1992 WL 437985
United States District Court, C.D. California.

Paul L. SPINK, et al., Plaintiffs,
v.
LOCKHEED CORPORATION, et al., Defendants.

No. CV 92–800–SVW (GHKX). | July 31, 1992.

**Opinion**

**ORDER GRANTING DEFENDANT LOCKHEED CORPORATION'S**

**MOTION TO DISMISS**

WILSON, District Judge.

## I. BACKGROUND

***1** Paul L. Spink, the named Plaintiff, seeks additional pension benefits under the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan") sponsored by the named Defendant, Lockheed Corporation ("Defendant"). Defendant first employed Plaintiff in 1939, and then intermittently through 1950. After an interim of nearly thirty years, Defendant again hired Plaintiff in May 1979. Under the Plan terms in effect at the time of his hire in 1979, Defendant lawfully excluded Plaintiff from participating in the Plan because he was over sixty years old. However, changes in federal law in 1986 compelled Defendant to permit Plaintiff to participate in the Plan beginning on December 25, 1988, the commencement date of the first fiscal Plan year following January 1, 1988. Plaintiff subsequently accrued benefits under the Plan until his retirement in June 1990.

In an effort to attenuate the effects of anticipated layoffs by inducing voluntary retirement, Defendant amended the Plan in 1990 to provide enhanced retirement benefits, allegedly paid out of surplus Plan funds, to participants deemed eligible to take early retirement. Participants choosing this option were required to sign a waiver of employment related claims. Although eligible, Plaintiff did not retire pursuant to this early retirement program.

In this action, Plaintiff alleges the following three claims in his individual capacity, and also on behalf of all similarly situated employees: first, statutory amendments to the federal law governing benefit plans allegedly require Defendant to provide retroactive participation and benefit accrual to all employees, like Plaintiff, who were excluded from Plan participation before 1988 because of age, and who have worked at least one hour in 1988; second, Defendant's 1990 Plan amendment allegedly breached a fiduciary duty in violation of federal law; and third, the same Plan amendment allegedly constituted a federally prohibited transaction because it benefitted Defendant, a party-in-interest. Finally, in a fourth claim brought solely in his individual capacity, Plaintiff alleges that he is personally owed retroactive benefits based on equitable estoppel stemming from Defendant's alleged oral misrepresentations.[1]

On April 2, 1992, Defendant filed this Motion to Dismiss the entire action, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that: the relevant federal law is exclusively prospective regarding plan participation and benefit accrual; amending the Plan did not violate a fiduciary duty because no such duty applied; and, as pleaded, federal law does not allow recovery for alleged oral misrepresentations. The Court held a hearing on April 27, 1992 to consider this motion. Having considered the arguments of counsel, both written and oral, the Court GRANTS Defendant's Motion to Dismiss in its entirety because even assuming the truth of Plaintiff's allegations for the purposes of this Motion, Plaintiff fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

## II. *DISCUSSION*

### A. *Alleged Violations of ERISA and ADEA*

***2** Plaintiff focuses on certain provisions of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 100 Stat.1973, that amended the Employee Retirement Income Security Act of 1974 ("ERISA"), ch. 18, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 301–1144), the Age Discrimination in Employment Act ("ADEA"), ch. 14, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34), and the Internal Revenue Code of 1986, 26 U.S.C. Prior to OBRA 1986, none of these statutes prevented an employer from denying participation in its pension plan to employees who were hired after age sixty if the normal retirement age was sixty-five. Indeed, both ERISA and the IRC specifically allowed this practice until OBRA 1986 proscribed it.

In order to accomplish comprehensive reform, OBRA 1986 amended ERISA, the ADEA, and the IRC together. Thus, OBRA 1986 amended the plan participation provisions of both ERISA, 29 U.S.C. § 1052(a), and the IRC, 26 U.S.C. § 410(a)(2), as well as the benefit accrual provisions of ERISA, 29 U.S.C. § 1054(b)(1)(H), the ADEA, 29 U.S.C. § 623(j), and the IRC, 26 U.S.C. § 411(b)(1)(H).

