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BY MICHELLE WRAY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

EDWARD D. WRZESIEN, LACEY VAN GRINSVEN and MEGAN ASHTON, Plaintiffs, v. STATE OF MONTANA and MONTANA PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION, Defendants.	Cause No.: DDV-2012-931 **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are cross-motions for summary judgment filed first by Defendants State of Montana and Montana Public Employee Retirement Administration (collectively State), and then by Plaintiffs Edward Wrzesien, Lacey Van Grinsven, and Megan Ashton. Plaintiffs are represented by Travis Dye. The State is represented by J. Stuart Segrest.

The motions have been fully briefed and the Court heard oral argument on October 7, 2014. For the following reasons, the Court concludes that the State's motion should be granted.

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns three retirement plans under the Montana Public Employee Retirement System (PERS). All PERS-eligible state employees must participate in one of the plans offered. For most employees, the options are the Defined Benefit (DB) plan and the Defined Contribution (DC) plan. Eligible employees of the Montana University System may choose to participate in the University's Optional Retirement Program (ORP).

Under the DB plan, state employees pay a portion of their earnings into a trust which funds the retirement benefits of all DB plan members. Sections 19-3-315(1)(a), 19-2-501, MCA. State employers contribute to the retirement system by paying into the trust fund amounts equivalent to a percentage of each DB plan employee's earnings. Section 19-3-316, MCA. After meeting age and service requirements, DB plan members may draw a statutorily-prescribed benefit from the trust fund. Sections 19-3-901 to -904, MCA.

Recognizing certain employees' desire for more control over their own retirement savings, the Montana Legislature designed the DC plan, which became active in 2002. Unlike the DB plan, the DC plan allows employees to contribute a percentage of their earnings into an individual account and choose how that account will be invested. Sections 19-3-315, -3-2102, -3-2122, MCA. State employers also contribute to the retirement system based on a percentage of the earnings of DC plan members, though that money is allocated differently than the employer contribution for DB plan members. Sections 19-3-316, -3-2117, MCA. The retirement benefits for DC plan members consist of the accumulated funds in their individual accounts along with any investment gain or loss. Sections 19-2-303(55), 19-3-2116, MCA. Employees who participate in the DC plan are

not entitled to any payments from the DB trust fund. Section 19-3-909, MCA.

Classified employees of the Montana University System have a third retirement plan option, ORP.[1] ORP is similar to the DC plan in that ORP employees have an individual account into which they contribute a portion of their earnings and choose how the account will be invested. Sections 19-21-201 to -214, MCA. The employer also contributes to the retirement system based on a percentage of the employee's earnings. Section 19-21-214, MCA. The employee's retirement benefit consists of the accumulated funds in the individual account, plus any investment loss or gain. ORP members are not entitled to any payments from the DB trust fund. Section 19-3-2112(4), MCA.

All covered employees are members of the DB plan by default. Section 19-3-401, MCA. New employees may elect to join the DC plan or ORP (if applicable) within one year of hire. Sections 19-3-2111(1) (DC plan), -3-2112(2) (ORP), MCA. The decision to join the DC plan or ORP or to remain in the DB plan is irrevocable. Sections 19-3-2111(2)(c) (DC plan), -3-2112(2)(b) (ORP), MCA. Those who were employed prior to the institution of the DC plan were given the option to join it within one year. All employees have access to "impartial and balanced information about plan choices, benefits, and features . . . . in a variety of formats. Plan comparisons must, to the greatest extent possible, be based upon historical rates of return on investments or benefits available in each retirement plan." Section 19-3-112(2)(a), MCA.

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[1] The program was renamed the Montana University System Retirement Program in 2013. For ease of reference the Court will refer to the program as ORP.

