IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOBBIE ADAMS, et al.	:	
	:	CIVIL ACTION
v.	:	No. 98-3572
	:	
SUN COMPANY, INC., et al.	:	

O'Neill, J. June , 2001

M E M O R A N D U M

I.

Presently before me are the parties' cross motions for summary judgment on the issue of whether defendants, acting in their role as fiduciaries under the Employee Retirement Income Security Act ("ERISA"), made affirmative misrepresentations to plaintiffs, former employees of Whitaker Coal Corporation. For the reasons stated below, I will enter judgment in favor of defendants and against plaintiffs.

II.

Plaintiffs are former employees of Whitaker Coal Corporation, a mining company owned by Sunoco, and were participants in the Whitaker Coal Corporation and Affiliates Defined Benefit Pension Plan (the "Whitaker Plan"). In September 1992, Sunoco decided to exit the coal business. Sun Coal, which provided financial, engineering, and administrative services to Whitaker, including the administration of the Whitaker benefits plans, assisted in the effort to sell Whitaker and its sister companies.

In 1995, the workforce of Whitaker was reduced from over 200 employees to less than 20. After the layoffs, Kareen Free, Manager of Compensation and Benefits for Sun Coal, received phone calls from former Whitaker mining employees inquiring about the possibility of immediately receiving their retirement money in a lump sum payment from the Whitaker Plan. Because the Whitaker Plan had no provision for such a payout to vested participants, participants had to wait until retirement age before they could receive any Plan benefits. Free's supervisor, Jack Allison,[1] Vice President of Finance and Administration for Sun Coal, considered the possibility of such a one-time payment under the Whitaker Plan. Mr. Allison consulted with James M. Freeman of Coopers & Lybrand (now Price Waterhouse Coopers) to explore the possibility of lump sum payments and/or termination of the Whitaker Plan. The parties disagree as to which option, if any, Mr. Allison chose at that time.

It is undisputed, however, that in November 1995 the Whitaker Board of Directors amended the Whitaker Plan to allow for the lump sum payment of benefits. Whitaker and Coopers & Lybrand then prepared the participant materials, which stated that the amendment was a "one-time" opportunity. Participants could make one of four elections: 1) a lump sum distribution paid on or before December 31, 1995; 2) an immediate 50% joint and survivor annuity to commence as of December 1, 1995 (for married participants); 3) an immediate straight life annuity to commence on December 1, 1995; or 4) the status quo, i.e., retaining the right to a deferred annuity at a normal retirement date. Plaintiffs elected to receive the immediate lump sum payment.

In February 1996, after the 1995 lump sum window had closed, a buyer for Whitaker

[1] Mr. Allison died in May 1999 before his deposition was taken in this case.

emerged. As part of this transaction, Sunoco was to become the sponsor of the Whitaker Plan. It was announced that the remaining plan participants would be given a second opportunity to receive a lump sum payment. Defendants argue that the second opportunity was given in order to reduce the administrative burden on Sunoco and that terms of the second opportunity were the same as the first. Plaintiffs argue that the second lump sum payment was actually planned at the time of the first but do not contest the assertion that the terms were the same in both instances.

The second window was originally planned to be open from the presumed date of the closing, June 1996, until August 31, 1996. The Sunoco Board of Directors then prepared and executed the amendments. Due to reasons unrelated to this litigation, the transaction did not close until September 1996. Accordingly, the governing documents were revised and Sunoco decided to merge the Whitaker Plan into the Sun Company, Inc. Cash Option Plan ("SCORP") on September 30, 1996. The revised schedule opened the second lump sum window to November 15, 1996.

Between the first lump sum window in 1995 and the second in 1996, interest rates fell. As a result, the lump sum payments, which were calculated based upon the future benefits reduced to present value, were larger for the second group than the first. Plaintiffs, all of whom elected to take lump sum payments in the first group, argue that defendants breached their fiduciary duty under ERISA by not disclosing at the time of the first window that a second window for lump sum payments would occur and that they were injured as a result.[2]

[2] By my Order of November 7, 2000, discovery was bifurcated and the question of causation was reserved for a later date.

III.