The central legal issue Plaintiff raises under OBRA 1986 concerns the effective dates of the amended provisions of ERISA and the ADEA, rather than their substantive provisions. Plaintiff asserts that the OBRA 1986 amendments entitle him to retroactive Plan participation, and concomitant benefit accrual, for those years of employment following his hire in 1979 and preceding his initial Plan participation in 1988. Plaintiff's thesis is that Defendant failed to comply with the provisions of amended ERISA—namely, 29 U.S.C. § 1052(a)(2)—by not allowing him, once he had worked an hour of service in 1988, to participate retroactively in and, thus, to accrue benefits retroactively under the Plan.

The plain language of OBRA 1986, however, defeats Plaintiff's claim. The Court holds that the relevant effective date provisions of the OBRA 1986 amendments to ERISA and the ADEA are *prospective* and thus do not provide Plaintiff the grounds to participate retroactively for periods of service prior to his joining the Plan on December 25, 1988, nor to receive retroactive benefit accrual.

First, as concerns Plan participation, OBRA 1986 § 9203(a) amended ERISA such that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." *See* 29 U.S.C. § 1052(a)(2). However, OBRA 1986 § 9204(b) further states that "[t]he amendments made by section 9203 shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* with respect to service performed on or after such date" (emphasis added). Thus, OBRA 1986 only required Defendant to allow Plaintiff to participate in the Plan beginning December 25, 1988—because that date marked the beginning of the first fiscal Plan year following January 1, 1988—and not for prior Plan years.

Second, because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual. To this end, the Court holds that one must first be a plan participant before one can enjoy benefit accrual. *See* 29 C.F.R. § 2530.204–1(b)(1) (service before an employee first becomes a plan participant is disregarded for benefit accrual purposes).

***3** Moreover, the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion. In particular, OBRA 1986 §§ 9201 and 9202 amended the benefit accrual language in both ERISA and the ADEA to make unlawful "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's accrual on account of age." However, OBRA 1986 § 9204(a) plainly states that "[t]he amendments made by sections 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). As such, it is apparent that Congress did not intend to retroactively impact benefit accrual provisions prior to January 1, 1988.

Given Congress' intention in this analogous context, Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation. To reiterate, the Court finds Plaintiff's argument unsupported by the unambiguous statutory language. Section 9204(a), which concerns the effective dates of OBRA 1986's participation amendments, plainly states: "The amendments made by section 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). Therefore, because the OBRA 1986 amendments only apply to Plan years beginning on or after January 1, 1988, Plaintiff is entitled neither to participate retroactively nor to accrue benefits retroactively for Plan years before 1988.

**B.** ***Alleged Violations Through Plan Amendment***

Plaintiff next contends that in amending the Plan in 1990, Defendant breached its fiduciary duty under ERISA. This claim is based on the false assumption that amending the Plan constituted a fiduciary act. Plaintiff correctly observes that a corporate sponsor must discharge its obligations solely in the interests of the participants and beneficiaries when acting in its role as plan administrator. However, where, as here, a defendant is both an employer *and* an administrator of a pension plan, it is subject to separate and differing responsibilities depending upon the role it is performing. As the Second Circuit has stated: "ERISA permits employers to wear 'two hats,' and ... assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." *Amato v. Western Union Int'l, Inc.,* 773 F.2d 1402, 1416–17 (2d Cir.1985) (*quoting Amato v. Western Union Int'l, Inc.,* 596 F.Supp. 963, 968 (S.D.N.Y.1984)), *cert. denied,* 474 U.S. 1113 (1986). Therefore, when acting in its corporate capacity, Defendant was obligated to "see that such benefit plans as it [chose] to maintain [were] designed to further the company's business interests in consonance with the company's obligations to its stockholders." *Musto v. American General Corp.,* 861 F.2d 897, 910 (6th Cir.1988), *cert. denied,* 490 U.S. 1020; *see also Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1471 (11th Cir.1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets."), *cert. denied,* 481 U.S. 1016 (1987). As the Third Circuit explained:

> ***4** Virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan.... [It is] extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word "administration" encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements.

*Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155, 1161 (3rd Cir.1990). The Sixth Circuit has similarly reasoned:

> There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.... The case law ... makes it clear that when an employer decides to establish, *amend,* or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

*Musto,* 861 F.2d at 911–12 (emphasis added). Finally, the Ninth Circuit similarly differentiates the duties owed in amending a plan from those arising from plan administration. Reflecting this approach, the Ninth Circuit held in *Amalgamated Clothing & Textile Workers v. Murdock,* 861 F.2d 1406, 1419 (9th Cir.1988), that amending a benefit plan so that a corporate sponsor would receive any surplus funds not needed to pay participants did not by itself comprise an ERISA violation, but only constituted "a claim upon which relief may be granted in the context of the complaint's further allegations that the *fiduciaries* misused plan assets." *Id.* (emphasis added). In sum, the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan; whereas, in their role as plan administrator with concomitant fiduciary duties, the same corporate sponsor must act in the sole interest of plan participants and beneficiaries when administering plan provisions.

Here, Defendant was not acting in its role as a plan administrator when it amended the Plan. Rather, amending the Plan to provide enhanced retirement benefits constituted a business judgment that properly resided with corporate officers. Therefore, Defendant's actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed. Indeed, the sole fiduciary duty implicated by the amendment was the duty owed to Defendant's stockholders. The Court views the subsequent payment of enhanced benefits to selected participants as merely Defendant's adherence, in its role as Plan administer, to the terms of the lawfully amended Plan. As such, Plaintiff fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions. Further, Plaintiff mistakenly relies on 29 U.S.C. § 1344(d)(1) to argue that only through the process of plan termination does an exception arise to the general principle that benefits must never, more than incidentally, inure to an employer as a party-in-interest. The process of plan termination allows this exception under the *fiduciary* responsibilities arising from plan administration. Hence, Plaintiff's argument is inapposite because the violations alleged arise from the amendment of the Plan and not from the subsequent administration of its terms.

***5** Plaintiff's attempts to distinguish the cases cited above fall far short of the mark.[3] The factual distinctions relied upon are not significant in the cases themselves and are nonexistent in the relevant statutes. In short, Plaintiff offers no authority to support his argument that the distinctions culled are of legal significance.

Plaintiff also asserts that Defendant specifically violated its fiduciary duty in requiring those participants electing to receive enhanced retirement benefits to execute a release of employment related claims. The Court disagrees and finds that this release condition, as embodied in the Plan amendment, was a design feature not subject to the scrutiny of ERISA's fiduciary standards unless improperly administered. This very type of release provision has been upheld in a case involving an initial plan creation, *Harlan v. Sohio Petroleum Co.,* 677 F.Supp. 1021, 1025 (N.D.Cal.1988), and the Court finds no holding, statute, or compelling reason to prohibit its inclusion through the amendment of a continuing plan.[4]

Finally, Plaintiff contends that the doctrine of collateral estoppel precludes Defendant from contesting Plaintiff's fiduciary breach theory in relation to the Plan amendments. Plaintiff alleges that Defendants had a full and fair opportunity to litigate these same Plan amendment issues in a previous motion to dismiss in a similar cause of action. *Engineers and Scientists Guild v. Lockheed Corp.,* No. CV 90–6891 ER (GHKx) (C.D.Cal.1990). The Court rejects this claim because the mere refusal by the prior court to grant the motion to dismiss did not adversely resolve any factual issues against Defendant, nor did it constitute a sufficiently firm or sufficiently final judgment. *Robi v. Five Platters, Inc.,* 838 F.2d 318, 326 (9th Cir.1988).

### c. *Alleged Violations Through Oral Misrepresentation*

Plaintiff argues in his final claim that despite the express language of the Plan, he is entitled to additional benefits on account of Defendant's alleged oral misrepresentation of coverage.[5] Defendant responds that ERISA only permits payment of benefits under the written terms of the Plan and no other section of ERISA authorizes recovery on a promissory or equitable estoppel basis.

