48 Or App 379, 390-91 (1980).  
18 *ORCP 32A(1). Numerosity.*

19 Bova alleges on information and belief that the class in this case numbers approximately  
20 300. Oregon courts on a number of occasions have certified smaller classes, with some  
21 numbering less than half this size. *E.g., Newman v. Tualatin Dev. Co.*, 287 Or 47, 597 P2d 800  
22 (1979) (125 members); *Hammer v. City of Eugene*, 202 Or App 189, 121 P3d 693 (2005) (173  
23 members); *Blue Line Farms, Inc. v. Pro-Fac Co-op, Inc.*, 2002 WL 33294579 (Or. Cir. 2002)  
24 (190 members). In its brief in opposition to the motion for class certification, the City provides  
25 no evidence that the class is inappropriately small.

26 Subject to and conditional on later ORCP 32C(1) limitations, the court finds Bova has  
27 met the numerosity requirement.  
28

1 *ORCP 32A(2). Commonality.*

2 The court finds that with respect to Bova's claim under ORS 243.303 (1<sup>st</sup> claim), the  
3 legal issues (interpretation of the statute and particularly the phrases "shall" and "to the extent  
4 possible") and the factual issues (principally, whether insurance coverage that includes an option  
5 for continuation after retirement is available for the City to purchase for its employees, *i.e.*,  
6 whether it is "possible" for the City to obtain such coverage) are the same, and the commonality  
7 requirement is met for this claim.

8 By order of this date, the court has dismissed Bova's second claim, brought under  
9 Medford Resolution No. 5715.

10 Bova's claim under the Oregon age discrimination statute, ORS 659A.030 (3<sup>rd</sup> claim),  
11 also involves common legal and factual issues. In its brief in opposition to the motion for class  
12 certification, the City has presented the court with no evidence that its motivations in entering  
13 into agreements that deny retirees the option of continuation were different for any individual  
14 employee or group of employees, evidence that might otherwise preclude a finding of  
15 commonality.

16 The court finds that common legal and factual issues do not predominate in Bova's  
17 contract claims (4<sup>th</sup> and 5<sup>th</sup> claims). On the record before the court, if there is a contract here at  
18 all for Bova and other non-union employees, it is a contract imposed by law. The court cannot  
19 find on this record that the factual issues in determining the existence and terms of such a  
20 contract are common to a class of employees including Bova, *e.g.*, what representations were  
21 made to Bova and the other employee(s) about benefits when each of them applied for  
22 employment, what bargaining and tradeoffs, if any, were made as to that employee's benefits,  
23 and so forth. The court will not certify a class on the 4<sup>th</sup> and 5<sup>th</sup> claims.

24 *ORCP 32A(3). Typicality.*

25 In this case, the element of typicality is met with respect to the first and third claims. The  
26 proposed class members – current employees of at least three years whose current health  
27 insurance coverage does not include an option to continue upon retirement – have the same  
28 claims as Bova, and the City has submitted no argument or evidence that his claims are atypical.

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2 *ORCP 32A(4). Representation.*

3 The Court finds Bova has satisfied both prongs of the representation requirement. Bova's  
4 counsel have sufficient qualifications and experience, and the City did not object to the adequacy  
5 of legal representation for the putative class.

6 Bova's claims are entirely equitable. He presents no claim for damages. As relevant to  
7 the claims eligible for class treatment, the court is asked to declare the rights of the parties under  
8 ORS 243.303 and ORS 659A and enjoin the City to comply with these statutes, in the case of  
9 ORS 243.303 to compel the City – if it provides health insurance to a current employee – to  
10 choose insurance suppliers whose coverage also includes an option for continuation after  
11 retirement, and in the case of ORS 659A, to refrain from discriminating against Bova and other  
12 current employees. Under these circumstances, the court finds that Bova's interests are co-  
13 extensive with the members of the proffered class and there is no evidence before the court to  
14 suggest he will not adequately represent their interests.