All employees contribute 7.9 percent of their earnings to their chosen retirement plan, though the Montana Public Employees' Retirement Board (Board) must annually review this contribution amount and recommend adjustments to the Montana Legislature "as needed to maintain the amortization schedule set by the board for the payment of the system's unfunded liability." Section 19-3-315(1), MCA.[2] For each employee, the employer contributes an amount equal to 8.17 percent of the employee's earnings to the retirement system regardless of the retirement plan the employee chooses. This is the sum of a base amount of 6.9 percent plus an additional, variable amount. Section 19-3-316(1), MCA. The variable amount is 1.27 percent for fiscal year 2014 and will increase by 0.1 percent each fiscal year until 2024, after which it will remain at 2.27 percent until it terminates. Section 19-3-316(3)(b), MCA.[3]

For each DB plan employee, the employer's entire contribution is paid into the DB trust fund, except for an amount equal to 0.04 percent of the employee's earnings which is allocated to the education fund.[4] Sections 19-3-316, -3-112(1)(b), MCA. For each DC plan employee, approximately half of the employer's contribution is paid into the employee's individual account. Section 19-3-2117(2)(a)(i), MCA. The remainder is allocated to different funds,

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[2] The employee contribution will decrease to 6.9 percent after the annual actuarial valuation of the retirement system determines that such decrease, along with the decrease in employer contribution contemplated by § 19-3-316(4)(b), MCA, "would not cause the system's amortization period to exceed 25 years." Section 19-3-315(2), MCA.

[3] The variable amount will terminate after the Board determines that such termination, along with a decrease in the employee's contribution contemplated in § 19-3-315(2), "would not cause the amortization period [for the system's unfunded liabilities] to exceed 25 years." Section 19-3-316(4)(b), MCA.

[4] This education fund is used to provide members with impartial and balanced information about plan choices, benefits, and features. Section 19-3-112(2)(a), MCA.

one of which is the DB trust fund.[5] The employer contribution for ORP employees is allocated in a similar, though not identical, manner.[6]

The Montana Constitution requires that the all public retirement systems be "funded on an actuarially sound basis," meaning "that contributions to each retirement plan must be sufficient to pay the full actuarial cost of the plan." Mont. Const. art. VIII, § 15; § 19-2-409, MCA. For the DB plan, "the full actuarial cost includes both the normal cost of providing benefits as they accrue in the future and the cost of amortizing unfunded liabilities over a scheduled period of no more than 30 years." Section 19-2-409, MCA. For the DC plan, "the full actuarial cost is the contribution defined by law that is payable to an account on behalf of the member." Section 19-2-409, MCA.

To maintain constitutionally-mandated actuarial soundness in the retirement system, the Montana Legislature created the Plan Choice Rate. Section 19-3-2121, MCA. The Plan Choice Rate is an allocation of part of the employer's contribution for DC and ORP employees that is paid into the DB trust fund, currently equivalent to 2.37 percent of the employee's earnings. Section 19-3-2117(2)(a)(ii), MCA. The retirement benefits paid by the DB trust fund were calculated assuming the fund would be supported by all PERS-eligible employees

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[5] For DC employees, the employer's 8.17 percent contribution is divided as follows: 4.19 percent to the employee's individual account, 2.37 percent to the DB trust fund as the Plan Choice Rate, 0.04 percent to the education fund, 0.3 percent to a disability plan, 0.27 percent to the DB trust fund to eliminate the Plan Choice Rate unfunded actuarial liability (this will be reallocated to the disability fund once certain triggers are met), and an additional 1.0 percent to the DB plan unfunded liabilities. Section 19-3-2117(2), (3), MCA.

[6] For ORP employees, 4.49 percent is paid to the employee's individual account, 2.37 percent is paid to the DB trust fund as the Plan Choice Rate, 0.04 percent to the education fund, 0.27 percent to the DB trust fund to eliminate Plan Choice Rate actuarial liability, and an additional 1.0 percent to the DB plan unfunded liabilities. Section 19-21-214, MCA; Mont. Admin. R. 2.43.3601.

plus employer contributions for each employee. To account for the "change in the normal cost contribution rate in the defined benefit plan that is the result of member selection of the defined contribution plan," the Plan Choice Rate is a transfer payment that is sufficient to "actuarially fund the defined contribution plan member's appropriate share of the defined benefit plan's unfunded liabilities." Section 19-3-2121(2), MCA. The Board periodically reviews the sufficiency of the Plan Choice Rate and makes adjustments, if necessary, so that it is sufficient to cover those unfunded liabilities. Section 19-3-2121(1), MCA.

The Montana Legislature also directed that a portion of the employer's contribution for DC plan and ORP employees, equal to 1.0 percent of the employee's earnings, be allocated to cover the DB plan's unfunded liabilities until certain conditions are met (the "additional 1.0 percent"). Section 19-3-2117(2)(c), MCA (DC plan); Mont. Admin. R. 2.43.3601 (ORP).

In other words, the DB trust fund must take in a certain amount to cover current and future retirement benefit payments. Because DC and ORP employees do not contribute to the fund and, absent the Plan Choice Rate, DC plan and ORP member employers would not contribute to the fund, the amount the fund takes in would be proportionally less than it was before the DC plan and ORP existed. Though DC and ORP employees do not draw benefits from the DB fund, the absence of their contributions and their employer contributions creates unfunded liabilities in the DB fund. The Montana Legislature directed that a portion of the employer contribution for DC and ORP employees be paid into the DB fund to cover those unfunded liabilities and maintain actuarial soundness. Actuarial soundness for the DC plan and ORP is maintained by paying a

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statutorily-defined portion of the employer's contribution into the employee's individual account. Section 19-2-409, MCA.

Plaintiff Ashton began employment with the State of Montana in October 2003. In April 2004, Ashton elected to enroll in the DC plan by signing a Retirement Plan Choice election form. Plaintiff Van Grinsven began employment with the State of Montana in April 2006. In March 2007, Van Grinsven elected to join the DC plan by signing a Retirement Plan Choice election form. Plaintiff Wrzesien began employment with the Montana University System in July 2006. Wrzesien elected to enroll in ORP in August 2007 by signing a Retirement Plan Choice election form. All three Plaintiffs signed an acknowledgement stating that they had "had the opportunity to be educated about the retirement plan choices and assume complete responsibility of this irrevocable decision."

Plaintiffs sued the State, alleging that the Plan Choice Rate and additional 1.0 percent violate their constitutional rights to equal protection and substantive due process. The parties agree there are no material facts in dispute.

STANDARD OF REVIEW

The Montana Supreme Court recently summarized the familiar standards applicable in considering motions for summary judgment:

> Under M. R. Civ. P. 56(c), summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. The evidence must be analyzed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of the non-moving party. The party moving for summary judgment has the initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. If this burden is met, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact does exist. If the district court determines that no genuine issue of material fact exists, the court then determines whether the moving party is entitled to judgment as a matter of law. . . .

> Summary judgment is an extreme remedy that should never be a substitute for a trial on the merits if a controversy exists over a material fact.

Harrington v. Crystal Bar, Inc., 2013 MT 209, ¶¶ 9-10, 371 Mont. 165, 306 P.3d 342 (citations and quotation marks omitted).

With these standards in mind, the Court turns to the facts of and law applicable to this matter.

ANALYSIS

Plaintiffs offer two substantive arguments as to the unconstitutionality of the Plan Choice Rate and additional 1.0 percent. First, Plaintiffs argue that diverting some of the employer contribution based on their salary to the DB trust fund violates their rights to equal protection because they are precluded by law from benefitting from that fund. Second, Plaintiffs argue that the Plan Choice Rate and additional 1.0 percent violate their substantive due process rights because these allocations are not rationally related to the legitimate interest of keeping the retirement system actuarially sound, making them arbitrary and unreasonable.

In addition to addressing Plaintiffs' substantive arguments, the State offers three procedural arguments in support of its motion for summary judgment. First, the State argues that the two-year period to enforce a liability created by statute has passed and the claims are therefore time barred under § 27-2-211(c), MCA. Second, the State argues that the equitable doctrine of laches bars Plaintiffs' claims. Third, the State argues that Plaintiffs have failed to join all parties who would be prejudiced by the Court's decision because if the Court determines the Plan Choice Rate and additional 1.0 percent are unconstitutional, the DB trust fund's capitalization would be reduced. This would affect the ability

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of the fund to provide full benefits to all current and future DB plan members, so those members must be joined as parties to this suit.

1. Statute of Limitations

The State argues that the cause of action accrued, if at all, when Plaintiffs joined the DC plan or ORP because they knew at that time how the employer contribution would be allocated. Ashton joined the DC plan in 2004. In 2007, Van Grinsven joined the DC plan and Wrzesien joined ORP. Because they are seeking to enforce a liability created by statute that accrued more than two years ago, their claims are time-barred under § 27-2-211(c), MCA.

