

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of themselves and those similarly situated,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON AND SARA R. ALT, IN THEIR OFFICIAL CAPACITIES ONLY,</p> <p>Defendants.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General Maurice G. Knaizer, #5624, First Assistant Attorney General*, maurie.knaizer@state.co.us William V. Allen, #26386, Senior Assistant Attorney General*, will.allen@state.co.us Megan Paris Rundlet, #27474, Assistant Attorney General*, megan.rundlet@state.co.us</p> <p>1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5235 FAX: (303) 866-5671 *Counsel of Record</p>	<p>Case No.: 2010-CV-1589</p> <p>Division: 6</p>
<p>STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT</p>	

Defendants Governor Bill Ritter and the State of Colorado (“State Defendants”), through the Colorado Attorney General, respectfully submit this reply in support of their motion to dismiss six of the eight claims in the Plaintiffs’ First Amended Class Action Complaint (the “Complaint”).¹

INTRODUCTION

The State Defendants and PERA Defendants moved to dismiss all but Count I and Count III of the eight claims alleged by Plaintiffs in their Complaint. In their response brief, Plaintiffs concede several issues. Plaintiffs admit that their second claim for relief under Article V, § 38 of the Colorado Constitution is meritless and should be dismissed. Resp. br. at 1, fn 2. They also agree that they cannot pursue monetary damages against state officials under 42 U.S.C. § 1983, and that they can only seek prospective declaratory relief. *Id.* Plaintiffs’ concession simplifies the analysis of this case and renders moot several of the arguments made by State Defendants in their Motion to Dismiss, as set forth below.

For the reasons described below, the remaining Counts IV through VIII against the State Defendants, and Plaintiffs request for monetary damages must be dismissed.

ARGUMENT

I. Plaintiffs fail to state a claim under the takings or substantive due process clauses of the United States Constitution – Counts IV and V must be dismissed.

State Defendants adopt the arguments made by the PERA Defendants in PERA’s Motion to Dismiss First Amended Class Action Complaint and in PERA’s Reply in Support of Motion to Dismiss First Amended Class Action Complaint. As set forth in the PERA briefs, Plaintiffs fail to state cognizable claims for an unconstitutional taking or for the violation of their substantive due process rights under the United States Constitution. The General Assembly’s reduction in the Cost of Living Allowance (COLA) is more properly characterized as a violation of the state and federal contracts clauses, as Plaintiffs have alleged in Count I (violation of

¹ To conserve the scarce judicial and legal resources of this Court and the named Defendants, State Defendants respectfully adopt the arguments made in PERA Defendants’ Reply in Support of Motion to Dismiss First Amended Class Action Complaint. State Defendants respectfully request the Court to consider all such facts and arguments as though set forth fully herein when the Court considers the motion to dismiss.

contracts clause under the Colorado Constitution) and Count III (violation of contracts clause under the United States Constitution) – and which are not the subject of Defendants’ motions to dismiss.

In their Motion to Dismiss, State Defendants argued that no direct cause of action for damages exists for alleged violations of the Federal Constitution, and that the Court was therefore required to dismiss Counts IV and V for failure to state a claim. Alternatively, State Defendants requested the Court to convert Counts IV and V to § 1983 claims and consider them accordingly. Plaintiffs’ concession that they seek no damages in conjunction with Counts IV and V moots State Defendants’ argument.

Regardless of Plaintiffs’ concession, as argued above, Plaintiffs cannot establish that they have a legally cognizable property right subject to the protections afforded by the takings clauses or substantive due process clauses of the state and federal constitutions. *See* PERA Reply. Plaintiffs remaining contract claims (Counts I and III) serve as the proper mechanism to address Plaintiffs legal claims regarding the COLA reduction. The Court should dismiss Counts IV and V accordingly.

II. Plaintiffs fail to state claims under 42 U.S.C. § 1983 for violations of the Contracts Clause, Takings Clause, and Substantive Due Process – Counts VI, VII and VIII must be dismissed.

A. Plaintiffs’ contracts clause claim does not give rise to a §1983 claim against Governor Ritter – Count VI must be dismissed.

State Defendants adopt the arguments made by PERA defendants. *See* PERA Reply at 20-21. Plaintiffs have not advanced any persuasive arguments justifying the Court’s departure from the rule set forth in *Kilbourn* that “[t]he Contracts Clause does not give rise to a § 1983 cause of action.” *Kilbourn v. Fire & Police Pension Ass’n*, 971 P.2d 284, 288 (Colo. App. 1988). Count VI must be dismissed.

