IN THE SUPREME COURT OF THE STATE OF OREGON

Ronald Doyle; and **Benedict Miller**;	Trial Court
	Case No. 08-0137L7
Plaintiffs-Respondents,	(Jackson County
Petitioners on Review,	Circuit Court)
and	**Court of Appeals Case No. CA A147497**
Robert Deuel; and **Charles Steinberg**,	
	Supreme Court Case No. S061463
Plaintiffs-Respondents,	
Cross-Appellants,	
Petitioners on Review,	
v.	
City of Medford, an Oregon Municipal corporation; and **Michael Dyal**, City Manager of the City of Medford, in his official capacity and as an individual,	
Defendants-Appellants,	
Cross-Respondents,	
Respondents on Review.	

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the decision of the Oregon Court of Appeals on appeal from a judgment of the Circuit Court for Jackson County, The Honorable Mark Schiveley, Judge

Order Filed: May 15, 2013
Author of Order: Hon. Rebecca A. Duncan
Concurring Judges: Hon. David Schuman and Hon. Robert Wolheim

Robert E. Franz Jr. OSB #73091
LAW OFFICE OF ROBERT E. FRANZ, JR.
P.O. Box 62
Springfield, OR 97477
Telephone: (541) 741-8220
Attorney for Defendants-Respondents on Review
City of Medford and Michael Dyal

Counsel Continued on Next Page *February, 2014*

Mr. Stephen L. Brischetto OSB #78156
Attorney at Law
621 SW Morrison Street, Ste. 1025
Portland, OR 97205
Telephone: (503) 223-5814
Of Attorneys for Plaintiffs-Petitioners on Review

Mr. George P. Fisher OSB #91043
Attorney at Law
3635 S.W. Dosch Road
Portland, OR 97239
Telephone: (503) 224-7730
Of Attorneys for Plaintiffs-Petitioners on Review

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Question Presented: Does ORS 243.303 create a private, civil cause of action for money damages by a retired employee against a city, county, school district, or other special district when the city, county, school district, or special district does not make the same medical insurance coverage available to the retired employee that he had when he was a current employee.

Proposed Rule of Law: The rule of law should be as follows: A court will not create a private civil cause of action for money damages for a failure to follow the terms of the statute, unless a private civil cause of action is expressly created by the legislature in the statute itself, or by the express terms of another statute.

However, in the case at bar, the rule of law does not need to go as to all criminal and civil statutes, since there is no penalty of any kind imposed for a violation of ORS 243.303. Thus, in this case the rule of law should be as follows: Where the legislature does not provided for a penalty, civil or criminal, for the failure to follow the terms of a statute; and where the failure to follow the terms of the statute is not expressly made unlawful, a court will not create a private civil cause of action for money damages for a failure to follow the terms of the statute, unless a private civil cause of action is expressly created by the legislature in the statute itself, or by the express terms of another statute.

Answer to Question Presented: Because the legislature has not provided for any penalty, civil or criminal, for the failure of a city, county, school district, or special district to follow the terms of ORS 243.303; and because no other statute, including ORS 243.303, expressly makes it unlawful to violate the terms of ORS 243.303; and because no other statute, including ORS 243.303 provides for a private civil cause of action against a city, county, school district, and special district for a failure to follow the terms of ORS 243.303, no private, civil cause of action for damages by a retired employee was created by ORS 243.303.

II. Nature of Proceedings.

This case has a lengthy procedural history in this Court and the Ninth Circuit Court of Appeals. Of particular relevance is the decision of the Ninth Circuit Court of Appeals as to plaintiffs-respondents' contention in federal court that the City of Medford's failure to follow the terms of ORS 243.303 violated Plaintiffs' Fourteenth Amendment Due Process rights. This follows because after receiving guidance from this Court, the Ninth Circuit interpreted the meaning of the important terms of ORS 243.303.

On plaintiffs' appeal of Judge Panner's dismissal of their due process claim in federal court, the Ninth Circuit determined that the plaintiffs did not have a protected property interest by reason of ORS 243.303, explaining:

> "We hold that section 243.303 does not create a protected property interest because 'insofar as and to the extent possible' is not a particularized standard, because the nature and extent of the entitlement that section 243.303 allegedly creates are too indeterminate, and because the statute allows local governments extensive functional discretion." *Doyle v. City of Medford*, 606 F.3d 667, 675 (9th Cir. 2010).

This finding is much akin to the City's argument that even if ORS 243.303 provided a private civil cause of action for damages, the City would nevertheless be immune from liability under the immunity provisions of the Oregon Tort Claims Act, ORS 30.265(6), which provides in part as follow:

> "Every public body and its officers, employees and agents acting within the scope and their employment or duties . . . are immune from liability for: ...
> (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."

As this Court has already noted in answering the Ninth Circuit's certified question, "there may be factual circumstances that excuse" any obligation to provide health insurance under the statute. Doesn't it follow that where a governing body is to weigh the skyrocketing costs of medical benefits in making the decision under ORS 243.303, such a decision is immune from liability under the Oregon Tort Claims Act. So even before going forward, one must ask the question: Why would the legislature create a private, civil cause of action for damages for a decision that is immune from liability?

Also, since ORS 243.303 only applies to not-for-profit cities, counties, school districts, and special districts (See ORS 243.303(1)(b)), and does not apply to the State of Oregon and its numerous employees, and does not apply to for-profit private corporations, one must also ask the question: Why the legislature would create large, monetary, civil liability for the failure to provide medical benefits just against cities, counties, school districts, and special districts many of which are small and rural, and all of which are required to operate on fixed budgets and limited funds, and are continually struggling for money?[1] Or better yet, why do the statutes governing the conduct of attorneys not provide for a civil cause of action, yet a statute that applies to limited types of public bodies does provide for a civil cause of action? *Bob Godfrey Pontiac v. Roloff*, 291 Or. 318, 630 P.2d 840 (1981), [New private cause of action would not be "created" or "recognized" for recovery of damages resulting from malicious conduct by attorney in violation of statute proscribing attorney from seeking to mislead court or jury by artifice or false statement of law or fact.] The answer to these questions is simple: The legislature never intended to provide a civil cause of action against cities, counties, school districts, or special districts, and did not do so in ORS 243.303.

[1] The whole selling point by the legislature was that passage of the statute was not going to cost any money to local governments. Creating a civil cause of action for damages is in direct conflict with this selling point.

In the case at bar, the Court of Appeals applied the framework set out by this Court in *Scovill v. City of Astoria*, 324 Or. 159, 166, 921 P.2d 1312 (1996). Based on both textual and contextual sources and the legislative history described in the Supreme Court's opinion, the Court of Appeals concluded that no private right of action was contemplated. The Court of Appeals, explained: "in a state where the legislature knows how to make explicit employment-related private rights of action, *see, e.g.*, ORS 659A.885 (describing procedures for employment-related statutory claims), the absence of an express statement supports an inference that a private right of action was not contemplated." *Doyle v. City of Medford*, 256 Or. App. 625, 640, 303 P.3d 346 (2013).

Additionally, the Court of Appeals noted there were no textual or contextual clues from which it could infer that the legislature contemplated the possibility of a private right of action or civil liability for the failure of a municipality to make available to its retirees the same insurance coverage that it provides to its employees. The Court of Appeals, explained that "[p]art of what persuades us that the legislature did not contemplate a private right of action under ORS 243.303(2) is the indefinite nature of the obligation." *Id.* at 641. The Court of Appeals explained, that the degree of flexibility and discretion accorded to the local government is inconsistent with an intention that the statute be enforceable through a private action for damages.