Rule 56 empowers a court to grant summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Initially, the moving party must state the basis for its motion and identify those portions of the record which it believes indicate the absence of any genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the burden of persuasion at trial, it may properly support its motion merely by showing that there is an absence of evidence to support the non-moving party's case. Id. at 325.

In response to a properly supported motion for summary judgment, the non-moving party must point to specific facts demonstrating that a genuine issue exists for trial. See Fed. R. Civ. P. 56(e). It may not rest upon unsupported allegations or denials. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "mere scintilla of evidence" supporting the non-moving party's position is insufficient to create a genuine issue of material fact; there must be sufficient evidence from which a jury could reasonably find for the non-moving party. Id. at 252. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts" should be left to the jury. Id. at 255.

The court must view all evidence in the light most favorable to the non-moving party. Id. Because I ultimately conclude that judgment should be entered in favor of defendants, I will view the evidence in the light most favorable to plaintiffs.

IV.

In their reply memorandum in support of their motion, defendants argue that summary judgment should be "granted as unopposed" because plaintiffs have failed to offer precise record citations in attempting to show that there are disputed material issues of fact.

This argument has some merit. Plaintiffs have in some cases characterized the record without citation or with general citations that refer to multiple pages. In addition, at oral argument plaintiffs' counsel attempted to rely on documents that were produced in discovery but which had not been provided as part of the summary judgment record. See Tr. (June 4, 2001) at 19.[3] I conclude, however, that plaintiffs have made adequate citations to record on the threshold issue of whether there was a specific proposal under serious consideration. I will, therefore, dispose of that issue on the merits rather than deciding whether plaintiffs' procedural failures are sufficient to support a grant of summary judgment.

V.

Section 404(a)(1) of ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . ." See 29 U.S.C. § 1104(a)(1). Based on this statutory duty, a fiduciary "may not materially mislead those to whom the duties of loyalty and prudence are owed." In re Unisys Corp., 57 F.3d 1255, 1261 (3d Cir. 1995). "A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must speak truthfully." Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993) ("Fischer I").

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[3] Plaintiffs were offered the opportunity to supplement the record with those documents but to date have not done so. Id. at 20.

There are at least two ways that a plaintiff could prove a breach of fiduciary duty based upon a misrepresentation. First, a plaintiff could prove that the fiduciary affirmatively misrepresented a material fact. See Unisys, 57 F.3d at 1262. Second, a plaintiff could prove that a fiduciary failed to disclose a potential change in the benefit plan that was under "serious consideration." See Fischer v. Philadelphia Elec. Co., 96 F.3d 1533, 1538 (3d Cir. 1996) ("Fischer II"). In this case, plaintiffs argue a hybrid of these two theories: defendants' representation that the 1995 lump sum payment would be a one-time opportunity was an affirmative misrepresentation because a second window for lump sum payments was under serious consideration at that time.

In Fischer II, the Court of Appeals outlined the requirements for finding serious consideration: "Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." Id. at 1539. The Court of Appeals went on to contrast the first element, a specific proposal, with "the antecedent steps of gathering information, developing strategies, and analyzing options." Id. at 1540. However, this does not mean that "the proposal must describe the plan in its final form." Id. "[T]he plan as finally implemented may differ somewhat from the proposal." Id. The second factor, discussion for the purposes of implementation, "recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits." Id. The final factor, consideration by senior management, is "limited to those executives who possess the authority to implement the proposed change." Id. However, "it should not limit serious consideration to deliberations by a quorum of the Board of Directors."

Id.

The only evidence that arguably suggests that a second opportunity for lump sum payments was under serious consideration was a September 25, 1998 letter from James Freeman of Coppers & Lybrand ("C&L") to Jack Allison. The letter begins with Freeman stating that C&L had "estimated the impact on the Whitaker Coal Corporation financial statements if the Plan is terminated and the and the participants are paid lump sums . . ." See Freeman Ltr. at 1. Freeman then listed and explained "three alternative courses of action": 1) terminating the Plan on or before December 31, 1995; 2) terminating the Plan on January 1, 1996; or 3) "making lump sum payments only to vested terminees and layoffs on or before December 31, 1995 (with possible later Plan termination)." Id. He went on to state that when the Plan is terminated "annuities would be purchased – at prices available in the annuity market as of the date of purchase – for retirees and beneficiaries currently receiving benefits." Id. at 2. The letter then ended with the following recommendation:

> Since a plan termination can frequently stretch out over a year or more, it is unlikely that Whitaker Coal will succeed in terminating the Plan and distributing its assets by the end of 1995.
>
> Instead, Whitaker Coal should promptly amend the Plan both to incorporate the RPA provisions and also to allow lump sum distributions of unlimited size, then calculate and distribute Plan benefits to all laid off employees and vested terminees. The benefit calculations and preparation of distribution forms should be started as soon as possible, with a goal of completing all payments before December 31, 1995.
>
> Simultaneously, Whitaker Coal can commence the Plan termination, with a goal of completing the termination by June 30, 1996. This goal is ambitious, but realistic.

Id. at 4.

Allison's hand-written notes on the letter from Freeman are also relevant to plaintiffs' argument. At the top of the first page of the letter, Allison wrote "Option-3" and "Payout Retirees By Annuity." Allison made an additional notation on the bottom of the first page just below the list of three options. Though not completely legible in the copies produced in discovery, plaintiff argues that this notation reads "+ merge w/SCORP." Plaintiff argues that this letter, viewed on its own terms and in light of Allison's hand-written notes, is evidence of serious consideration of a second lump sum payment. I disagree.

Considering the letter unto itself, i.e., without Allison's handwritten notes, it is clear that it was merely an "antecedent step of gathering information." See Fischer II, 96 F.3d at 1539-40. As the Court of Appeals has emphasized, "[a] company must necessarily go through these preliminary steps before its deliberations can reach the serious stage." Id. at 1540. Moreover, "a corporate executive can order an analysis of benefits alternatives or commission a study without seriously considering implementing a change in benefits." Id.

Considering the letter togther with Allison's hand-written notes does not change this conclusion. There is nothing in the letter or Allison's notes that even hints of a second window for lump sum payments. Drawing all inferences in the light most favorable to plaintiffs, I am willing to accept plaintiffs' argument that (at some undetermined time)[4] Allison read the letter and chose the third option; namely, "making lump sum payments only to vested terminees and layoffs on or before December 31, 1995 (with possible later Plan termination)." Freeman Ltr. at

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[4] Plaintiffs argue that Allison made his hand-written notes shortly after he received the letter and, therefore, prior to the first window for lump sum payments. In support of this argument, plaintiffs refer to the deposition of Mitchell J. Anderman, Manager of Employee Benefits at Sun Company. Anderman testified that in the fall of 1995 Allison had chosen some option for terminating the Plan. See Anderman Tr. at 13. However, Anderman was never asked which option Allison chose. Id. Therefore, it is unclear whether the fall 1995 choice that Anderman testified to was one of the options outlined for Allison in the Freeman letter.

1. Plaintiffs argue that a second opportunity for lump sum payments was implicit in the phrase "with possible later Plan termination." However, the Freeman letter states that if the Plan was terminated annuities would be purchased for plaintiffs (Freeman Ltr. at 2), and Allison wrote "Payout Retirees By Annuity" directly under "Option-3" on the first page of the letter. No jury could reasonably rely on "Option-3" and simultaneously ignore "Payout Retirees By Annuity." Terminating the Plan by purchasing annuities would have differed from a second lump sum payment in two ways. First, plaintiffs would not have had an opportunity to elect benefit options. Second, plaintiffs would not have received any immediate benefits. Instead, plaintiffs would have received the normal plan benefits at retirement age, though those benefits would have been paid by the annuity provider rather than by the Plan. In other words, termination would have been a non-event from plaintiffs' perspective and does not imply a second opportunity for receiving a lump sum payment.

I therefore conclude that plaintiffs have produced no evidence from which a jury reasonably could conclude that a second window for lump sum payments was under serious consideration at the time of the first.

An appropriate Order follows.

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O R D E R

AND NOW, this day of June, 2001, after consideration of the parties' cross-motions for summary judgment and briefs and oral arguments, and for the reasons stated in the accompanying memorandum, plaintiffs' motion is DENIED, defendants' motion is GRANTED and judgment is entered in favor of defendants and against plaintiffs.

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THOMAS N. O'NEILL, JR.