

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

KEVIN BALMAT, <u>et al.</u>	:	CIVIL ACTION
	:	
v.	:	NO. 04-2505
	:	
CERTAINTEED CORPORATION	:	

MEMORANDUM AND ORDER

Kauffman, J.

December 9, 2004

Plaintiffs Kevin Balmat, John Ducaji, Doug Ford, Michael Mann, Richard Parker, John Ward, and Ken Wilson (collectively “Plaintiffs”) bring this action against Defendant CertainTeed Corporation (“Defendant”). Now before the Court is Defendant’s Motion to Dismiss. For the reasons stated below, the Court will grant the Motion in part.

I. Factual Background

The Complaint alleges: Plaintiffs are former employees of Defendant. See Complaint ¶¶ 17, 30, 42, 54, 66, 77, 90. Defendant conducted false and fraudulent audits of Plaintiffs’ respective expense accounts for the purpose of manufacturing a pretext for termination to avoid paying them certain benefits, including severance pay, incentive bonuses, health insurance benefits and pension benefits. Id. ¶¶ 10, 13, 19-20, 27-28, 33, 45, 57, 69, 80, 93. The audit was conducted by individuals without accounting degrees who were directed to terminate employees. Id. ¶¶ 21, 35, 46, 58, 70, 81, 94. Plaintiffs were told by their supervisors to seek reimbursements for legitimate expenses, and that those expenses were approved. Id. ¶¶ 23, 36, 48, 60, 72, 83, 96. Six of the seven interrogations of Plaintiffs by the “auditors” lasted hours and involved threats of termination and the filing of criminal charges. Id. ¶¶ 25, 38, 50, 62, 85, 98. Each Plaintiff was

terminated in either 2002 or 2003 for the alleged expense account fraud. See id. ¶¶ 20, 33, 45, 57, 69, 80, 83. The value of the benefits lost because of the alleged pretextual terminations exceed \$75,000 per Plaintiff. Id. ¶¶ 28, 40, 52, 64, 75, 88, 100. Defendant’s severance policy provided for the payment of severance benefits to employees who were terminated for reasons other than cause and the severance plan was a benefit policy governed by the Employee Retirement Income and Security Act (“ERISA”). Id. ¶¶ 11, 124, 126, 131, 133.

The Complaint includes counts for violation of Pennsylvania’s Wage Payment and Collection Law (Count I), breach of contract (Count II), breach of covenant of good faith and fair dealing (Count III), violation of ERISA (Counts IV and VI)¹, and punitive damages (Count VII). Defendant asks the Court to dismiss Counts I, III, VI, and VII pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted.

II. Legal Standard

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Brown v. Phillip Morris Inc., 250 F.3d 789, 796 (3d Cir. 2003).

¹ The Complaint contains no “Count V”.

III. Analysis

A. Count I: Wage Payment and Collection Law

Plaintiffs initially alleged that they were entitled to recover unpaid severance and bonus compensation under the Pennsylvania Wage Payment and Collection Law (“WPCL”), 43 P.S. §§ 260.1, et. seq.. However, Section 541(a) of ERISA provides that it supercedes “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.” 11 U.S.C. § 1144(a). Plaintiffs concede that “Count I as it related to severance benefits only, is preempted by ERISA,” and that Count I is now limited to claims for incentive payments. Plaintiffs’ Reply to Defendant’s Motion to Dismiss, at 2 fn. 1. Accordingly, the Court will dismiss Count I to the extent it seeks recovery of severance payments.

B. Count III: Breach of Covenant of Good Faith and Fair Dealing

Plaintiffs claim that Defendant had a duty to deal with them in good faith, and that Defendant’s audit and conduct was a sham and an intentional invasion of their employment rights and other benefits, both contractual and otherwise. Complaint ¶¶ 120-21. Defendant claims that, as this Count relates to severance payments or health or pension benefits, it is preempted by ERISA. As Plaintiffs now “concede that any claims under Count III regarding severance, health insurance, and pension benefits are preempted by ERISA and fall within the ERISA counts contained in the Complaint,” the Court will dismiss Count III as to these claims. Plaintiffs’ Reply to Defendant’s Motion to Dismiss, at 4 fn. 2.