15 *ORCP 32B. Superiority of class action over other available methods.*

16 Based upon the relief sought in this case, the court finds a class action is superior  
17 because:

- 18 (1) Prosecution of separate actions for declaratory judgment as to the interpretation and  
19 applicability of ORS 243.303 and ORS 659A.030 in the circumstances currently  
20 prevailing at the City would create a serious risk of inconsistent judgments and could  
21 create unfair and unnecessary confusion about the City's obligations.
- 22 (2) This case fits squarely within the confines of subsection (2) – injunctive and  
23 declaratory relief--and the court finds this to be the single most important element of  
24 ORCP32B pointing to a conclusion that class action treatment is superior to other  
25 methods.
- 26 (3) With respect to the first and third claims, and as indicated elsewhere in this opinion,  
27 common questions predominate.
- 28 (4) Neither side has suggested to the court that any individual members of the putative  
class desire to maintain separate lawsuits.
- (5) Neither side has suggested to the court that any member of the putative class has a  
lawsuit pending on the same subject matter, and the court is aware of none.
- (6) The claims here are exclusively about employment in Medford. It is clearly desirable  
to concentrate the litigation here.
- (7) The relief sought here is limited to declaratory and injunctive relief, and given the  
broad authority given to the court in ORCP 32E to shape the order and scope of  
discovery and other matters, and in the absence of any suggestions from the City

1 about a more desirable means for litigating the issues, the court finds the difficulties  
2 in managing a class action would not be eliminated or significantly reduced by  
3 adjudication in some other, undefined manner or forum.

- 4 (8) If and to the extent the plaintiff class prevails on their claims, they will receive  
5 significant relief in the form of an order requiring the City – if it provides health  
6 insurance coverage to its current employees -- to offer that same coverage to the  
7 employee when he or she retires, unless the City can demonstrate that there are no  
8 insurance suppliers who will contract with the City for such option.

9 **ORDER**


10 Bova's Motion for Class Certification is granted in part and denied in part, as follows:

- 11 1. This matter will proceed as a class action with respect to the first and third claims,  
12 brought under ORS 243.303 and ORS 659A.030 respectively, but not with respect to  
13 the fourth and fifth claims, as to which Bova is the only plaintiff.
- 14 2. The class consists of the current employees of the City of Medford who meet all of  
15 the following criteria:
- 16 a. The employee is currently employed by the City of Medford, whether  
17 management, unionized, or non-unionized, and has been employed for at least  
18 three years prior to the date of this order.
  - 19 b. The employee (and/or family members) has health insurance coverage  
20 provided by the City of Medford that does not include an option to continue  
21 that coverage when the employee retires.
- 22 3. Within 30 days of the entry of this order, the City is to provide the court and class  
23 counsel with a list of the names and addresses of all employees meeting the  
24 requirements set forth above, and class counsel is to prepare and file a draft notice to  
25 be sent to all members of the class, taking into consideration the provisions of ORCP  
26 32E and 32F.
- 27 4. Until further order of this court, discovery in this matter shall be limited to the list set  
28 out in item 3 and such written and oral discovery as either side deems necessary in  
order to determine whether it is possible for the City to contract for health insurance  
coverage for members of the class that includes an option to continue the coverage  
upon retirement. As set out in the order of today's date on the defendants' summary  
judgment order, neither the circumstance that the union trust with which the City  
currently contracts will not provide such coverage, nor that other suppliers of  
insurance coverage for current employees would charge more than the union trust for  
coverage, whether or not it included the continuation option, constitutes  
"impossibility" for purposes of ORS 243.303. All such discovery shall be complete  
within 90 days of the entry of this order.

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5. If and to the extent either side wishes to file a dispositive motion on Bova's claims, such motion and supporting papers are to be filed on or before March 1, 2009, with responsive briefs due no later than April, 1, 2009, and any replies due April 1, 2009.
6. If dispositive motions are filed, the court will hear oral argument on such motions on April 27, 2009.

DATED this 20 day of November, 2008.

  
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MARK SCHIVELEY  
Circuit Court Judge

cc: Mr. Robert E. Franz, Jr.  
Mr. Stephen Brischetto  
Mr. George P. Fisher