The Court of Appeals went on to consider the legislative history, and explained the history "also emphasizes an intention to create flexibility in compliance with the obligation described in ORS 243.303(2) and supports our conclusion that the possibility of a private right of action for damages to enforce the statute's provisions was not contemplated when the legislature enacted ORS 243.303 in 1981, or when the statute was amended in 1985." *Id.*

The Court of Appeals, thus concluded that in considering the text, context, and legislative history of ORS 243.303(2), the "legislature did not contemplate a private right of action for damages when a local government fails to carry out the obligation described in the statute." Since, the Court of Appeals determined that there was no legislative intent, it did not address the next inquiry described in *Scovill*, whether the court should accord plaintiffs a civil remedy. *Id.* at 642 n.6.

Clearly, if the Court stays with the framework set out by this Court in *Scovill v. City of Astoria*, *supra*, then the decision of the Court of Appeals should be affirmed. Its excellent decision needs no further analysis. Likewise, if the Court should decide that it is time to let the legislature take over creating civil causes of actions for damages as proposed by the City in this brief, the Court of Appeals decision should be affirmed.

III. Summary of Facts.

Ronald Doyle worked for the City of Medford as an attorney. He retired effective January 1, 2005. (ER-44; ER-48 to ER-49; Tr. 177 (Sept. 7-9, 2010)). He was a non-bargaining unit, management employee of the City of Medford. The medical benefits he received were set by the "Rules and Regulations for Executive, Supervisory, and Confidential-Professional Employees of the City of Medford" adopted by City ordinance and agreed by him to be followed.

Charles Steinberg worked for the City of Medford as a police officer. He was a union employee, a member of Teamsters Local Union No. 223. He retired effective January 31, 2003. (ER-1-2; Tr. 233 (June 22-24, 2010)). The medical benefits he received as a current employee were bargained for by his union.

Robert Deuel worked for the City of Medford in the Public Works Department. He was a non-bargaining unit, management employee of the City of Medford. He retired effective January 31, 2003. (ER-3; Tr. 165 (June 22-24, 2010)). The medical benefits he received were set by the "Rules and Regulations for Executive, Supervisory, and Confidential-Professional Employees of the City of Medford" adopted by city ordinance and agreed by him to be followed.

Benedict Miller worked for the City of Medford as a police officer. He was a union employee, a member of Teamsters Local Union No. 223. He

retired effective May 31, 2006. (ER-3; Tr. 261-262 (June 22-24, 2010). The medical benefits he received as a current employee were bargained for by his union.

Starting in 1991, members of the Teamsters of the Police Department that were current employees were provided health care benefits by the Oregon Teamster Employers Trust (OTET). (Tr. 291 (June 22-24, 2010)). OTET is a self-funded ERISA-regulated employee benefit plan. (ER-37). Health care benefits were negotiated between the Teamsters and the City of Medford under the collective bargaining statutes of the State of Oregon.

As to the non-union employees, prior to January 1, 2002, the City of Medford contracted with ODS to have ODS provide health care benefits. Effective January 1, 2002, the management group of the City switched to OTET. (Tr. 132 (June 22-24, 2010)). The decision to switch to OTET was for financial reasons. (Tr. 381 (Sept. 7-9, 2010)).

With regards to both union and non-union employees, each employee, upon retirement, had the choice of having continual coverage for the same medical and dental care benefits during the 18-month period after they retired. This option for coverage was mandated by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Furthermore, upon retirement, each of the plaintiffs could have enrolled in the PERS Health Insurance Program.

(Tr. 288-289 (Sept. 7-9, 2010)). However, after the 18-month COBRA period of time, retirees could not obtain the same coverage they had through OTET.

IV. Summary of Argument.

The plaintiffs have no private, civil cause of action to recover damages for a violation of ORS 243.303.

Prior to even considering whether there is a cause of action to enforce ORS 243.303, this Court should consider the implications of ERISA. If this Court determines that there is a private cause of action for civil remedies under ORS 243.303, the statute will nevertheless be preempted under ERISA (the Employee Retirement Income Security Act). ERISA includes expansive pre-emption provisions. First, ERISA section 514(a) [29 U.S.C. § 1144(a)] expressly preempts all state laws "[i]nsofar as they may now or hereafter relate to any employee benefit plan." Second, ERISA section 502(a) [29 U.S.C. § 1132(a)] contains a comprehensive scheme of civil remedies to enforce ERISA's provisions. *See* 29 U.S.C. § 1132(a). "Any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 200-201, 124 S. Ct. 2488, 159 L.Ed.2d 312 (2004).

In this case, OTET is a self-funded ERISA-regulated employee benefit plan. To the extent that ORS 243.303 requires the City to include retires in the

plan, the statute is preempted by ERISA as it relates to an employee benefit plan. Second, however, to the extent ORS 243.303 is interpreted to provide a private cause of action, it is preempted as it would supplement ERISA's comprehensive scheme.

Since ERISA would prevent any cause of action this Court implies, it would be futile to provide a remedy. This Court should not infer a private cause action under these circumstances.

If not preempted, a third provision of ERISA would prevent ORS 243.303 from applying to the City in this case. Section 29 U.S.C. § 1144(b)(2)(B)) provides that OTET (a self-funded employee benefit plan) is not insurance. Thus, ORS 243.303 (which pertains to insurance) is not even applicable to the plan, and the City was thus under no obligation to provide health care insurance to its retirees anyway. This Court should not consider whether ORS 243.303 provides a private cause of action, where the interpretation does not affect the plaintiffs in this case.

To the extent this Court considers whether Oregon law provides for a civil remedy under ORS 243.303, it does not. Initially, this Court should reconsider its method articulated in *Scovill v. City of Astoria*, 324 Or. 159, 166, 921 P.2d 1312 (1996), to the extent it allows a court to legislate whether or not to provide a civil remedy to a plaintiff under a statute, where no statute provides that it is unlawful to violate ORS 243.303, and where the express terms of the

statute does not provide for such a claim for damages, and where no other statute provides for a civil damage remedy. Without mincing words, and with all due respect to our courts and judges, it is not the function of a court to create a private cause of action for damages when it finds that it is "reasonable to give to the protective purpose spelled out in the legislation." *Id* at 171. Rather a court is "to declare the law as it is and not what it thinks it ought to be." *George B. Wallace Co. v. Int'l Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics*, 155 Or. 652, 661–62, 63 P.2d 1090 (1936). This Court should reconsider its holding in *Scovill*, and determine that a private cause of action for civil damages based on a statute is justified only where the legislature expressly provides for a civil action for damages for a violation of the statute.

Assuming, the Court does not wish to revisit the framework set out in *Scovill*, it still should find that here the plaintiffs are not entitled to a civil remedy for an alleged breach of ORS 243.303, just as the Court of Appeals determined.

Under *Scovill*, the first question is to consider whether a statute creates a duty. The Court then considers the text and context of the statute to discern whether the legislature intended for the breach of that duty to give rise to tort liability. If it is determined that the legislature intended that breach of that duty give rise to tort liability, the courts consider whether the court should accord plaintiffs a civil remedy. *Scovill*, 324 Or. at 169-72.

Here, the text, context, and legislative history support that there is no duty to provide health insurance to retirees, rather ORS 243.303 was enacted as a permissive statute that was intended to allow government bodies the ability to offer health insurance to retirees through collective bargaining. The initial purpose coupled with the flexible standards used by the legislature support that ORS 243.303 does not give rise to a duty to provide health insurance to retirees.