Plaintiff accurately observes that 29 U.S.C. § 1132(a)(1)(B) allows a participant or beneficiary to bring suit against a plan "to recover benefits due to him under the terms of the 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." However, the Ninth Circuit has held that recovery must be based upon the terms of the plan and that alleged oral misrepresentations are insufficient under 29 U.S.C. § 1132(a)(1)(B). Basing its analysis on 29 U.S.C. § 1102(a)(1), which requires benefit plans to be maintained pursuant to a written agreement, the Ninth Circuit rejected a suit for additional plan benefits holding that to allow a claim based on estoppel would conflict with the statutory requirement. *Davidian v. So. Calif. Meat Cutters Union & Food Employees Benefit Fund,* 859 F.2d 134, 136 (9th Cir.1988); *see also Hansen v. Western Greyhound Retirement Plan,* 859 F.2d 779, 781 (9th Cir.1988). In addition, there is no jurisdictional basis in this case for a claim under § 1132(a)(1)(B) because Plaintiff is not suing the Plan.

***6** Second, although 29 U.S.C. § 1132(a)(2) permits a claim for equitable relief founded on a violation of fiduciary duty, the Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell,* 477 U.S. 134, 142, 105 S.Ct. 3085, 3090, 87 L.Ed.2d 96 (1985), that any amounts recovered under § 1132(a)(2) must be paid to a plan, not to an individual participant or beneficiary. In this action, recovery under § 1132(a)(2) is untenable because Plaintiff's oral misrepresentation claim is brought solely in his individual capacity, not on behalf of the Plan.

Finally, while 29 U.S.C. § 1132(a)(3) permits an action for equitable relief to enforce the terms of a plan, the Ninth Circuit has held that a suit for fiduciary breach may only be brought if recovery would inure to the benefit of the plan as a whole and not to individual participants. *Horan v. Kaiser Steel Retirement Plan,* 947 F.2d 1412, 1418 (9th Cir.1991). Again, Plaintiff brings his oral misrepresentation claim in his individual capacity and, thus, § 1132(a)(3) does not apply.

## III. *CONCLUSION*

For all of the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss in its entirety, and DISMISSES Plaintiff's Complaint WITH PREJUDICE for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

**Parallel Citations**

61 Empl. Prac. Dec. P 42,094, 15 Employee Benefits Cas. 2242

Footnotes

1 In response to Defendant's Motion to Dismiss, Plaintiff filed an amended opposition on April 17, 1992 withdrawing Count IV, a claim for benefits under the Plan, from his Complaint.

3 Plaintiff urges that the cases are distinguishable because, *inter alia,* they involve welfare rather than pension plans, unfunded or underfunded plans, amendments to terminate a plan, the initial creation and design of a plan, and/or amendments that only benefit the sponsor in an incidental manner.

4 Plaintiff concedes that Defendant would have enjoyed broad discretion in both the establishment and termination of the Plan. The amending of a continuing plan seems similarly legitimate to the Court. Not surprisingly, the case law bears out this intuition. "The case law ... makes it clear that when an employer decides to establish, *amend,* or terminate a benefits plan, ... its actions are not to be judged by fiduciary standards." *Musto,* 861 F.2d at 912 (emphasis added).

5 Although the basis for this claim is unclear, regardless of whether Plaintiff intended to bring this allegation under ERISA or state common law, ERISA explicitly preempts state laws to the extent that they relate to any employee benefit plan not exempt from federal regulation. 29 U.S.C. §§ 1144. Further, cases in the Ninth Circuit have consistently held that ERISA preempts state law theories of recovery. *E.g. Olson v. General Dynamics Corp.,* 960 F.2d 1418, 1423 (9th Cir.1991) (holding that ERISA preempts a state law claim based on alleged oral misrepresentation by an employer as to the level of benefits). Therefore, only three statutory grounds, discussed *infra,* survive as conceivable foundations for recovery: 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), and 1132(a)(3).