Nos. 127527 & 127594 (cons.)

IN THE
SUPREME COURT OF ILLINOIS

JOHN O'CONNELL,

Plaintiff-Appellee,

v.

COOK COUNTY, et al.,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 20-1031
There Heard On Appeal From The Circuit Court Of Cook County, Illinois
No. 20-CH-288

REPLY BRIEF OF DEFENDANT-APPELLANT COUNTY OF COOK

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT IN REPLY

Having been discharged from County employment – the lawfulness of which is not challenged in this appeal – John O'Connell claims that he is now entitled to disability benefits under Article 9 of the Pension Code, as well as County-paid pension contributions. As explained in the County's opening brief, this argument is irreconcilable with the plain language of Article 9 and basic principles of statutory construction, County Br. 8-13, and if accepted would have the absurd effect of giving permanently discharged employees more favorable disability benefits than temporarily discharged employees who have returned to work, County Br. 9-10.[1]

In his response, O'Connell argues that because he worked long enough to earn approximately 4 and a half years of ordinary disability benefits, he is entitled to the full 4 and a half years of employment benefits even after he was lawfully terminated. O'Connell argues that not continuing his ordinary disability benefits violates the Pension Clause and Article 9's plain language, Response 17-22, the purpose of the term "employee" in Section 9-157, Response 22-34, and is inconsistent with *Di Falco*, Response 34-39. As explained below and in the County's opening brief, O'Connell's argument expands the plain language of Article 9 and the contractual relationship between the employee, the County, and the Pension Board, and produces the absurd result this court previously rejected.

[1] We cite our opening brief as "County Br. ____" and O'Connell's response as "Response ___.

FORMER EMPLOYEES ARE NOT ENTITLED TO ORDINARY DISABILITY BENEFITS OR EMPLOYER CONTRIBUTIONS.

As explained in the County's opening brief, the language of Article 9 is clear. It only provides ordinary disability benefits to "employee[s]," 40 ILCS 5/9-157, and requires the County to "contribute all amounts ordinarily contributed by it for annuity purposes for any *employee* receiving ordinary disability benefit as though he were in active discharge of his duties during such period of disability," 40 ILCS 5/9-181 (emphasis added). Article 9 defines an "employee" as "[a]ny employee of the county *employed in any position* in the classified civil service of the county." 40 ILCS 5/9-108 (emphasis added). Because an individual "discharged" from employment "is obviously not 'employed,' in any sense of the word," *Di Falco v. Board of Trustees*, 122 Ill. 2d 22, 28 (1988), O'Connell is not an "employee" and therefore is not entitled to disability benefits or ongoing pension contributions from his former employer.

In arguing to the contrary, O'Connell notes that "employed" can refer to a person who "was 'employed,' as well as one who is currently 'employed,' and one who might be 'employed' in the future." Response 18.[2] This argument is irreconcilable with *Di Falco*, which makes clear that the word "employed" in the Pension Code refers to *current* employment, not the *former* employment of

[2] We do not understand O'Connell to argue that Article 9 entitles future County employees to disability benefits. That is a wise decision, since the notion that the County is required to pay pension contributions for individuals who have not even *begun* their employment is patently absurd.

an individual discharged from his position. 122 Ill. 2d at 28. But even setting aside *Di Falco*, O'Connell's argument must be rejected.

As this court has explained, statutory terms "cannot be considered in isolation but must be read in context to determine their meaning." *Dynak v. Bd. of Educ.*, 2020 IL 125062, ¶16. That context is particularly informative here. While it is true that the word "employed" can refer to past or present employment, that term, standing alone, literally *never* indicates past employment. Instead, past employment is always indicated by saying a person "*was* employed" or some equivalent. One need not look any farther than the Pension Code itself for confirmation of such a commonsense fact. *See*, *e.g.*, 40 ILCS 5/14-110(c)(17) (referring to person who "*was* employed as an arson investigator on January 1, 1995 and is no longer in service") (emphasis added); 40 ILCS 5/6-106(a) (defining "fireman" as any person who "*was*, is, or shall be employed by a city in its fire service") (emphasis added); 40 ILCS 5/15-136(e) (requiring increase in annuity even for "terminated" employees, provided that person "*was* employed at least one-half time during the period on which the final rate of earnings was based") (emphasis added); 40 ILCS 5/14-104(k) (method for establishing creditable service by a person "who *was* employed on a full-time basis by the Illinois State's Attorneys Association Statewide Appellate Assistance Service LEAA-ILEC grant project") (emphasis added). Indeed, that is exactly how O'Connell refers to past employment *in his own brief*. *See* Response 18 (using phrase "*was* 'employed'" to refer to past

employment) (emphasis added). The word "was," or any equivalent language indicating an intent to extend disability benefits to former employees, being conspicuously absent from Article 9, demonstrates that the legislature did not intend the word "employed" to refer to past employment.