Even if there is such a duty, there is no indication that the legislature intended that breach of such a duty would give rise to tort liability. Indeed, especially in the area of employment law, the legislature clearly knows how to provide a civil remedy. Nothing in the statute or other statutes provides for a penalty (civil or criminal) or civil cause of action for a violation of ORS 243.303. Nothing in the legislative history indicates any intent to create a civil cause of action. Nothing plus nothing does not equal something. It is tough enough for courts to interpret the meaning of the words set forth in a statute. It is impossible for courts to interpret the meaning of words that do not even appear in a statute.

This case is very different from the few cases where the court has accorded a civil cause of action. Unlike prior cases where a cause of action has been inferred, where it is clear that the legislature contemplated civil liability, there is no indication here. Furthermore, as the Court of Appeals determined, the extensive amount of discretion provided to local governments by the

legislature is inconsistent with contemplation of a private cause of action. At most, it can be determined that the legislature intended the statute to be directed at the collective bargaining process, and any remedy should be through ORS 243.672.

Finally, if the Court considers whether it "should accord plaintiffs a civil remedy," there is no reason to do so here.

V. Argument.

A. This Court should consider the impact of ERISA prior to the consideration of whether to imply a private cause of action for damages, as ERISA would preempt any such cause of action.

This Court need not consider whether ORS 243.303 provides a private cause of action in this matter, because even if the statute does provide a private cause of action, it is preempted by ERISA (the Employee Retirement Income Security Act). "Congress enacted ERISA to "protect ... the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provide[e] for appropriate remedies, sanctions, and ready access to the Federal courts." *Aetna Healthcare v. Davila, Aetna Health Inc. v. Davila*, 542 U.S. at 208 *(citing* 29 U.S.C. § 1001(b)). "The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. *Id.* To this end, ERISA includes expansive pre-emption provisions, *see* ERISA § 514, 29 U.S.C.

§ 1144, which are intended to ensure that employee benefit plan regulation would be "exclusively a federal concern." *Aetna Health*, 542 U.S. at 208.

There are three major ERISA provisions at issue in considering the impact of ORS 243.303.

First, ERISA section 514(a) [29 U.S.C. § 1144(a)] expressly preempts all state laws "[i]nsofar as they may now or hereafter relate to any employee benefit plan." As explained before both the trial court, and the Court of Appeals, the Oregon Teamster Employers Trust is a self-funded ERISA-regulated employee benefit plan. (ER-37). Indeed, District of Oregon case law has recognized the same trust as at issue here as an ERISA regulated plan. *Medearis v. Oregon Teamster Employers Trust, et al.*, No. CV 07-723-PK, 2009 WL 1788183 (D. Or. June 19, 2009). ("Plaintiffs LaVern and Russell Medearis filed this class action against the Oregon Teamsters Employers Trust (Trust), the William C. Earhart Company (Earhart) and Doe defendants. The Trust is an ERISA-regulated multi-employer welfare benefit plan."). OTET is an ERISA regulated plan.[2]

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[2] The trial court determined the plaintiffs' claims were not preempted by ERISA since government benefit plans are not covered by ERISA. OTET does not fall under the governmental plan exception of ERISA because the plan is not "*established or maintained"* by the City or any other political subdivision as required to meet the definition of a governmental plan under 29 U.S.C. § 1002(32). Rather OTET is established and maintained by the Trustees of OTET. Also, OTET covers more than a de minimis number of private sector employees. Thus the governmental plan exception is not applicable. *See, e.g.*,

ERISA expressly preempts state laws which "relate to" employee benefit plans. A state law "relates to" an ERISA plan "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S. Ct. 2890, 77 L.Ed.2d 490.

Here, ORS 243.303 both has a "reference" to such a plan and has a "connection" to such a plan, and thus is preempted.

Although not explicitly designating an ERISA welfare plan, ORS 243.303 does "reference" a plan under U.S. Supreme Court precedent. In *District of Columbia v. Greater Washington Board of Trade,* 506 U.S. 125, 113 S. Ct. 580, 121 L.Ed.2d 513 (1992), the Court examined a District of Columbia Act that required employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers' compensation benefits. The Act stated:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." *Id.* at 128.

Livolsi v. City of New Castle, 501 F. Supp. 1146 (D.C. Pa. 1980); *see also* Dep't of Labor ERISA Op. Letter No.2000-04A (Mar. 30, 2000), 2000 WL 1154961 at *2 (explaining: "if a benefit arrangement were to cover more than a de minimis number of private sector employees, the Department may not consider it a governmental plan under Title I of ERISA.")

It further required that the employer must provide such health insurance coverage for up to 52 weeks "at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits." *Id.*

The Court explained the measuring of health insurance coverage on the basis of "existing health insurance coverage," (which was an ERISA welfare benefit plan) resulted in preemption:

> "[The Act] specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted. The health insurance coverage that § 2(c)(2) requires employers to provide for eligible employees is measured by reference to 'the existing health insurance coverage' provided by the employer and 'shall be at the same benefit level.' D.C.Code Ann. § 36-307(a-1)(1) and (3) (Supp.1992). The employee's 'existing health insurance coverage,' in turn, is a welfare benefit plan under ERISA § 3(1), because it involves a fund or program maintained by an employer for the purpose of providing health benefits for the employee 'through the purchase of insurance or otherwise.' § 3(1), 29 U.S.C. § 1002(1). Such employer-sponsored health insurance programs are subject to ERISA regulation, see § 4(a), 29 U.S.C. § 1003(a), and any state law imposing requirements by reference to such covered programs must yield to ERISA." *Id.* at 130.

To the extent ORS 243.303 requires an employer to provide the same health insurance coverage to retirees as it does to existing workers, it is preempted just as in *Greater Washington Board of Trade.*

Even if this Court rejects the argument that ORS 243.303 refers to an ERISA plan, ORS 243.303 is still preempted since it has a sufficient

"connection" with an ERISA plan. State laws have a connection with a plan when they mandate benefit structures or administration. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 658, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995). Where a statute binds plan administrators to a particular choice of rules for determining beneficiary status, there is an impermissible connection. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147, 121 S. Ct. 1322, 149 L.Ed.2d 264 (2001).

For instance, the Supreme Court has said of its decision in *Shaw*: "we had no trouble finding that New York's "Human Rights Law, which prohibit[ed] employers from structuring their employee benefit plans in a manner that discriminate[d] on the basis of pregnancy, and [New York's] Disability Benefits Law, which require[d] employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans." *Travelers*, 514 U.S. at 657 (citing *Shaw*, 463 U.S. at 97)). Similarly in *Egelhoff* the Supreme Court struck down a Washington State law that directed a choice of beneficiary that conflicted with the choice provided in an ERISA plan.

Since one of ERISA's primary objectives is to create a uniform scheme, allowing one state to set standards on the beneficiary status would defeat this goal. As the Court explained in *Engelhoff r*egarding such state mandates:

> "Uniformity is impossible, however, if plans are subject to different legal obligations in different States."
> …

> "Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes …."
> …
>
> "Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators-burdens ultimately borne by the beneficiaries." *Id.* at 148-150.

If ORS 243.303 is interpreted to require employers to include certain plan participants in an ERISA regulated plan, there is a sufficient connection to the employee benefit plan, and ORS 243.303 is preempted whether it provides a private cause of action or not. The State of Oregon cannot dictate who are beneficiaries in an ERISA regulated plan.

Second, ERISA section 502(a) [29 U.S.C. § 1132(a)] contains a comprehensive scheme of civil remedies to enforce ERISA's provisions. *See* 29 U.S.C. § 1132(a). Any state cause of action that would fall within the scope of this scheme of remedies is preempted. As the U.S. Supreme Court explained in *Aetna Health Inc. v. Davila*:

> "ERISA's 'comprehensive legislative scheme' includes 'an integrated system of procedures for enforcement.' . . .
>
> Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."