B. Plaintiffs’ § 1983 claims against Governor Ritter based on the taking and substantive due process violations fail as a matter of law – Count VII and Count VIII must be dismissed.

The same reasons that Plaintiffs have failed to state cognizable claims under the takings and substantive due Process clauses (Counts IV and V) apply equally to Plaintiffs’ § 1983 claims against Governor Ritter based on the alleged violations of the takings and substantive due process clauses. *See* PERA Reply. Plaintiffs’ allegations do not support a takings claim or a substantive due process claim against any of the State Defendants. The Court should dismiss Count VII and

Count VIII and focus on whether the adjustment to COLA satisfies the Contract Clauses of the Colorado and United States Constitutions.

C. Plaintiffs' admission that they are only entitled to prospective declaratory relief does not save their claims from dismissal.

Because Plaintiffs sought unspecified damages in their Amended Complaint, State Defendants moved to dismiss certain of Plaintiffs' constitutional claims based on the State Defendants' sovereign immunity recognized in *Alden v. Maine*, 527 U.S. 706, 712 (1999) and *Middleton v. Hartman*, 45 P.3d 721 (Colo. 2002). See State Defendants' Motion to Dismiss. Now Plaintiffs admit that they cannot obtain the monetary relief requested in paragraph F of their prayer for relief, wherein Plaintiffs' asked the Court to "[a]ward Plaintiffs and the Class monetary damages (plus interest), pursuant to Colo.Rev.Stat. § 13-51-112 and/or 42 U.S.C. § 1983, to make them whole for any loss and to restore them to the positions they would have been in but for the improper application of Sections 19 and 20 of Senate Bill 10-001 by Defendants." Comp. at 14.

Plaintiffs have retracted their request for unspecified monetary damages in order to preserve their claims against the state and to fall within the *Ex Parte Young* exception to sovereign immunity, which allows certain private suits against state officers if the suit seeks only injunctive or declaratory relief to remedy an ongoing violation of law. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Plaintiffs concede that, in spite of the relief requested in paragraph F, they are only seeking prospective declaratory relief and not monetary damages. This admission does not save Plaintiffs' taking and substantive due process claims from dismissal because, as described above, Plaintiffs have failed to state cognizable claims under the takings and substantive due process clauses of the state and federal constitutions. The Court should dismiss paragraph F in Plaintiffs' prayer for relief requesting monetary damages, and dismiss Counts IV through VIII.

CONCLUSION

For the foregoing reasons, and the reasons stated in their Motion to Dismiss and in the adopted PERA Defendants' Motion to Dismiss. State Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' second, fourth, fifth, sixth, seventh, and eighth claims in their First Amended Complaint, as well as paragraph F of Plaintiffs' prayer for relief requesting monetary damages.

Respectfully submitted this 23rd day of June, 2010.

JOHN W. SUTHERS
Attorney General

s/William V. Allen

WILLIAM V. ALLEN, #26386
Senior Assistant Attorney General
Megan Paris Rundlet
Assistant Attorney General, #27474
Civil Litigation and Employment Law Section
Attorneys for Defendants
*Counsel of Record

In accordance with Colo.R.Civ.P. 121 § 1-26(7), a printed or printable copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within State Defendants' Reply in support of Motion to Dismiss First Amended Class Action Complaint upon all parties herein by e-filing or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 23rd day of June, 2010 addressed as follows:

Richard Rosenblatt
Richard Rosenblatt & Associates,
LLC
8085 East Prentice Avenue
Greenwood Village, CO 80111
rosenblatt@cwa-union.org

William T. Payne
Stephen M. Pincus
Joh Stember
Stember Feinstein Doyle & Payne,
LLC
Allegheny Building, 17th Floor
Pittsburgh, PA 15219
wpayne@stemberfeinstein.com
spincus@stemberfeinstein.com
jstember@stemberfeinstein.com

Daniel M. Reilly
Eric Fisher
Jason M. Lynch
Lindsay A. Unruh
Caleb Durling
Reilly Pozner LLP
511 Sixteenth Street, Suite 700
Denver, CO 80202
dreilly@rplaw.com
efisher@rplaw.com
lunruh@rplaw.com
jlynch@rplaw.com
cdurling@rplaw.com

Mark G. Grueskin
Ed Ramey
Isaacson Rosenbaum P.C.
1001 17th Street, # 1800
Denver, CO 80202
mgrueskin@ir-law.com
eramey@ir-law.com

Jean E. Dubofsky, Esq.
Jean E. Dubofsky, P.C.
1000 Rosehill Drive
Boulder, CO 80303

s/Sally Ott