While the plain language of Article 9, standing alone, makes clear that O'Connell is not entitled to disability benefits, that result finds further support in the absurdity of O'Connell's contrary reading of Article 9. As we explain, discharged employees who are absent from service for more than 60 days and then reenter service *continue* to be ineligible for such benefits until they have served for 6 months. County Br. 9 citing 40 ILCS 5/9-157. If, as O'Connell believes, an individual who is *permanently* discharged from service is entitled to receive the full amount of ordinary disability benefit he has accrued at the time of discharge, that would imply that such individuals receive more favorable treatment than employees who are only *temporarily* laid off and then seek disability benefits after returning to service.

Tellingly, O'Connell does not deny that this would be an absurd result, nor could he. Instead, he declares that the County's proffered scenario is impossible because someone who reenters service is, by definition, no longer "disabled." Response 30. In making this argument, O'Connell wrongly conflates "disability" with "discharge." It most certainly is possible for a disabled person to be temporarily *discharged* for budgetary reasons, then later

reinstated to employment when the budget shortfall has passed.[3] The existence of a disability would only go to the person's ability "to perform the duties of his position," 40 ILCS 5/9-113. It would not change the fact that the reinstated person is no longer discharged and therefore an employee entitled to an employee's disability benefits unless and until he is discharged.

O'Connell also argues that it does not matter if a person is permanently discharged for serious misconduct because the legislature intended to deny benefits only for "certain misconduct" such as criminal activity or conduct resulting in a dishonorable discharge from military service. Response 31 (citing 40 ILCS 5/9-235; 40 ILCS 5/9-120.1(e)). This is obvious nonsense, as nothing in either section indicates any legislative intent to limit termination of disability benefits to criminals and those dishonorably discharged. To the contrary, section 5/9-120.1(e) states only that an individual may not use military service as credit towards pension benefits if he was dishonorably discharged from service. Section 5/9-235 merely makes clear that a person *otherwise eligible* for benefits under Article 9 cannot be paid those benefits if he "is convicted of any felony relating to or arising out of or in connection with his service as an employee." It does not change the fact that a person no longer

[3] As we noted in our opening brief, County Br. 12-13, the appellate court made the same mistake when it assumed that individuals receiving disability benefits are "*no longer working* as county employees," A7-8, ¶18. In attempting to argue otherwise, O'Connell misleadingly omits the words "as county employees" from that quote. Response 22.

employed by the County is no longer an employee and therefore no longer eligible for the disability benefits provided to current County employees.

O'Connell also argues that because "retirement annuities, widows' annuities, and children's annuities [are] available only to former employees or other family members," the legislature must have intended disability benefits to be provided to former employees. Response 18-19; *accord id.* at 25-26 (citing 40 ILCS 5/9-135.1, *id.* 5/9-148, *id.* 5/9-154, *id.* 5/9-159(c), *id.* 5/9-160, *id.* 5/9-161). In making this argument, O'Connell forgets that the legislature made clear that terms of Article 9 "have the meanings ascribed to them . . . *except when the context otherwise requires*." 40 ILCS 5/9-102. Thus, even if the context of certain sections of Article 9 require a more expansive understanding of "employee" to encompass former employees as well as current employees, that expansive understanding applies only to *those* sections, not to the other sections of Article 9 that are divorced from that context. Indeed, this court recognized exactly that in *Di Falco* when it rejected an argument materially identical to the argument O'Connell advances here. In that case, the plaintiff argued "that the term 'fireman' is used in certain sections of the Pension Code to refer to persons other than those currently in service as fire fighters," relying on the language of a section providing benefits to a "fireman" who was "no longer in service." 122 Ill. 2d at 32. Rejecting this argument, this court noted that – just like Article 9 – Article 4 of the Pension Code specifically provided that "the term 'fireman' shall have the meaning ascribed to it in section 4-106,

'except when the context otherwise requires.'" *Id.* Thus, the language cited by the plaintiff in *Di Falco* only showed "a change in the context of the definition of 'fireman' *as used in that section*." *Id.* But because the operative section of Article 4 at issue in *Di Falco* contained "no such contextual phrase," this court explained, "the term 'fireman' in section 4-110 refers only to fire fighters currently in service." *Id.* at 32-33. Like the plaintiff in *Di Falco*, O'Connell is unable to identify any contextual phrases requiring a more expansive understanding of "employee" for purposes of determining eligibility for ordinary disability benefits. Rather, every section he identifies concerns eligibility for and payment of *annuities*, which are not at issue in this case. As a result, the same result as in *Di Falco* is appropriate here.