ERISA section 502 allows for a beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Oregon should not create a separate cause of action to allow a retiree to litigate which benefits he is entitled to under an ERISA regulated plan. Such a cause of action would be preempted as set out in *Aetna*.

As the Supreme Court of Washington articulated, in analyzing whether former employees claims of negligence, outrage, breach of contract, negligent misrepresentation and fraud were preempted under ERISA Section 502:

> "The most significant loss they suffered was their inability to participate in the ERISA-covered plan. They brought this lawsuit primarily demanding damages equivalent to the value of benefits under the plan. … Because the court's inquiry must be directed to the plan, the entire action falls within the scope of ERISA pre-emption." *Cutler v. Phillips Petroleum Col*, 124 Wash. 2d 749, 764, 881 P.2d 216 (Wash. 1994).

Here, plaintiffs are seeking to recover damages for not being allowed to continue in an ERISA regulated plan after retirement. Just as the causes of actions in *Cutler*, any cause of action implied under ORS 243.303 is preempted by the ERISA's civil enforcement scheme. To the extent ORS 243.303 is interpreted to provide a private cause of action, it is preempted as the State cannot supplement the civil remedies provided in ERISA.

Third, even if not preempted entirely under ERISA, ERISA does prevent OTET from being considered insurance, and thus ORS 243.303 should not be

construed as applicable to the City. ERISA specifically prevents a self-funded plan from being deemed to be an insurer. 29 U.S.C. § 1144(b)(2)(B) ("Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies."). Thus, in the case at bar, OTET is not insurance, and ORS 243.303 does not even apply to the Teamster's plan. This Court should not consider whether to imply a private cause of action under ORS 243.303, where such a cause of action would not even be available to the plaintiffs.

B. If this Court considers whether to imply a private cause of action, it should determine that a retiree is not entitled to bring a cause of action for civil relief for an alleged breach of ORS 243.303.

As the Court of Appeals properly determined, ORS 243.303 does not provide a private cause of action. In analyzing this issue, this Court has asked the parties to include a discussion of *Scovill v. City of Astoria*, 324 Or. 159 (1996).

In the *Scovill* case, this Court examined whether the estate of a decedent could bring a claim for a statutory tort against the City of Astoria for failing to take Scovill into protective custody while intoxicated in violation of

ORS 426.460. The complaint in *Scovill* alleged that the decedent had been taken to the City's police station, and despite being visibly intoxicated, was allowed to leave. It was alleged that when Scovill left the station, she entered an intersection against traffic, and was struck and killed. *Id.* at 162, 165.

At the time of her death, ORS 426.460(1) (1989), provided:

> "Any person who is intoxicated or under the influence of controlled substances in a public place *may* be taken or sent home or to a treatment facility by the police. However, if the person is incapacitated, the health of the person appears to be in immediate danger, or the police have reasonable cause to believe the person is dangerous to self or to any other person, the person shall be taken by the police to an appropriate treatment facility. A person shall be deemed incapacitated when in the opinion of the police officer or director of the treatment facility the person is unable to make a rational decision as to acceptance of assistance." *Id.* at 162.

Also in effect at that time, was ORS 426.470 (1989). This statute was enacted simultaneously with ORS 426.460, and provided:

> "No peace officer * * * shall be held criminally or civilly liable for actions pursuant to ORS 426.450 to 426.470 * * * provided the actions are in good faith, on probable cause and without malice." *Id.*

The court in *Scovill* discussed "when read together" ORS 426.460(1) and ORS 426.470 created a duty, the breach of which could be tortious to one harmed as a result of that breach. *Id.* at 166.

In the case at bar, there are no "two" statutes to read together. There is no statute, anywhere, which mentions any type of liability for decisions made under ORS 243.303. Specifically, there is no statute that provides:

> "No city, county, school district, or special district shall be held criminally or civilly liable for actions pursuant to ORS 243.303 provided the actions are in good faith, based upon reasonable grounds, and without malice."

The *Scovill* court sets out essentially three questions to consider in determining whether to imply a private cause of action under a statute. First, a court must consider whether a statute creates a duty. This "is determined by discerning what the legislature intended." *Id.* The court considers this question by looking at the text and context of the statute.[3] *Id.*

The second question, a court must consider is whether the legislature contemplated a breach of a duty would give rise to a potential liability in tort in circumstances. *See id.* at 169 ("the text and context of [the statutes] … disclose that failure to act as mandated was contemplated by the legislature to give rise to a potential liability in tort in circumstances….").

Next, the *Scovill* court explained if it determined the legislature created a duty, and contemplated a breach of the duty could give rise to civil liability, a court must decide whether to provide a tort remedy. *Id.* at 170. The *Scovill* Court cited of *Restatement (Second) of Torts*, § 874A (1979), in support of this analysis, which provides:

> "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that

[3] The *Scovill* decision was issued in 1996, prior to the 2001 amendment to ORS 174.020.

> the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action." *Id.* at 171.

(It is interesting to note that the illustrations set forth in the Restatement are criminal statutes and statutes that make conduct unlawful.) The court explained, "recognition of a statutory tort is governed by the weight that a court finds reasonable to give to the protective purpose spelled out in the legislation." *Id.*

Applying the above framework, the *Scovill* court noted the mandatory duty provided under the statute. The court also noted the immunity provision, was very limited. *Id.* at 168.

The court thus concluded:

> "the text and context of ORS 426.460(1) and ORS 426.470 disclose a legislative intent to impose on the police a statutory duty to act on behalf of a publicly intoxicated person who is a danger to self and further disclose that failure to act as mandated was contemplated by the legislature to give rise to a potential liability in tort in circumstances in which the limitations stated in ORS 426.470 do not apply." *Id.* at 169.

The court then determined that "permitting a tort action in the circumstances alleged in this case is consistent with and serves to enforce the legislated duty imposed by ORS 426.460(1), which does not specify other means for its enforcement." *Id.* at 172.

The *Scovill* court, thus, determined that the Court of Appeals correctly reversed the trial court's judgment of dismissal on the statutory tort claim.

As explained below, this Court should review the standards set out in *Scovill*. However, as the Court of Appeals determined, even applying the *Scovill* framework, this Court should determine that ORS 243.303 does not create a private cause of action.

1. The Court should review the standards set out in *Scovill.*

This Court should review the standards applied in *Scovill*. It is not the function of the Court to alter statutes where it deems it reasonable to do so, and *Scovill* should be overruled to the extent that it allows a court to do so. This Court should adopt the rule of law proposed by the City in this brief. However, if the Court does not adopt the City's proposed rule, at a minimum, just as the California courts have held, this Court should reject the position set out in the *Restatement (Second) of Torts*, § 874A. Rather, at a minimum, similar to U.S. Supreme Court case law, this Court should return to a pre-*Scovill* methodology, and look to legislative intent as the determinative consideration.

a) It is not the function of the courts to amend a statute wherever it finds it appropriate to do so, and Scovill should be overruled to the extent it allows this.

Oregon's Consitution gives the legislature the authority to legislate. Or. Const., Art. IV, § 1. The judiciary interprets duly enacted laws. ORS 174.010; ORS 174.020; *See Portland Gen. Elec. Co. v. Bureau of Labor &*

Indus., 317 Or. 606, 610–11, 859 P.2d 1143 (1993), *as modified by State v. Gaines*, 346 Or. 160, 166-74, 206 P3d 1042 (2009). "It is axiomatic that the doctrine of separation of powers prohibits the judiciary from encroaching upon or interfering with the proper exercise of the legislative function." *State ex rel. Lucas v. Goss*, 23 Or. App. 501, 504, 543 P.2d 9 (1975). "The function of the court is to declare the law as it is and not what it thinks it ought to be." *George B. Wallace Co. v. Int'l Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics*, 155 Or. 652, 661-62, 63 P.2d 1090 (1936).