Plaintiffs argue that the injury in this case occurs every two weeks when part of their employer contribution is allocated to the DB fund. Montana law recognizes that, in some contexts, a new cause of action arises each time the injury occurs. *See e.g. Burley v. Burlington N. & Santa Fe Ry. Co.*, 2012 MT 28, ¶ 14, 364 Mont. 77, 273 P.3d 825 ("[T]he continuing tort doctrine applies to a temporary injury that gives rise to a new cause of action each time that it repeats."); *Benjamin v. Anderson*, 2005 MT 123, ¶ 46, 327 Mont. 173, 112 P.3d 1039 ("[T]he entirety of a hostile work environment claim is actionable *even though* an employee may reasonably have realized that he or she had an actionable claim at an earlier date, so long as the hostile work environment continued to a point in time that lies within the statutory time limits for filing a claim."); *Craver v. Waste Mgmt. Partners of Bozeman*, 265 Mont. 37, 45, 874 P.2d 1, 5 (1994) ("[W]here an employer continually fails to comport with Montana's wage laws on a monthly basis, the employee's wage claims accrue on a monthly basis." (overruled on other grounds)). Because the alleged injury is ongoing, the statute of limitations is only

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relevant to damages calculations as Plaintiffs would only be able to recover for the period provided for in the statute of limitations.

Plaintiffs also argue that because they are seeking a declaratory judgment for constitutional violations, not a liability created by statute, the applicable statute of limitations is five years under § 27-3-231, MCA (as an "action for relief not otherwise provided for.").

Although the alleged injury in this case is not a tort, nor a claim of hostile work environment, nor a claim of failure to comport with wage laws, the reasoning in the cases cited by Plaintiffs, particularly *Craver*, is applicable. Plaintiffs allege that their constitutional rights to equal protection and due process are violated because they do not receive all of their employer contribution while their coworkers who are members of the DB plan receive their entire employer contribution. This occurs every time an employer contribution is paid, with every biweekly paycheck. Therefore, Plaintiffs' claims are not barred by the statute of limitations because they concern an alleged ongoing injury.

2. Laches

The State claims that allowing Plaintiffs to challenge the Plan Choice Rate now, after the DC plan has been in place for over ten years, would prejudice DB plan members because the actuarial soundness of the DB plan depends on contributions through the Plan Choice Rate.[7] If the Plan Choice Rate is removed, it may affect the DB fund's ability to pay DB member retirement benefits, thereby prejudicing all DB plan members. Therefore, the claims should be barred by

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[7] The State concedes that the additional 1.0 percent, which was added in 2013, is not barred by laches or the statute of limitations. (State's Resp. Cross-Mot. S.J. & Reply at 14 (June 27, 2014)).

laches. Plaintiffs note that "[l]aches is not a mere matter of elapsed time, but rather, it is principally a question of the inequity of permitting a claim to be enforced." *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 25, 308 Mont. 265, 42 P.3d 760. Plaintiffs point out that for the first ten years of the DC plan's existence, approximately $21.68 million was paid into the DB fund through the Plan Choice Rate. (Pls.' Reply Supp. Cross-Mot. S.J. at 8 (August 4, 2014)). During that same period, total contributions to the DB fund were approximately $1.48 billion. (Pls.' Reply Supp. Cross-Mot. S.J. at 8 (August 4, 2014)).

The contributions through the Plan Choice Rate were less than 1.5 percent of the total contributions to the fund over the first ten years of the DC plan. The State has provided only general statements that declaring the Plan Choice Rate unconstitutional would "adversely affect" the DB fund and admitted that "paying back prior contributions likely would not cause the fund to go bankrupt by itself . . . ." (State's Resp. Cross-Mot. S.J. & Reply at 14 (June 27, 2014)). Therefore, the Court declines to find that Plaintiffs' claims are barred by laches.

3. Failure to Join All Interested Parties

The State correctly notes that § 27-8-301, MCA, requires that all persons who "have or claim any interest which would be affected by the declaration" be joined as parties in an action for declaratory relief. The State argues that all current and retired DB plan members must be joined because declaring the Plan Choice Rate unconstitutional would affect the DB fund's ability to provide full retirement benefits to them. As explained above, the State has failed to show that such relief would actually affect DB plan members. Therefore, the Court declines to grant summary judgment on the grounds that Plaintiffs have failed to join all interested parties.