Plaintiffs also claim that their termination was a breach of the covenant of good faith and fair dealing as it relates to incentive payments which are not part of an ERISA benefit plan.

Plaintiffs further claim that this breach was in addition to Defendant's breach of contract. See Plaintiffs' Reply to Defendant's Motion to Dismiss at 6. However, the weight of authority provides that Pennsylvania law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing separate and apart from a claim for breach of contract. Bagasra v. Thomas Jefferson Univ., 1999 WL 517404, at *1 (E.D. Pa. July 20, 1999) (dismissing an implied covenant claim where the plaintiff stated a separate claim for breach of contract); McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 328 (E.D. Pa. 1997). The Third Circuit, and this Court, have held that a party may not maintain separate claims for breach of contract and breach of covenant of good faith and fair dealing where both causes of action arise out of the same conduct by the defendant. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701-02 (3d Cir. 1993); McAllister v. Royal Carribean Cruises, Ltd., 2003 WL 23192102, at *4 (E.D. Pa. Sept. 30, 2003) (stating that under Pennsylvania law a covenant of good faith and fair dealing is implied in every contract and that Pennsylvania does not recognize a separate claim for breach of implied covenant of good faith and fair dealing).

Plaintiffs assert a claim for breach of contract in Count II. They may not also assert a separate and independent claim for breach of the implied covenant of good faith and fair dealing. Thus, Count III will be dismissed.

C. Count VI: Violation of ERISA

In Count VI, Plaintiffs assert a claim for benefits due under the terms of various benefit plans pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Defendant responds that Count VI should be dismissed because Plaintiffs have failed to exhaust their administrative remedies as required under Harrow v. Prudential Ins. Co. of America, 279 F.3d 244, 249 (3d Cir.

2002). Plaintiffs do not allege that they have exhausted the various plans' internal appeals procedures or that they initiated such procedures. Instead, they claim that they did not exhaust administrative remedies because it would be futile to do so. Plaintiffs' Reply to Defendant's Motion to Dismiss at 6.

"Except in limited circumstances . . . a federal court will not entertain an ERISA claim unless the plaintiff has exhausted the remedies available under the plan." Harrow, 279 F.3d at 249 (quoting Weldon v. Kraft, Inc., 896 F.2d 793, 800 (3d Cir. 1990)). The exhaustion of administrative remedies applies to plan enforcement actions under Section 502. D'Amico v. CBS Corp., 297 F.3d 287, 290-91 (3d Cir. 2002). An ERISA claim is subject to dismissal if it does not "plead or otherwise deal with the issue of exhaustion." Campbell v. Prudential Ins. Co. of Am., 2002 WL 462085, at *2 (E.D. Pa. Mar. 25, 2002). However, Plaintiffs are "excused from exhausting administrative procedures under ERISA if it would be futile to do so." Harrow, 279 F. 3d at 249. A party claiming futility must make a "clear and positive showing" that further attempts to seek redress under the plan would be futile. Id. Whether exhaustion will be excused on futility grounds depends on several factors, including: (1) whether Plaintiffs diligently pursued administrative relief; (2) whether Plaintiffs acted reasonably in seeking immediate judicial review under the circumstances; (3) the existence of a fixed policy denying benefits; (4) the failure of Defendant to comply with its own internal procedures; and, (5) testimony of plan administrators that any administrative appeal would be futile. See id. at 250.