In interpreting a statute, "[i]t is not within the province of the court to amend the terms of a statute because it operates unfairly in a particular instance, or to ignore it because it might not seem appropriate in a particular case." *State ex rel. Lucas*, 23 Or. App. at 504. Rather, as provided in ORS 174.010:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Scovill is inconsistent with these well-established standards, and should be overruled in its determination that: "recognition of a statutory tort is governed by the weight that a court finds reasonable to give to the protective purpose spelled out in the legislation." It should not be the court's function to determine whether a statute provides a cause of action for damages if it is

"reasonable," rather the court should apply the law as it is written consistent with the legislative intent.

b) This Court should reject the Restatement approach as the California courts have done since the approach is inconsistent with legislative intent.

Just as the California courts have done, this Court should reject the position set out in the *Restatement (Second) of Torts*, § 874A that was adopted in *Scovill* since the Restatement approach is inconsistent with the above principles.

As the court in *Crusade*r explained: "the Restatement approach allows the court itself to create a new private right to sue, even if the Legislature never considered creation of such a right, if the court is of the opinion that a private right to sue is 'appropriate' and 'needed.'" *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 54 Cal.App.4th 121, 124, 62 Cal.Rptr.2d 620 (1997). The *Crusader* court explained the proper procedure where the legislature did not contemplate a private cause of action was not for the courts to infer such a right, but rather to turn to the legislative process:

> "If the Legislature simply did not consider the possibility of creating a new private right to sue, then the Legislature cannot have had an intent to create a new private right to sue. Hence—pursuant to the legislative intent test—a statute cannot be interpreted as creating a private right to sue. In such a circumstance, the proper course for a party who believes that there should be a private right to sue is to bring the matter to the attention of the Legislature so that the Legislature can in fact consider whether it should, or should not, create such a right. The

> Restatement, by contrast, takes quite a different approach." *Id.* at 127.

As the *Crusader* court proposed, if retirees want a private cause of action under ORS 243.303, they should bring the matter to the legislature, not the courts. A court should not read a cause of action into the text of the statute where the legislature did not provide it. For once this happens, the courts, not the legislature, then determine the key elements of the claim like whether the cause of action is tried to the court or a jury; the type of damages available; whether the burden of proof is by a preponderance of evidence or clear and convincing evidence; and whether the standard is negligence conduct or intentional conduct.

c) At a minimum, the proper consideration should be solely whether the legislature intended to provide a private cause of action, as pre-Scovill case law recognized. Such a test is also consistent with U.S. Supreme Court guidance in interpreting federal statutes.

As explained above, this Court should reject the test articulated in *Scovill*. If the City's proposed rule is not adopted, then the proper test for this Court to apply is to look solely to whether the legislature intended to provide a private cause of action for damages. This test is consistent with pre-*Scovill* case law and also with the U.S. Supreme Court's guidance in interpreting federal statutes.

Prior to the 1983 case, *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983), this Court had never recognized an implied statutory tort. Case law

prior to the *Nearing* decision rejected implying statutory torts, but instead left the matter to the legislature. *See Farris v. United States Fidelity and Guaranty Company*, 284 Or. 453, 587 P.2d 1015 (1978)(explaining: "There is nothing to indicate that the legislature intended, … , that actions for breach of insurance contracts would be transformed, in all of the covered instances, into tort actions with a resulting change in the measure of damages."); *Burnette v. Wahl*, 284 Or. 705, 588 P.2d 1105 (1978)(explaining; "It is obvious that had the legislature intended a civil action it would have provided for one, as legislatures many times do. Therefore, the underlying assumption is that it was not intended that the statute create any civil obligation or afford civil protection against the injuries which it was designed to prevent.").

This Court should retreat from broader standards articulated in *Scovill*, but instead focus on legislative intent. Retreating from the broadened standards set out in *Scovill* to a legislative intent approach mirrors the path of U.S. Supreme Court precedent.

In 1975, the U.S. Supreme Court issued its decision in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). In *Cort*, the Supreme Court set out four factors to consider in determining whether to imply a cause of action under a federal statute as follows:

> "in determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute

> was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78.

However, the *Cort* factors have now effectively been overruled.[4] *Thompson v. Thompson,* 484 U.S. 174, 189, 108 S. Ct. 513, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring "[i]t could not be plainer that we effectively overruled the *Cort v. Ash* analysis ... converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence.").

The Supreme Court has since recognized that the only factor that is determinative is legislative intent. For instance, in a 2001 decision, the Court explained:

> "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander*

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[4]Another point to note is that the factors that the plaintiffs rely on its briefing (Brief on the Merits, p. 18) are similar to the *Cort* factors, which have now been effectively overruled by the U.S. Supreme Court.

> *v. Sandoval,* 532 U.S. 275, 286-287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)(internal citations omitted).

Moreover the Court "emphatically rejected the notion that courts have the obligation 'to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *NASDAQ OMX PHLX, Inc. v. PennMont Securities,* 52 A.3d 296, 303 (Pa.Super.2012)(*citing*: *Sandoval*, 532 U.S. at 287).

Just as the Supreme Court opinions have recognized, implying a private cause of action should be limited to where there is legislative intent to do so, this Court should rein in its prior interpretation on implied cause of actions. The Court should not provide a private cause of action where it is "reasonable" or to effect legislative purpose, but should find a statutory tort only where the legislature intends for one.

Here, looking at the text and context of ORS 243.303, there is absoultely no indication that the legislature intended to provide for a private cause of action for damages. Nowhere in ORS 243.303 or any other section or chapter of the Oregon Revised Statutes is a civil claim for damages provided for a violation of ORS 243.303. Had the Legislature intended that there be a civil claim for damages for a violation of ORS 243.303, it would have done so. The Court of Appeals should be affrmed on the basis that there was no legislative intent to create a private cause of action.

2. Even applying standards set out in *Scovill*, the Court should not imply a cause of action for damages.

Even applying the standards of *Scovill*, this Court should not find an implied cause of action. *Scovill* requires an analysis of three questions: 1) whether the statute imposes a duty; 2) whether there is legislative intent to provide a cause of action for a breach of any such duty; and 3) if it is appropriate for the court to provide a cause of action. Since the answer to all three of these question is "no," the Court should not imply a cause of action to enforce ORS 243.303.

a) *This Court should review whether ORS 243.303 imposes a duty only on local governments.*

The first question to consider under the *Scovill* framework is whether there is a duty under the statute. In answering the certified question from the Ninth Circuit, this Court concluded:

> "Based on the foregoing, we interpret ORS 243.303(2) to create an obligation on local governments to make the health insurance coverage that they provide to active employees available to retired employees." *Doyle v. City of Medford*, 347 Or. 564, 227 P.3d 683 (2010).

However, this Court should reexamine this determination. The statute, entitled "Local government authority to make health care insurance coverage available to retired officers and employees, spouses and children" is just that, a statute that gives a local government the authority to make insurance available to retirees. Although the statute uses the word "shall," the discretionary

language "to the extent possible" wipes out any mandatory duty supported by the use of the word "shall." This position is consistent with the legislative history.

The original version of ORS 243.303 was adopted by the 1981 Legislative Assembly. Or. Laws 1981, ch. 240 § 1. The legislation was proposed as House Bill (HB) 3010, and first introduced to the House Committee on Intergovernmental Affairs on April 22, 1981 by Rep. Shirley Gold. As initially proposed, the first sentence of subsection (2) read:

> "The governing body of any local government that contracts for or otherwise makes available health care insurance coverage for officers and employees of the local government *shall*, in so far as and *to the extent possible*, make *that coverage* available for retired officers and employees of the local government and for spouses and unmarried children under 18 years of age of those retired officers and employes." (Emphases supplied).

