

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

MARIO DIFURIO : CIVIL ACTION
: :
v. : :
: :
AMERICAN FEDERATION OF STATE, : :
COUNTY AND MUNICIPAL EMPLOYEES : NO. 97-7405

MEMORANDUM AND ORDER

Fullam, Sr. J. April , 1998

Plaintiff has brought this ERISA action, claiming that, in calculating his pension benefits, the defendant failed to credit him with all of his years of employment before retirement. His benefits were calculated on the assumption that his employment began in 1977, whereas he contends the correct date is in 1974.

The defendant has filed a motion to dismiss, correctly pointing out: (1) that the defendant is legally obligated to comply with the express terms of the pension plan, and (2) that, under the express language of the pension plan, plaintiff's pre-1977 employment did not constitute "eligible employment," for purposes of the pension calculation.

Tacitly conceding that the defendant is correct, plaintiff now claims that some other employees have, in the past, been permitted to "buy back" years of service by making payments into the fund. Plaintiff alleges that his attempts to "buy back" the extra three years of service have been disregarded.

Plaintiff requests an opportunity to conduct discovery in aid of this new theory. In a reply brief, defendant suggests that plaintiff is mistaken, that the only "buy back" permitted by the plan can occur where an employee withdraws his or her pension contributions in a lump sum upon leaving covered employment, but later is re-employed and wishes to reinstate pension eligibility.

The Court is confronted with a motion to dismiss, under Federal Rule of Civil Procedure 12(b)(6). It is very clear that the present complaint does not set forth a valid claim, under the plain language of the plan documents. The present complaint must therefore be dismissed. If plaintiff wishes to pursue the "buy back" theory, an amended complaint would be required. It should be a relatively simple matter, involving little or no formal discovery, for plaintiff's counsel to determine whether there is a basis for such a theory, or whether his client is merely mistaken as to the type of "buy back" other employees achieved.

An Order follows.

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ORDER

AND NOW, this day of April, 1998, IT IS ORDERED:

(1) Plaintiff's complaint is DISMISSED.

(2) Plaintiff is granted a further period of 45 days in which to file an amended complaint (if, after further investigation, that can be done without violating Federal Rule of Civil Procedure 11). Unless such an amended complaint is filed within that period, this action will be dismissed with prejudice as of June 15, 1998.

John P. Fullam, Sr. J.