4. Equal Protection

Montana's Constitution provides that "[n]o person shall be denied the equal protection of the laws." Mont. Const. art. II, § 4. "Equal protection provides a check on governmental action that treat similarly situated persons in an unlike manner." *Caldwell v. MACo Workers' Comp. Trust*, 2011 MT 162, ¶ 14, 361 Mont. 140, 256 P.3d 923.

"[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877. "An equal protection challenge fails if the groups at issue do not constitute similarly situated classes." *Bean v. State*, 2008 MT 67, ¶ 13, 342 Mont. 85, 179 P.3d 524 (citing *Powell*, ¶ 22). The court "start[s] with the presumption that all legislative enactments comply with Montana's Constitution." *Bean*, ¶ 12 (citing *Powell*, ¶ 13). Plaintiffs must prove "the statute's unconstitutionality beyond a reasonable doubt." *Bean*, ¶ 12 (citing *Farrier v. Teacher's Ret. Bd.*, 2005 MT 229, ¶ 13, 328 Mont. 375, 120 P.3d 390).

The State argues that it has not adopted any classification because Plaintiffs voluntarily chose to participate in the DC plan or ORP. Plaintiffs argue that the fact that choice is involved does not mean state action is lacking. Plaintiffs direct the Court to two cases in support of their argument. In *Oberson v. United States Department of Agriculture*, 2007 MT 293, 339 Mont. 519, 171 P.3d 715, the Montana Supreme Court found that a statute which applied a gross negligence standard of care to snowmobile operators violated equal protection because an ordinary standard of care was applied to other inherently dangerous sports. In

Brewer v. Ski-Lift, Inc., 234 Mont. 109, 762 P.2d 226 (1988), the Montana Supreme Court found that a skier responsibility statute violated equal protection because it was not rationally related to the interest of protecting the economic viability of the ski industry.

Plaintiffs argue that because people choose to ride snowmobiles or go skiing, *Oberson* and *Brewer* demonstrate that choice cannot be a factor in determining whether the State has adopted a classification. However, the Montana Supreme Court did not discuss whether it considered the choice aspect and the nature of the choice in those cases is quite different than the nature of the choice here. In this case, the State presents all PERS-eligible employees with a choice between various retirement plans. The employee's choice puts her into a class (DB plan member, DC plan member, etc.), not any action by the State. All employees have an equal opportunity to choose. If employees do not make a choice, they are automatically placed in the DB plan. The state action here is limited to providing options, educating employees as to the benefits and consequences of each option, and placing all employees into the same class if they do not decide for themselves.

Moreover, the classes at issue are not similarly situated. Plaintiffs point to two cases in support of their classification argument. In *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, the Montana Supreme Court addressed a section of the Workers' Compensation Act (WCA) that provided for different permanent partial disability payments depending on whether the injured employee was eligible for social security benefits. The Montana Supreme Court concluded that the WCA created two similarly situated classes because "both classes have suffered work-related injuries, are unable to return to their time of injury jobs, have permanent physical impairment ratings and

must rely on § 39-71-703, MCA, as their exclusive remedy." *Reesor*, ¶ 12. The only difference between the classes created by the WCA was the age of the claimant because the classification was based on eligibility for social security benefits. *Reesor*, ¶ 12.

In *Henry v. State Insurance Compensation Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, the Montana Supreme Court addressed the way vocational rehabilitation services are provided under the WCA and the Occupational Disease Act (ODA). Workers who suffered an injury during one shift had to seek redress under the WCA, while workers who suffered an injury caused by events over multiple shifts had to seek relief under the ODA. *Henry*, ¶ 27. The Montana Supreme Court concluded that both classes were similarly situated because the only distinction was whether the injury happened in one day or over multiple days. *Henry*, ¶ 28. The Court noted that some injuries, such as herniated discs, could fall under either class. *Henry*, ¶ 28.

The State cites *Bean* in support of their argument that the DB employees and DC or ORP employees are not similarly situated classes. In *Bean*, the statute at issue classified National Guard firefighters for eligibility for different retirement benefit plans based on whether they were hired before or after October 1, 2001. In *Bean*, the Montana Supreme Court considered its earlier decision in *Gulbrandson v. Carey*, 272 Mont. 494, 901 P.2d 573 (1995), in which it found that a retirement system that provided superior benefits to judges who retired after a certain date did not violate equal protection because the legislation creating the new retirement system, like most legislation, necessarily produced classifications based on a particular point in time. *Bean*, ¶ 16 (citing *Gulbrandson*, 272 Mont. at 504, 901 P.2d at 579-80). That temporal distinction created two

dissimilar classes, and the statute at issue operated equally on all members within each class. *Gulbrandson*, 272 Mont. at 504, 901 P.2d at 580. In *Bean*, the firefighters were eligible for different retirement plans based on their date of hire. Like in *Gulbrandson*, the Court found that the classes were not similarly situated. *Bean*, ¶ 17.