Testimony at the 1981 session clearly established that the statute was permissive legislation, and the "shall" language did not impose a mandate.

In her introductory comments before the committee, Rep. Gold explained that HB 3010 "is desirable *permissive* legislation," intended to provide retirees with "this *option* that would *permit* their former employers to continue to offer them comprehensive group medical coverage." House Committee on Intergovernmental Affairs, April 22, 1981, State Archives Tape 87A (emphases supplied).

After completing the presentation of her written testimony to the committee, Rep. Gold explained that "it's clear among us (*i.e*., the bill's sponsors) that * * * this is a Bill which *simply gives authority* to local jurisdictions to do this sort of thing. *And there is a disclaimer,* for instance, in lines 10 and 11 which says, 'insofar as and *to the extent possible'*." Id., State Archive Tape 87A (emphasis supplied). Rep. Gold then explained that the provision was not mandating that local governments make the same health care coverage available to retirees. "*In fact you're doing the opposite* – you're giving the local * * * group * * * their autonomy to do together with their employees *what they feel is feasible to do*. And *that's the intent of this entire thing.*" Id., State Archive Tape 87A (emphases supplied).

Rep. Gold, explained that it was necessary to provide permissive language, so smaller entities would not question their authority to do so. Rep. Gold, explained that:

> "It's only purpose is for a--- If I can use the example of a small rural district, any that I, that you might think of, that uh--- The experience legislatively has been in the past that your smaller, uh, counties, cities, school districts, unless they are expressly given the authority to do something, they feel that they cannot. And so the purpose of this would be to say to them that if you choose to do this, you may do it." Senate Committee on Local Government, Urban Affairs, and Housing, June 1, 1981, State Archives Tape Tape 85A.

The "shall" language in the original bill did not affect the statute being permissive. When asked about the shall language, Rep. Gold explained:

> "Well, however, * * * that's why I read to you in my original testimony the phrase that followed * * * the phrase '*insofar as and to the extent possible*' ***wipes out the 'shall.'*** So * * * I don't know, how else to say that, * * * except that * * * *if* it said 'local government shall make that coverage available' and that * * * other phrase was *not* in there then I'd say yes it's a mandate, *but it's no mandate when* [that phrase is there]." (Emphases supplied). House Committee on Intergovernmental Affairs, April 22, 1981, State Archive Tape 86B.

During the 1981 session, the "shall" language was modified to the word "may" prior to being passed so that the first sentence of subsection (2) read:

> "The governing body of any local government that contracts for or otherwise makes available health care insurance coverage for officers and employes of the local government may, in so far as and to the extent possible, make that coverage available for retired officers and employes of the local government * * * ."

However, it was not that change that made the bill permissive. As Rep. Gold explained, it was always intended to be permissive, even with the "shall" language. It was always the intent that the use of the word "'*insofar as and to the extent possible*' ***wipes out the 'shall.'"*** This is demonstrated by the following dialogue between Sen. Simmons and Rep. Gold:

> "**Sen. Simmons:** Uh, originally the Bill that was written for it was mandatory.
>
> **Rep. Gold:** No Senator---
>
> **Sen. Simmons:** You said 'shall' and that was changed to 'may' and, uh---
>
> **Rep. Gold:** Senator Simmons if I may. The bill was never mandatory; it was always permissive.

> **Sen. Simmons:** Or it was never meant to be mandatory.
>
> **Rep. Gold:** Never meant to be mandatory because if I may point out even where the word 'shall' was in originally the phrase that followed it said 'shall insofar as and to the extent possible.' And so even that 'shall' was not a mandate." Senate Committee on Local Government, Urban Affairs, and Housing, June 1, 1981, State Archives Tape Tape 85A.

Ultimately, HB 3010, was passed as amended with "may" instead of "shall" before the "to the extent possible" phrase. The bill was approved by the governor, and ORS 243.303 took effect November 1, 1981. Or. Laws 1981, ch. 240 § 1; Or. Const., Art. IV, § 28 (*see* Or. Laws 1981, Vol. I, *Foreword*, p. iii).

During the 1985 Legislative Assembly, an amendment to ORS 243.303 was introduced as House Bill (HB) 2430. The text of this bill amended subsection (2) to read:

> "The governing body of any local government that contracts for or otherwise makes available health care insurance coverage for officers and employees of the local government **shall**, insofar as and to the extent possible, make that coverage available for **any retired employee of the local government who elects to participate in that coverage**...." (New text in bold).

The House Committee on Intergovernmental Affairs conducted a work session on HB 2420 on March 26, 1985, and took testimony in support of the bill from witnesses including Don Satchell of the Oregon Education Association. After a discussion between Chairperson Hill and the witnesses on the type of coverage to be made available to retirees, Rep. Cease asked about

the meaning of the phrase "insofar as and to the extent that," in the original 1981 legislation. House Committee on Intergovernmental Affairs, March 26, 1985, Tape 97. Mr. Satchel responded: "That is the *current law* and *I cannot explain it*." Rep. Cease then asked: "Whatever it means in current law, *it would mean the same thing here then*?" Mr. Satchel replied: "*That's right*." House Committee on Intergovernmental Affairs, March 26, 1985, Tape 97 (Emphases supplied). Thus, there was no intention to change the meaning of "to the extent possible," which was meant to wipe out the word shall.

The legislative history leading to the adoption of HB 3010 in 1981 and the 1985 amendments in HB 2430, read as a whole, demonstrates that the phrase "shall, insofar as and to the extent possible, make that coverage available" was never intended to impose a mandatory duty on local governments to select health care coverage for their employees only from insurers who agreed to provide the same coverage to retirees until eligible for Medicare.

This Court should reconsider its prior determination that ORS 243.303 creates a duty articulated in answering the Ninth's Circuit's Certified Question. ORS 243.303 does not create a duty but (as the title of the statute states) gives the "[l]ocal government authority to make health care insurance coverage available to retired officers and employees."

b) Regardless of whether ORS 243.303 imposes a duty, there is absolutely no legislative intent to support that breach of such a duty could give rise to a private cause of action.

If the Court elects not to review its determination regarding whether ORS 243.303 imposes a duty on a local government, this Court should conclude (as the Court of Appeals did) that the legislature did not intend violation of this duty provided a civil action for damages against only local governments.

In the case at bar, there is nothing in "the text or context" of the statute, which shows that the legislature "intended to provide" retired employees "with a statutory cause of action." Rather, as the Court of Appeals found, the fact that the legislature has extensively provided for tort remedies in the area of employment law support, coupled with the flexible nature of the obligations of the statute, support that no cause of action was intended by the legislature. At most, the legislature was contemplating collective bargaining obligations under the statute.

i) There is nothing in the text or context of the statute to indicate the legislature intended to provide a civil claim for damages.

When the legislature wishes to provide a tort remedy for a violation of a statute, it knows how to do it. Particularly in the area of employment law, the Oregon legislature has already provided numerous express statutory tort remedies. For instance, look at the details set forth in ORS 659A.885. One can see that the legislature is quite specific when it wants to create a civil remedy

for an unlawful employment action. In ORS 659A.885, the legislature has not only gone through the effort of stating that an action may be brought in circuit court; it has also defined with a high degree of particularity the relief that may be obtained for particular statutory violations, whether punitive damages are available, entitlement to attorney fees, who shall be the trier of fact, and the standard of review on appeal. ORS 659A.885 not only establishes all of these aspects, it also varies them within the statute depending upon which unlawful employment practice is at issue.