Plaintiffs contend that according to Defendant's Employment Status, Changes, and Benefits Plan, severance pay is available only to employees who are "separated for reasons other than Termination for Misconduct, Resignation, or Furlough." Defendant's Motion to Dismiss,

Exhibit A. Plaintiffs thus claim that there is a fixed policy denying severance benefits to employees terminated for misconduct, and that any attempt to engage an administrative remedy process would be futile. However, in Harrow, the plaintiff's claim was dismissed for failure to exhaust administrative remedies where his only attempt at an appeal, before filing suit, was one telephone call to the plan administrator. Harrow, 279 F.3d at 251-52. Applying the requirement of a "clear and positive showing of futility," the Third Circuit held that "a plaintiff in these circumstances was obligated" to do more before instituting suit. Id. at 249-52. Here, Plaintiffs, without ever trying to engage the administrative appeals process, simply cite a section of the Plan and claim that it establishes a fixed policy without providing any example or further explanation.

Plaintiffs must do more to demonstrate futility. They do not allege that they attempted to appeal the alleged denial of their benefits internally. Plaintiffs allege only that their counsel contacted Defendant's counsel to inquire about administrative remedies. Further, Plaintiffs' argument regarding futility focuses on the severance policy and does not address why it would have been futile to pursue administrative remedies with respect to the health and pension benefits which they also claim were denied.

Plaintiffs have not established a clear and positive showing of the futility of exhausting administrative remedies. Accordingly, the Court will dismiss Count VI without prejudice so the Plaintiffs may pursue this claim if and when they exhaust their administrative remedies. See Reg'l Employers' Assurance Leagues Voluntary Employees' Beneficiary Ass'n Trust v. Sidney Charles Markets, Inc., 2003 WL 220181 (E.D. Pa. Jan. 29, 2003).

D. Count VII: Punitive Damages

Plaintiffs claim that Defendant's intentional, willful, wanton, and outrageous actions were

performed with reckless disregard to the resulting harm to Plaintiffs, and thus Plaintiffs are entitled to punitive damages. Complaint ¶¶ 139-40. Defendant responds that this claim fails on its face, as punitive damages are not available in connection with any of Plaintiffs' causes of action.

Regarding Count I, the WPCL authorizes liquidated damages in certain cases, but does not provide for the recovery of punitive damages. 43 P.S. § 260.10; see also Belcufine v. Aloe, 112 F.3d 633, 640 n. 7 (3d Cir. 1997) (noting that the WPCL is a penal statute that is to be narrowly construed). Regarding Count II, Pennsylvania prohibits the recovery of punitive damages for breach of contract. Samuel-Bassett v. Kia Motors Am., Inc., 357 F.3d 392, 402 (3d Cir. 2004) (citing Thorsen v. Iron & Glass Bank, 476 A.2d 928, 932 (Pa. Super. 1984) (“the law is clear that punitive damages are not recoverable in an action for breach of contract”)).

Plaintiffs may not recover punitive damages under Counts IV or VI, as ERISA does not provide for such relief. Kirkhuff v. Lincoln Tech. Inst. Inc., 221 F. Supp. 2d 572, 575 (E.D. Pa. 2002) (stating “ERISA nowhere authorizes a participant or beneficiary to obtain punitive damages”); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 57 (holding the remedies set forth in ERISA are exclusive and a remedy for punitive damages is not to be implied).

Accordingly, Count VII will be dismissed.

IV. Conclusion

For the foregoing reasons, the Court will grant in part Defendant's Motion to Dismiss. An appropriate Order follows.

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ORDER

AND NOW, this day of December, 2004, upon consideration of Defendant's Motion to Dismiss Counts I, III, VI, and VII (docket no. 9), Plaintiffs' response thereto (docket no. 11), and Defendant's Reply Memorandum (docket no. 13), it is **ORDERED** that Defendant's Motion is **GRANTED** in part. Accordingly,

- (1) Count I is **DISMISSED** with prejudice to the extent it seeks recovery of severance payments;
- (2) Count III is **DISMISSED** with prejudice;
- (3) Count VI is **DISMISSED** without prejudice; and,
- (3) Count VII is **DISMISSED** with prejudice.

BY THE COURT:

**S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.**