Here, Plaintiffs argue that the Plan Choice Rate and additional 1.0 percent create two similarly situated classes—covered employees who participate in the DB plan and have the full amount of their employer contribution paid to the plan in which they participate, and covered employees who participate in the DC plan or ORP and do not have the full amount of their employer contribution paid to the plan in which they participate. The flaw in this argument is the assertion that all PERS-eligible employees "receive an employer-paid contribution equal to 8.17% of salary." (Pls.' Combined Br. Opposing State's Mot. S.J. & Supporting Pls.' Mot. S.J. at 24 (May 27, 2014)). In fact, neither DB plan members nor DC plan members nor ORP members individually receive an 8.17 percent contribution.

Under the DB plan, the employer contribution does not go to the employee; it goes to the DB trust fund. DB plan employees do not have individual accounts. DB plan members only have an interest in the employer contribution insofar as it helps maintain the actuarial soundness of the fund that pays their retirement benefits. A member's retirement benefits are calculated based on the member's highest compensation and length of service or the *member's* accumulated contributions. Section 19-3-904, MCA. The employer contribution is not part of the calculus. If a DB plan member leaves employment before the retirement benefits vest, that member is only entitled to withdraw her own contributions to the fund, not any employer contribution. Section 19-2-602, MCA.

Section 19-3-316, MCA, which establishes the employer contribution rates, mandates that each employer contribute to the retirement *system*, not to the individual employee. The employer contribution is not the employee's money. It is an allocation of state funds to support the retirement system. If anything, DC plan members receive more than DB plan members because they are personally entitled to an employer contribution equal to 4.19 percent of their salary. DB plan members are not personally entitled to any of the employer contribution.

Given the foregoing analysis, the Plan Choice Rate and additional 1.0 percent do not create two similarly-situated classes as Plaintiffs describe. Instead, the two classes are risk-averse state employees who wish to forego any potential investment gain in favor of a known, guaranteed retirement benefit, and risk-accepting state employees who wish to maintain control over how their retirement funds are invested. These two classes are not similarly situated, as were the classes in *Reesor* and *Henry*. In those cases, the only distinction between the classes was age or the way the injury was incurred. Here, the distinction between the two classes is a fundamentally different approach to retirement savings. Such distinction is even more significant than the distinctions between the classes in *Bean* and *Gulbrandson*, which the Montana Supreme Court found were also not similarly situated.

And it must be kept in mind throughout this analysis that the State merely provides options. It is the employee who makes the choice and who creates the dissimilar classifications.

Because Plaintiffs have failed to prove beyond a reasonable doubt that the State has adopted a classification that treats two similarly situated classes

differently, the Court need not complete the remainder of the equal protection analysis. The Plan Choice Rate and additional 1.0 percent contribution do not violate Plaintiffs' rights to equal protection.

5. Substantive Due Process

Article II, section 17 of the Montana Constitution provides that "No person shall be denied life, liberty, or property without due process of law." "Substantive due process prohibits the state from taking unreasonable, arbitrary, or capricious action." *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶ 35, 315 Mont. 107, 67 P.3d 892. Montana courts apply a three-part test to determine whether a statute violates substantive due process. The statute must "(a) seek to achieve a legitimate governmental purpose; (b) use means that are rationally related thereto; and (c) be neither arbitrary nor unreasonable in its effects." *Town Pump, Inc. v. Bd. of Adjustment*, 1998 MT 294, ¶ 19, 292 Mont. 6, 971 P.2d 349.

All parties agree that maintaining the actuarial soundness of the DB trust fund is a legitimate governmental purpose.

