UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONNA C. RICHARDS, individually, and on behalf of others similarly situated, Plaintiff	:	
v.	:	CIVIL ACTION NO. 3:04-cv-1638 (JCH)
FLEETBOSTON FINANCIAL CORP. et. al., Defendants.	:	OCTOBER 16, 2006

RULING ON DEFENDANTS' MOTIONS FOR CERTIFICATE OF APPEALABILITY OR RECONSIDERATION [DOC. NOS. 157 & 159]

I. INTRODUCTION

Plaintiff Donna C. Richards is an employee of defendant FleetBoston Financial Corp. ("Fleet"), a participant in the defendant FleetBoston Pension Plan ("Amended Plan"), and a former participant in Fleet's former pension plan, a traditional defined benefits plan ("Traditional Plan").[1] Fleet moves again to modify the court's March 31, 2006 Ruling [Doc. No. 112] pursuant to 28 U.S.C. § 1292(b).[2] In the alternative, Fleet moves the court to reconsider its previous Ruling as it relates to Count I, in which Richards alleges that FleetBoston Amended Plan's cash balance formula reduces the rate of benefit accrual on account of age in violation of § 204(b)(1)(H) of the

[1]Unless otherwise indicated, the defendants will be collectively referred to as "Fleet." Bank of America is also a defendant in this action.

[2]On May 26, 2006, this court denied defendants' first Motion to Modify March 31 Order Pursuant to 28 U.S.C. § 1292(b), because that motion did not present "one of those 'rare' or 'exceptional' circumstances that justifies an interlocutory appeal" [Doc. No. 138].

Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1054(b)(1)(H). The court will assume familiarity with its prior Ruling, which contains an in-depth analysis of the Count I claim. See Ruling on Defendants' Motion to Dismiss ("Ruling"), at 9-28 [Doc. No. 112].

II. DISCUSSION

A. Section 1292(b) Standards for Motion for Certificate of Appealability

The district court's order certifying an interlocutory appeal under § 1292(b) must state that it is "of the opinion" that the order satisfies three requirements: (1) it "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "that an immediate appeal may materially advance the ultimate termination of the litigation." 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3930 415 (2d ed. 1996). The first factor does not require that the case have precedential value for a large number of suits. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 921 F.2d 21, 24 (2d Cir. 1990). "[T]he resolution of an issue need not necessarily terminate an action in order to be controlling." Id. (citations omitted). As for the second factor:

> The mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion. Rather, 'it is the duty of the district judge . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is substantial ground for dispute.

Flor v. Bot Financial Corp., 79 F.3d 281, 284 (2d Cir. 1996) (citations omitted). The third requirement is "closely tied to the requirement that the order involve a controlling

question of law." Wright, Miller & Cooper § 3930 at 432. The Second Circuit has noted that courts have tended to consider the first and third requirements as a single requirement. In re Duplan Corp., 591 F.2d 139, 148 n.11 (2d Cir. 1978).

According to Wright, Miller & Cooper, "[t]he three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." Wright, Miller & Cooper § 3930 at 415-16.

> All of these determinations . . . are compatible with the conclusion that § 1292(b) is designed to permit interlocutory appeals only for the purpose of minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings. Interlocutory appeals, however, might serve the additional purposes of avoiding hardship that does not result from the length of the proceedings alone, or of providing a vehicle for appellate review of issues that characteristically evade review on appeal from a final judgment."

Id. at 439. However, the Second Circuit has cautioned that "'the power [to grant an interlocutory appeal] must be strictly limited to the precise conditions stated in the law.'" Klinghoffer, 921 F.2d at 25 (brackets in original, citation omitted). "[U]se of this procedure should be strictly limited because 'only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'" Flor, 79 F.3d at 284 (quoting Klinghoffer) (citations omitted). "The use of §1292(b) is reserved for those cases where an immediate appeal may avoid protracted litigation." Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865-66 (2d Cir. 1996) (citations omitted).

In light of the Second Circuit's cautioning against interlocutory appeals, the court denies Fleet's motion for certificate of appealability, for it does not view this as one of those "rare" or "exceptional" circumstances that justifies an interloctory appeal. It finds that, despite the recent Seventh Circuit and Southern District of New York decisions

that conflict with this court's previous Ruling, circumstances have not changed sufficiently to warrant this court modifying its previous Ruling.[3] This court does not find a contrary decision by a circuit court to present "exceptional circumstances" justifying an interlocutory appeal. Flor, 79 F.3d at 284. This court continues to believe, even in face of the Seventh Circuit opinion, that an interlocutory appeal would not avoid protracted litigation in this case.

B. Motion for Reconsideration

Fleet requests in the alternative that, in light of recent decisions by the Seventh Circuit and the Southern District of New York that rejected plaintiff's theory regarding her age discrimination claim, the court reconsider its March 31, 2006 Ruling denying the motion to dismiss on this Count.

Under Local Rule 7(c)(1)[4] of the District of Connecticut, "motions for reconsideration shall be filed and served within ten (10) days of the filing of the decision or order from which such relief is sought." D. Conn. L. Civ. R. 7(c)(1). A failure to timely file a motion for reconsideration may constitute sufficient grounds for denying the motion; however, courts have exercised their discretion to address even untimely motions. See Lopez v. Smiley, 375 F. Supp. 2d 19, 21-22 (D. Conn. 2005); see also Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 541 (2d Cir. 1996) ("[A] district court is vested with the power to revisit its decisions before the entry of final

[3]In the court's previous Ruling, it already recognized that there is an conflict among the federal courts on this issue. See Ruling at 16, 17-18.

[4]In their Memorandum in Support of Motion for Certificate of Appealability or Reconsideration, Fleet refers to Local Rule 9(e)(1), but that Rule does not exist.

judgment and is free from the constraints of Rule 60 in so doing.").

The standard for granting a motion for reconsideration is strict. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Such a motion "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Id. A "motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." Id.

In light of Fleet's introduction of additional relevant case law, the court will exercise its discretion to consider defendants' alternative motion for reconsideration at this time. In Cooper v. IBM Personal Pension Plan, 457 F.3d 636 (7th Cir. 2006), the Seventh Circuit reversed the district court's decision, which found that the "rate of benefit accrual" is the grammatically correct way of saying "the rate of accrued benefit," the phrase that is defined in ERISA § 3(23), and that the term "rate of benefit accrual" is therefore unambiguous. See Cooper v. IBM Personal Pension Plan, 274 F.Supp.2d 1010, 1016 (S.D. Ill. 2003). Although this court concurred with the Cooper court's ultimate reading of the phrase "rate of benefit accrual," it did so to support its holding that the meaning of this phrase is clear from ERISA itself. See Ruling at 20.

While recognizing that its decision is contrary to several other courts, including now the Seventh Circuit and the Southern District of New York, this court continues to adhere to its previous statutory interpretation of the terms Congress used in ERISA § 204(b)(1)(H). In light of the great similarity that "rate of benefit accrual" bears to the statutorily defined term "accrued benefit," and the fact that ERISA requires accrued benefit to be measured as an annual benefit commencing at normal retirement age for

defined benefit plans, but requires accrued benefit to be measured as the balance of an individual's account for defined contribution plans, in this court's opinion, the term "rate of benefit accrual," as used in § 204(b)(1)(H)(i), refers to rate measured as a change in the annual benefit commencing at normal retirement age. The statute is unambiguous in this respect, and the court need not inquire further into its meaning.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Fleet's Motion for Certificate of Appealability or, in the alternative, for Reconsideration.

SO ORDERED.

Dated at Bridgeport, Connecticut this 16th day of October, 2006.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge