

Lipscomb Supreme Court Decision – Q&A

What was this case about?

The PERS Board made a decision to credit 20% earnings to members' regular accounts in 1999. The City of Eugene and other employers sued the PERS Board and said they credited too much in 1999. Because the lawsuit impacted member accounts, the PERS Coalition intervened in the lawsuit on behalf of all public employees and argued that member accounts had been credited correctly. In 2002, Judge Lipscomb sided with employers. The PERS Coalition appealed to the Supreme Court to have Judge Lipscomb's rulings in the *City of Eugene* case overturned.

In March 2004, prior to the Supreme Court making a decision, the PERS Board and the employers entered into a settlement agreement that did not include public employees.

On August 11, 2005 the Oregon Supreme Court dismissed our appeal due to the settlement agreement and ruled that we did not have to be included as a party to the settlement agreement. Therefore the settlement stands as does Judge Lipscomb's ruling. (The Supreme Court's opinion is available online at: <http://www.publications.ojd.state.or.us/S50617.htm>)

What was Judge Lipscomb's original ruling?

There were two major issues Judge Lipscomb decided in his 2002 ruling in the *City of Eugene* case that impact us today.

1. The PERS Board credited too much money to regular (fixed) accounts in 1999 and should have saved more money for a rainy day (We were credited with 20% earnings and Judge Lipscomb believed it should have been 11.33%).
2. If a member had money invested in the variable account and retires on money match, employers will only match what that employee would have earned in the regular (fixed) account. This change became effective for all retirements beginning July 1, 2004 as a result of the Settlement Agreement.

What is the Settlement Agreement between the PERS Board and Employers?

The Settlement Agreement requires PERS to reallocate 1999 earnings to Tier One member accounts at 11.33 % instead of 20%. It also changes Money Match retirement benefits to require employers to only match what employees would have earned if they had only invested in the fixed account (not variable).

The Settlement Agreement is based on Judge Lipscomb's findings in the *City of Eugene* case and the 2003 PERS Reform Legislation challenged in the *Strunk* case. The Settlement Agreement is posted on the PERS website at: http://www.oregon.gov/PERS/RELATED/section/board_information/city_of_eugene_v_pers.shtml.

Did the Oregon Supreme Court uphold Judge Lipscomb's ruling?

No. The Supreme Court dismissed our appeal of Judge Lipscomb's case because of the settlement agreement. They did not analyze or rule on the correctness of Judge Lipscomb's decision. However, by not allowing our appeal to proceed, Judge Lipscomb's decision stands and the settlement agreement will be implemented.

Who is impacted?

Any member who was in the system in 1999 will be impacted by this decision. This includes retirees who left the system after March of 2000.

Does this only affect Tier 1 members?

No. This ruling affects any person who was an active PERS member during 1999.

Does the decision mean I will have money taken out of my variable account?

No it does not. The change to the Money Match calculation was effective only with retirements as of July 1, 2004 and is not retroactive. When you retire, if you retire on money match, your employer will only match those dollars you would have received if you were fully invested in the regular (fixed) account.

Is the new match limited to the 8% annual guarantee, or the actual amount credited to the regular accounts?

The new match is limited to the actual amount credited to the regular (fixed) account.

I am a retiree – what is the impact on me?

If you retired after March of 2000 you will most likely receive an invoice from PERS for dollars you have already received and your monthly pension will be reduced. General estimates on the impact to retirees are available on the PERS website at http://oregon.gov/PERS/RELATED/docs/ex_benefit_changesR.pdf. These are only estimates until the PERS Board decides at their September 23, 2005 Board meeting how they are going to implement this decision.

I am an active member – what is the impact on me?

If you were a member of PERS in 1999, you will have money taken out of your PERS regular (fixed) account. Again, the timing is unknown. Your account will be reduced by the difference in interest from 20% to 11.33%, and any interest received on those dollars that were credited to your account.

I retired before March, 2000. Does this ruling impact me?

No. It only impacts those members who received earnings credited for 1999.

What is the impact on employees who started working in a PERS job after 1999?

Public employees who started working after 1999 are not impacted by this decision. Only those who were active members of the system in 1999 are impacted.

When will these changes take place?

It will take time for the PERS Board to implement these changes. The PERS staff estimates that more than 40,000 retirement benefits will have to be recalculated and many by hand. The Board meets on September 23, 2005 to discuss how they will implement this decision.

What are our legal options?