Also, the Oregon legislature has in the past, and on many occasions, exercised its policy judgment expressly in defining when a particular employment practice should give rise to a statutory cause of action, what the remedies shall be for that particular unlawful practice, whom the trier of fact shall be, and what the standard of appellate review shall be.

The unlawful employment practices for which the Oregon legislature has provided such express direction include ORS 25.337 and ORS 25.424 (discrimination against employees because of child support orders), ORS 171.120 (discrimination against legislative members by employers because of the member's service as a member of the legislative assembly), ORS 399.235 (discrimination against employees who are members of an organized militia of a state), ORS 476.574 (leaves of absence for volunteer firefighters), ORS 659A.030 (discrimination in employment on the basis of

race, religion, color, sex, national origin, marital status, or age), ORS 659A.040 (discrimination against workers who apply for workers' compensation benefits), ORS 659A.043 (violation of right to reinstatement by injured workers), ORS 659A.046 (violation of right to reemployment by injured workers), ORS 659A.069 (discrimination against employees for applying for group health benefits under ORS 659A.063), ORS 659A.112 (discriminations against disabled persons in employment), ORS 659A.183 and ORS 659A.194 (denial of family leave or discrimination for use of leave), ORS 659A.203 (discrimination for whistleblowing activities), ORS 659A.218 (unlawful disclosure of a whistleblower's identity), ORS 659A.230 (discrimination against employees for initiating or aiding in criminal or civil proceedings); ORS 659A.233 (discrimination for employee testimony at unemployment compensation hearings); ORS 659A.236 (discrimination against employees for testimony before the legislative assembly); ORS 659A.259 (unlawful evictions from employee housing or discrimination for reporting violations of ORS 659A.250 to ORS 659A.262 relating to employee housing), ORS 659A.300 (unlawful employer-required breathalyzers, polygraphs, psychological tests, brain-wave tests, or genetic tests); ORS 659A.306 (unlawfully requiring employee to pay for medical examination); ORS 659A.309 (discrimination because of employment of another family member); ORS 659A.315 (unlawful restriction

on the off-duty use of tobacco), and ORS 659A.318 (discrimination against employees with degrees in theology or religious occupations).

In other words, when one looks at Oregon's employment laws contextually, it becomes clear that the Oregon legislature has taken it upon itself to expressly provide for a statutory cause of action with defined procedures and remedies when it wishes for a statutory cause of action to exist. The legislature has labeled a number of statutory employment violations "unlawful employment practices," for which a remedy may be sought under the provisions ORS 659A.885.

In contrast, the legislature has not defined a violation of ORS 243.303 as an unlawful employment practice for which a cause of action is provided under ORS 659A.885. There is no penalty of any type or nature for a violation. The only contextual inference to be made, is that the legislature did not wish for violations of ORS 243.303 to give rise to a tort action, because if it had, it would have done what it always does--provide an express remedy by statute.

Furthermore, this case is distinguishable from the few other cases where the courts have implied a private cause of action. For instance, in *Scovill*, ORS 426.470, which was enacted simultaneously with ORS 426.460, and provided:

> "No peace officer * * * shall be held criminally **or civilly liable** for actions pursuant to ORS 426.450 to 426.470 * * * provided the

> actions are in good faith, on probable cause and without malice." (emphasis supplied).

Thus, the face of the statute demonstrated that the legislature had contemplated "civil liability." Similarly, in *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983), the court considered whether a statutory tort could be implied for violation of a mandatory arrest statute, ORS 133.310(3). There too, an immunity provision expressly contemplated civil liability:

> "[n]o peace officer shall be held criminally or **civilly liable** for making an arrest pursuant to ORS 133.055(2) or 133.310(3) provided he acts in good faith and without malice." ORS 133.315. (emphasis supplied).

No statute, including ORS 243.303 provides:

> "No city, county, school district, or special district shall be held criminally or civilly liable for making a decision pursuant to ORS 243.303 provided it acts in good faith and without malice."

Here, there is no indication on the face of the statute, in any other statutory provision, or in the legislative history that demonstrates the legislature contemplated a private cause of action.

Additionally, the flexibility in ORS 243.303 is in contradiction to those cases where the Court has previously implied a private cause of action as the Court of Appeals explained in its opinion *Doyle*, 256 Or. App at 641.

This Court should not find a private cause of action in the absence of any legislative intent whatsoever to do so. This is particularly true, where the legislature has examined and amended ORS 243.303 at three different

legislative sessions subsequent to enactment, (Or. Laws, 1981 ch. 240 §1; Or. Laws, 1985 ch. 224 §1; Or. Laws, 2001 ch. 604 §1; Or. Laws, 2003 ch. 62 §1; Or. Laws, 2003 ch. 694 §1), and has never once amended the statute to provide for civil liability, or added an immunity section for certain conduct. The Legislature clearly knows how to provide for tort liability for employment law cases, and would do so if it wishes to create a private cause of action. The flexible nature of the statute further supports that the legislature did not contemplate a private cause of action.

ii) At most, the text and context of the statute indicate that the legislature intended ORS 243.303 to be bargained for with the employees.

Not only is there absolutely no indication that the legislature intended to allow for recovery through the judicial process, it is evident that the statute (if it is to be enforced) is to be enforced through the collective bargaining process. Initially, ORS 243.303 is part of the "Public Employee Rights and Benefits" chapter of the Oregon Revised Statutes, in the same chapter with the provisions regarding collective bargaining. Furthermore, the text of the statute indicates that the collective bargain process was considered by the legislature: "The local government may pay none of the cost of making that coverage available or may agree, by collective bargaining agreement or otherwise, to pay part or all of that cost." (emphasis supplied).

Additionally, the legislative history indicates that the legislature was contemplating the collective bargaining process when considering this statute. For instance in the 1985 Session, Rep. McCarty explained:

> "**Rep. McCarty:** I think this is a very fine Bill. And, you know, I've gone over it very thoroughly and it really doesn't give them anything but the opportunity to barter for these benefits and I think we ought to give it all due consideration." House Committee on Intergovernmental Affairs, February 28, 1985, State Archives Tape 50 (emphases supplied).

At most, the legislature was contemplating that local governments shall participate in bargaining over benefits for retirees in amending the statute in 1985.

c) This Court should not find this situation appropriate to provide a new cause of action.

If this Court reaches the question of whether it should accord a remedy in furtherance of the purpose of the legislative process, it should find it is not appropriate to create a new cause of action. Initially, as explained above, this Court should reject the Restatement approach that it adopted in *Scovill,* because it is not the function of the courts to act as the legislature. However, to the extent it follows the Restatement approach, the Court should not find it appropriate to imply a new cause of action in this case.

Initially, if the Court continues to follow the Restatement (Second) of Torts approach, it should recognize that a court "must be careful to exercise that discretion cautiously and soundly." Restatement (Second) of Torts § 874A

cmt. d (1979). Furthermore, the Restatement recognizes, that (unlike with ORS 243.303), that "[t]he typical case falling within this Section is one involving a criminal statute that proscribes conduct and imposes a criminal penalty but says nothing about civil responsibility." Even if the Court chooses to continue to adopt the Restatement approach, by the language of the Restatement itself, ORS 243.303 is not typically the type of statute that would lead to a new cause of action.

If the Court continues to apply the Restatement, the following are factors the Restatement states a court may consider, Restatement (Second) of Torts § 874A cmt. h (1979).

i) Factor 1: "The nature of the legislative provision."

