

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p> <p><i>Plaintiffs:</i> GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of themselves and those similarly situated,</p> <p>v.</p> <p><i>Defendants:</i> 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>EFILED Document CO Denver County District Court 2nd JD Filing Date: Sep 14 2010 12:38PM MDT Filing ID: 33223033 Review Clerk: Linda L Gibbs</p> <p>COURT USE ONLY</p>
	<p>Case No.: 2010 CV 1589</p> <p>Division: 6</p>
<p>ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS.</p>	

This matter comes before the Court on Defendants' Motion to Dismiss pursuant to C.R.C.P. 12(b)(5) and C.R.C.P. 12(b)(1). The Court has reviewed the motions, related pleadings, all other legally relevant material; is fully advised on the matter and makes the following findings and Order.

This case arises from the passage of Senate Bill 10-001 (the "Bill"), signed into law by Governor Ritter on February 23, 2010. The Bill was designed to address PERA's current underfunding. It modifies employee/employer contributions, places a cap on cost of living

increases for retirees, creates new contributions for working retirees, and increases the age and service requirements of certain groups of employees before they are eligible to receive retirement benefits. Specific to the issues in this case, Sections 19 and 20 modify the cost of living adjustments (“COLA”) received by Plaintiffs.¹

Plaintiffs request judicial declarations finding Sections 19 and 20 of Senate Bill 10-001 in violation of the Contract clause of the Colorado Constitution (Claim I); Article V, § 48 of the Colorado Constitution (Claim II); and the Contract (Claim III), Takings (Claim IV), and Due Process (Claim V) Clauses of the United States Constitution. In addition, Plaintiffs seek relief pursuant to 42 U.S.C. § 1983 against the individual defendants in their official capacities for violations of the Contract (Claim VI), Takings (Claim VII) and Due Process (Claim VIII) Clauses of the United States Constitution. Defendants collectively argue that this Court lacks subject matter jurisdiction over claims numbered IV, V, VI, VII, and VIII and/or that Plaintiffs fail to state a claim upon which relief may be granted.

“When a court's subject matter jurisdiction is challenged in a motion to dismiss pursuant to C.R.C.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction, and the trial court may consider any competent evidence pertaining to the motion.” *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo.1993); *Egle v. City & County of Denver*, 93 P.3d 609 (Colo.App.2004). When determining jurisdiction under C.R.C.P. 12 (b)(1) a trial court may make findings of fact. *Medina v. State*, 35 P.3d 443 (Colo. 2001); *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo.App. 2003).

A C.R.C.P. 12 (b)(5) motion to dismiss tests the competence of a plaintiff's complaint. *Dorman v. Petrol Aspen*, 914 P.2d 909, 911 (Colo. 1996). When a court decides whether such complaint sufficiently states a claim upon which relief may be granted, the court may consider only those allegations made in the complaint and all material allegations must be taken as admitted. *Nelson v. Nelson*, 31 Colo.App. 63, 65-66, 497 P.2d 1284, 1286, (1972). Motions to dismiss are looked upon with disfavor, and a complaint should not be dismissed unless it appears with certainty that

¹ Depending on the sub class to which a specific Plaintiff belongs, the COLAs were modified from a guaranteed annual increase of 3.25% or 3.5% to an annual increase to be calculated under a different formula and capped at 2%.

Plaintiff has asserted no claim upon which relief can be granted. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

This Court cannot find, at this juncture, that Plaintiffs assert no claim upon which relief can be granted in Claims IV or V. In addition, pursuant to *Weston v. Cassata*, 37 P.3d 4693 (Colo.App. 2001) this Court finds that Claims VI, VII, and VIII are properly before the court. *Weston v. Cassata*, 37 P.3d 469, 473 (Colo.App. 2001) (“actions for prospective relief are not treated as actions against the state...[t]hus, in actions for declaratory or injunctive relief...government entities and their officers are properly considered “persons” under § 1983 so long as they are responsible for the implementation and enforcement of a state statute”). The parties have agreed to dismiss Claim II and the requests for monetary damages in Claims VI, VII and VIII.

Accordingly, Defendants’ Motion to Dismiss is DENIED as to Claims IV, V, VI, VII, and VIII but GRANTED as to Claim II and the requests for monetary damages in Claims VI, VII, VIII.

Done this 14TH day of September, 2010.

By the Court



Robert S. Hyatt
District Court Judge