Plaintiffs argue that the Plan Choice Rate and additional 1.0 percent run afoul of the second part of the test because they are not rationally related to maintaining the soundness of the DB trust fund and cite two cases in support of their argument. In *Hardy*, the Montana Supreme Court found that anti-stacking provisions in auto insurance policies were not rationally related to the legitimate interest of keeping insurance premiums affordable. *Hardy*, ¶ 38. In that case, the insurer argued that if customers are allowed to stack coverage, insurers must pay out more in claims and consequently must charge all customers higher premiums. The Montana Supreme Court held that the statue permitting

anti-stacking provisions allowed insurers to charge premiums for non-existent coverage, which is "the antithesis of affordable coverage." *Hardy*, ¶ 37. The statute was not rationally related to the goal of promoting affordable insurance and therefore violated due process.

In *Newville v. State*, 267 Mont. 237, 252, 883 P.2d 793, 802 (1994), the Montana Supreme Court found that portions of Montana's comparative negligence statute were unconstitutional because they allowed a jury to apportion negligence to non-parties, which placed a substantial burden on plaintiffs to guess who defendants would attempt to blame. Though there were valid reasons for enacting comparative negligence tort reform, the Montana Legislature acted arbitrarily and unreasonably in responding to those reasons. *Newville*, 267 Mont. at 254-255, 883 P.2d at 803.

This case presents a situation not found in *Hardy* or *Newville*. In those cases, plaintiffs were denied the benefit of their paid insurance premiums or viable negligence claims. The common theme is that those plaintiffs were deprived of something to which they had a right. Here, Plaintiffs argue that "[t]he Plan Choice Rate requires DC plan participants to contribute nearly half of their employer contribution to the DB plan, a plan from which they are statutorily precluded from participating." (Pls.' Combined Br. Opposing State's Mot. S.J. & Supporting Pls.' Mot. S.J. at 37 (May 27, 2014)).

As explained above, this assertion mischaracterizes the nature of the employer contribution. It is not the employee's money that she must give up. It is an allocation of state funds. The employee is only entitled to the amount statutorily directed into her individual account. Though the amount of the employer's contribution is calculated based on the employee's earnings, the

employee does not have an individual right to it. Plaintiffs here are not deprived of anything to which they have a right. The Plan Choice Rate and additional 1.0 percent are rationally related to the interest of maintaining the soundness of the DB trust fund because they account for the amount not being paid into the fund due to the employee's choice to participate in the DC plan or ORP.

Plaintiffs also argue that the Plan Choice Rate is arbitrary and unreasonable because "[a]ll public employees must choose a retirement plan, but only those who elect to participate in the DC plan are assessed a fee for their choice." (Pls.' Combined Br. Opposing State's Mot. S.J. & Supporting Pls.' Mot. S.J. at 38 (May 27, 2014)). Again, this is a mischaracterization because the employer contribution is not the employee's money, except for the amount that is statutorily directed to the employee's individual account. Unlike in *Newville*, where the Montana Supreme Court found that a statute that kept a plaintiff guessing as to how negligence would be apportioned was arbitrary and unreasonable, here all employees have access to educational materials so they understand the how the plans work and the consequences of selecting one plan over another. Calculating the amount the employer contributes to the retirement system based on the DC employee's earnings is neither arbitrary nor unreasonable, because doing so accounts for the unfunded liabilities created by that very employee's choice to enroll in the DC plan.

Because the Plan Choice Rate and additional 1.0 percent are rationally related to the interest of maintaining actuarial soundness in the retirement system, and they are neither arbitrary nor unreasonable, Plaintiffs have failed to establish beyond a reasonable doubt that the Plan Choice Rate and additional 1.0 percent violate their substantive due process rights.

Good cause appearing therefore, **IT IS HEREBY ORDERED** that:

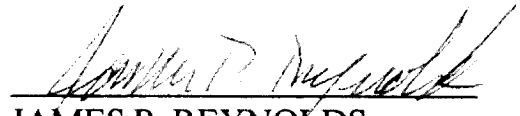
1. Defendant State of Montana and Montana Public Employee Retirement Administration's motion for summary judgment is GRANTED.

2. Plaintiffs' motion for summary judgment is DENIED.

Let Judgment be entered accordingly.

Counsel for the State is directed to prepare a judgment in conformity with the Court's foregoing opinion.

DATED this 12 day of November 2014.



JAMES P. REYNOLDS
District Court Judge

c: Travis Dye
Timothy C. Fox/J. Stuart Segrest/Michael G. Black

JPR/d