In considering this factor, the Restatement advises a court may consider "[h]ow specific is the legislative provision in the regulation of conduct?"; "[d]oes it clearly let both the court and the actor know in advance what conduct is prohibited?"; "[o]r is it posed in broad, general terms that will acquire specific meaning only if-and after- the court has determined to supply the tort remedy and expressed if for the benefit of the persons being affected?

As explained above, ORS 243.303 is a broad, flexible standard that may be entirely excused under the circumstances. The statute does not provide specific standards, but allowing a cause of action would lead to numerous of

other questions. Unlike, an unambiguous criminal statute, ORS 243.303 provides no standards that let the actor know in advance exactly what conduct is prohibited. This factor strongly weighs against the Court finding it appropriate to infer a cause of action.

ii) Factor 2: "The adequacy of existing remedies."

The entire point behind ORS 243.303 was to permit local governments to offer and bargain for retiree insurance. Even with the amendment in 1985 that changed the word "may" to "shall," the purpose was still to have the local governments put retiree insurance on the bargaining table as explained above. The collective bargaining procedures and remedies are adequate to ensure that the retirees' interests in health care are protected. This Court has no jurisdiction to create a judicial remedy that interferes with the collective bargaining process.

iii) Factor 3: "The extent which the tort action will aid or supplement or interfere with, existing remedies and other means of enforcement."

There are numerous existing remedies that already protect a retiree's interest in health care benefits. First, the City has a statutory contract to contribute money into the PERS program so that PERS can contract with a health care provider to provide retirees with health care benefits. Then, second, we have the collective bargaining laws of the State of Oregon that require the City to comply with collective bargaining agreements relating to health care benefits. Then, third, the provisions of ERISA provide a method for the

employee to enforce rights under a benefit plan. The Court should be hesitant to imply a right of action, where there are already numerous enforcement mechanisms.

Additionally, a new cause of action would interfere with exiting ERISA remedies as explained above.

iv) Factor 4: "The significance of the purpose that the legislative body is seeking to effectuate."

The entire purpose of ORS 243.303 was to permit large, small, and rural cities and school districts to bargain with their employees for retiree coverage of medical benefits, the cost of which can be enormous. As demonstrated in this case, the benefits were in fact bargained for, however, and the members received the coverage they wanted. The purpose of the statute was thus fulfilled without a cause of action, since it in fact brought the issue to the bargaining table. Providing a private cause of action would only interfere with the bargaining process.

v) Factor 5: "The extent of the change in tort law."

Among considerations of this factor, the Restatement states a court should consider: "[w]ill the elements of the enlarged tort be difficult or easy to understand and apply?"

There are no standards in the statute that explain the "to the extent possible" standards. The fact that there is no express statutory tort remedy for

violations of ORS 243.303 gives rise to a host of questions about how any implied tort proceeding should be conducted. Will the proceeding be a bench trial or a jury trial? How is the phrase "to the extent possible" to be applied? Is it to be determined by the judge or the jury? What objective factors should go into the question?

If it is the jury's decision to decide what "to the extent possible" means, how should they be instructed? Where a one-dollar increase in the premiums as a result of providing retiree coverage would most likely be "possible," one can assume that a $1 billion increase in the premiums would be actually impossible. But where is the line of what is not and what is possible, and how is the jury to be objectively confined so that the intent of the statute is followed?

In fact, the "extent possible" language in the statute is sufficiently vague that there is no objective means to put any sort of implied tort action before a jury for factual determination. This supports the conclusion that there can be no implied tort action, and that the determination of what is "possible" is best left to the public body who must make the determination of whether it is fiscally "possible" to provide equivalent coverage to retirees.

Other concerns arise as well. What is the standard of conduct to be applied in determining whether a public body has lawfully complied with its duty to make health insurance coverage available "to the extent possible?" Is there to be a reasonableness standard, such that it takes the form of a negligence

action? Is the question to be whether the City reasonably determined that it was not possible to provide the coverage? There is no guidance in the statute to define the standard of conduct, which would be applied in a tort action.

Implying a cause of action would not simply extend current law, but an entirely new area of law, with new standards will need to be developed. The court should be hesitant to do so.

vi) Factor 6: "The burden the new cause of action will place on the judicial machinery."

Again, since there are no standards in place, it will be difficult to decide the extent this could have on the judiciary. It is unclear whether the proceedings would be a bench trial or a jury trial. It is unclear what standards will apply, and whether the jury or a judge will make findings regarding the possibility of insurance. However, if a private cause of action is inferred, a new area of law will need to be developed, and in that sense, there will be a burden on the judiciary.

If the Court wishes to find a private cause of action, absent legislative intent, where it thinks it is appropriate to do so, then the circumstances here do not support that this is an appropriate remedy. As the application of the factors listed in the Restatement demonstrate, ORS 243.303 is not an appropriate statute for the Court to imply a cause of action.

VI. Conclusion.

The Court should affirm the Court of Appeals determination that ORS 243.303 does not create a private, civil cause of action for damages either by (1) accepting the City's proposed rule of law; (2) by restoring the pre-*Scovill* methodology, and look to legislative intent as the determinative consideration; or (3) by accepting the Court of Appeals analysis of *Scovill*.

If the Court were to create a cause of action, it would merely be preempted under ERISA, or found to be subject to immunity under the Oregon Tort Claims Act, since policies decisions regarding the City budget are entitled to discretionary immunity, and such discretion is built into the statute.

Initially, this Court should reconsider its method articulated in *Scovill v. City of Astoria*, and reject its previous reliance on the Restatement. Whether a statute provides for a cause of action should be a matter for the legislature not the courts. Here, ORS 243.303 does not provide for a private cause of action, and the inquiry should end there. The Court should not read in additional language to the statute that does not exist in order to allow for a private right of action.

If the Court does not reconsider the method set out in *Scovill*, it still should still determine that the legislature did not intend to provide a private

cause of action as the Court of Appeals determined. Nor, is this a situation where a court should accord plaintiffs a civil remedy.

Respectfully submitted,

/s/ Robert E. Franz, Jr.

LAW OFFICE OF ROBERT E. FRANZ, JR.
Robert E. Franz, Jr. OSB #73091
Of Attorneys for Defendants-Respondents on Review

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW on Stephen L. Brischetto, Of Attorneys for Petitioners on Review, electronically, and on George P. Fisher, Of Attorneys for Petitioners on Review by depositing a certified true copy thereof in the United States mail in Springfield, Oregon, on Sunday, February 2, 2014, enclosed in a sealed envelope, with postage paid and addressed to:

Mr. George P. Fisher
Attorney at Law
3635 S.W. Dosch Road
Portland, OR 97239
Of Attorneys for Plaintiff-Petitioners on Review

Dated: Sunday, February 2, 2014.

/s/ Robert E. Franz, Jr.
LAW OFFICE OF ROBERT E. FRANZ, JR.
Robert E. Franz, Jr. OSB # 73091
P.O. Box 62
Springfield, Oregon 97477
E-Mail: rfranz@franzlaw.comcastbiz.net
Telephone: (541) 741-8220
Of Attorneys for Defendants-Respondents on Review

I hereby certify that this document is a true and correct copy of the original.

Robert E. Franz, Jr.

CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)

I hereby certify that (1) this brief complies with the word-count limitation of ORAP 5.05(2)(b)(i); and, (2) the word count of this brief (as described in ORAP 5.05(2)(a) is 12,374 words.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes and the font is Times New Roman as required by ORAP 5.05(4)(f).

DATED: Sunday, February 2, 2014.

/s/ Robert E. Franz, Jr.
LAW OFFICE OF ROBERT E. FRANZ, JR.
Robert E. Franz, Jr. OSB #73091
Of Attorneys for Defendants-Respondents on Review