Next, O'Connell claims that Article 9 cannot be limited to current employees because that would make the Credit Purchase Option and Early Annuity Option provided to individuals who have exhausted their disability benefits "entirely dependent upon unfettered County discretion, with no standards in the statute to guide exercise of the discretion." Response 28. O'Connell complains that this would have the "perverse effect" of incentivizing county employers to terminate their disabled employees to avoid paying those benefits. *Id.* at 29. Again, this court already rejected this very argument in *Di Falco*, explaining that "there are safeguards to prevent such abuse and the possibility of it happening are extremely minimal, if not nonexistent." 122 Ill. 2d at 31.

Put another way, *Di Falco* made clear that employees discharged for no reason but a desire to avoid paying their benefits are protected by their ability to challenge the lawfulness of their discharge. O'Connell expressly disavows any challenge to the lawfulness of his discharge, Response 29 n. 12, and is conspicuously unable to offer any actual explanation of *why* the safeguards this court identified in *Di Falco* "would not prevent" the abuses he supposedly fears, *id.*[4] Because this court is entitled to have all contentions offered to it supported by coherent, developed argument, *see*, *e.g.*, *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824 (1st Dist. 2008), O'Connell's inability to offer any support for his belief that a ruling in the County's favor would invite unchecked abuse waives that contention for purposes of this appeal. Absent any reason to believe that counties would expose themselves to suit for wrongful discharge merely to avoid paying benefits, the possibility of such action is no reason to depart from the plain language of Article 9.

O'Connell's remaining arguments are easily disposed. O'Connell argues that this court's decision in *Di Falco* does not apply because *Di Falco* contains different underlying facts and interprets Article 4, not Article 9. Response 34-39. These are distinctions without a difference. *Di Falco* is not significant because of any supposed factual similarities to this case or because of the

[4] While O'Connell complains that nothing in Article 9 prevents him from being discharged for his disability, Response 29 n.12, that is immaterial. The relevant question under *Di Falco* is whether there are any safeguards against *abuse* of discharge to avoid paying benefits.

Article of the Pension Code that it involved, but because of its recognition of a simple, commonsense fact about the English language; a discharged employee "is obviously not 'employed,' in any sense of the word." 122 Ill. 2d at 28.

O'Connell also complains that other Pension Code Articles have been interpreted to allow former employees to continue receiving disability benefits, Response 35-36, 39 (citing *Iwanski v. Streamwood Police Pension Bd.*, 232 Ill. App. 3d 180 (1st Dist. 1992); *Greenan v. Bd. of Trustees*, 213 Ill. App. 3d 179 (4th Dist. 1991); *O'Keefe v. Retirement Bd.*, 267 Ill. App. 3d 960 (1st Dist. 1994)), but overlooks that those Pension Code Articles contain language expressly contemplating that former employees will continue to receive the benefits at issue, *see* 40 ILCS 5/3-114.2 (providing an officer "who is found to be physically or mentally disabled *so as to render necessary his or her suspension or retirement from police service in the police department*, shall be entitled to a disability pension") (emphasis added); 40 ILCS 5/6-106(a) (defining "fireman" as any person who "*was*, is, or shall be employed by a city in its fire service") (emphasis added). The legislature omitted such language from Article 9, and that choice must be respected and given effect by the courts.

Finally, building on that error, O'Connell claims that the legislature must have intended for discharged individuals to be entitled to disability benefits because Article 9 did not provide for them to be reinstated when that disability ends, Response 38-39 (comparing 40 ILCS 5/9-158 with *id.* 5/4-112), but that theory is backwards. The legislature did not provide for reinstatement

of individuals receiving disability benefits because it never contemplated that discharged individuals would receive disability benefits.[5]

CONCLUSION

For the above reasons and as explained in the County's opening brief, this court should reverse the judgment of the appellate court and affirm the judgment of the circuit court.

Respectfully submitted,

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[5] O'Connell fundamentally misunderstands section 5/4-112. It does not involve reinstatement to *employment* after a disability ends, but reinstatement to "active service" after a disability ends. Indeed, as O'Connell previously admitted, Response 29 n.12, Article 4 specifically prohibits the discharge of a covered firefighter for a disability that forms the basis of a disability benefits request, 40 ILCS 5/4-112.

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 10 pages.

/s/ *Rebecca M. Gest*
Assistant State's Attorney

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

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The undersigned, being first duly sworn, deposes and states that on March 11, 2022, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Defendant-Appellant County of Cook. On March 11, 2022, service will be accomplished by email and electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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