The PERS Coalition continues to study the *City of Eugene* case as well as the *Strunk* case and will be formulating its legal strategy in the next couple of weeks. The PERS Coalition is committed to taking all reasonable steps necessary to protect the rights of public employee members.

Already, the PERS Coalition has a case filed in Multnomah County Circuit Court (the *White* case) which contests the provisions of the Settlement Agreement. The Settlement Agreement is based on Judge Lipscomb's opinion in the *City of Eugene* case. Because this case is in circuit court (the lowest court) it will likely take several years before it is resolved.

Doesn't the Supreme Court's ruling violate contract rights?

No. Judge Lipscomb decided the *City of Eugene* case based on his interpretation of statutes that existed in 1999. By construing the statutes in this fashion, Judge Lipscomb defined the extent of the contract rights and therefore there can not be a violation of those rights.

We do not agree with Judge Lipscomb's analysis and the Supreme Court did not address our arguments with his analysis at this time. But, because his analysis is the basis for the Settlement Agreement, we have challenged the Settlement Agreement in a new court case called *White*.

Can the PERS Board that made the 1999 distribution decision be sued by the Coalition and/or individual PERS members?

No. There is no viable legal theory for suing the board. They acted in good faith and made what they believed to be the correct decision. The fact that it was later overturned by Judge Lipscomb does not mean they acted irresponsibly.

Will I now get the money owed to me because of the *Strunk* decision?

Yes. The PERS Board has been waiting to pay back members for the *Strunk* decision until the *City of Eugene* case was resolved. If you are a Tier 1 member, you will receive 8% interest on your account for 2003 and 2004. If you are a retiree, you will get the Cost of Living Adjustment (COLA) owed to you as well. These will most likely be figured into your account at the same time as the *City of Eugene* deduction for 1999 earnings.

Can there be a claim made against any type of fiduciary insurance policy that PERS may carry on the Board?

Even if the PERS Board carried a fiduciary insurance policy the amount of money that could be recovered would be insignificant in the context of a judgment which has an impact in excess of a billion dollars on retiree benefits.

Judge Lipscomb's decisions said a number of times that retirees will be protected. I've read that retirees will have to pay the most? What is the truth?

Judge Lipscomb did express concern about retirees and whether the PERS Board could amend their retirement benefits. This is part of our challenge to the Settlement Agreement under the *White* case.

Why do people that invested in the variable pay less than those of us that stayed in the regular (fixed) account?

Public employees that invested up to 75% of their money in the variable account, had less money in the regular fixed account and received less earnings on the regular (fixed) account in 1999.

If the PERS Coalition is successful in protecting retirees from this decision, will active members have to pay more to offset it?

The PERS Coalition has always been careful to make certain that the legal positions it asserts benefit all members. The PERS Coalition will not move forward with a legal position which would disadvantage one group of PERS members over another.

What if I don't pay it back? What are the consequences?

PERS indicated that if a member does not voluntarily payback what they deem to be overpayments, they will begin making deductions from future pension benefit payments. We do know from statute that this can not exceed 10% of your monthly pension check. PERS will confirm this at their September 23, 2005 Board meeting.

Will PERS let me pay back money on a payment plan?

Yes. PERS indicated they will work with retirees to set up a payment plan.

What about those people who took their money out in a lump sum? Will they have to pay money back also?

Yes.

Does this ruling mean that PERS can go back and change my retirement again? Does it mean other people can go back and sue them on past crediting decisions?

In the *Strunk* case, the court made it clear that all crediting decisions before 1999 can not be challenged. The challenges made in this case were due to a set of

circumstances that are not likely to happen again. Once the current issues related to retiree benefits are resolved, retirees should be able to count on the benefits they have been promised.

I read that retirees are suing the PERS Board so they don't have to pay this money – is that true?

No cases have yet been filed but both the PERS Coalition and OPRI (Oregon Public Employee Retirees, Inc.) are looking into ways to protect those hurt the most by this ruling, retirees. The PERS Coalition and OPRI have been working together all along.

I understand Judge Lipscomb ruled the employer was not liable for matching the variable part of a member's account, only the amount of money that a regular account would have earned. What would happen if the variable did not do as well as the regular, would they only be obligated to match the lesser amount? Is the match limited to the 8% annual guarantee, or the actual amount credited to the regular accounts?

Under the Lipscomb ruling the match is only on the amount which would have been earned in the regular account. If the variable account had a period of poor returns, then this approach could work to the benefit of members. Overall it is anticipated that this would result in a substantial lowering of benefits for many members.