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

GORDON L. JOHNSTON,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
vs.	**:**	**NO. 04-4040**
	:	
EXELON CORPORATION, EXELON	**:**	
GENERATION COMPANY, LLC, and	**:**	
EXELON CORPORATION SENIOR	**:**	
MANAGEMENT SEVERANCE PLAN	**:**	
Defendants.	**:**	

ORDER AND MEMORANDUM

O R D E R

AND NOW, this 23rd day of March, 2005, upon consideration of Defendants' Partial Motion to Dismiss and Motion to Transfer Venue (Doc. No. 4, filed November 22, 2004), Plaintiff's Opposition to Defendants' Partial Motion to Dismiss and Motion to Transfer Venue (Doc. No. 6, filed December 22, 2005), and the Reply Brief in Support of Defendants' Motion to Dismiss and Motion to Transfer Venue (Doc. No. 7, filed January 10, 2005), **IT IS ORDERED** thatDefendants' Partial Motion to Dismiss and Motion to Transfer Venue is **GRANTED IN PART AND DENIED IN PART**, as follows:

1. Defendants' Motion to Transfer Venue is **DENIED**;

2. Defendants' Motion to Dismiss Count I of the Complaint as to Exelon Generation is **GRANTED**; and

3. By agreement, Defendants' Motion to Dismiss Count II of the Complaint is **GRANTED**.

IT IS FURTHER ORDERED that the caption of the Complaint is **AMENDED** so as to remove Exelon Generation as a defendant.

IT IS FURTHER ORDERED that a Preliminary Pretrial Conference will be scheduled in due course.

M E M O R A N D U M

I. BACKGROUND

Plaintiff was Director of Nuclear Oversight for Exelon Generation, a subsidiary of Exelon Corporation. On August 6, 2003, Exelon Corporation downsized and eliminated plaintiff's position. At that time, Exelon offered plaintiff the opportunity to participate in the Exelon Corporation Senior Management Severance Plan (the "Plan") which provided severance pay and other benefits to qualifying executives. As one of the requirements of the Plan, beneficiaries were required to sign a non-competition provision which prohibited them from obtaining employment in a "competitive business" without Exelon's written consent for a period of two years following termination of employment. Shortly after signing the non-competition provision, plaintiff accepted employment with Florida Power & Light Company ("FP&L").

After the time of plaintiff's termination, plaintiff contends that he had discussions with agents of Exelon concerning potential job opportunities for plaintiff in the energy industry. Plaintiff alleges that agents of Exelon told him that FP&L was not considered a "competitive business," and therefore, employment with FP&L would not violate the non-competition provision because it was geographically distant and was a regulated electric utility company.[1] Relying on these statements, plaintiff sought employment at FP&L. Exelon, upon learning that plaintiff had become employed at FP&L, terminated plaintiff's severance benefits.

On August 25, 2004, plaintiff filed the instant action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1011, *et seq*. Count I of the Complaint is a claim to recover benefits under the Plan pursuant to ERISA, 29 U.S.C. § 1132. Count II of the Complaint states a

[1] Plaintiff states that because the energy industry in Florida is regulated by the state, FP&L does not engage in direct competition with Exelon and Exelon is prohibited from entering Florida's energy market. (Compl. ¶¶ 32, 34).

claim for employer discrimination pursuant to ERISA, 29 U.S.C. § 1140, alleging that defendants discriminated against plaintiff by permitting other similarly situated former employees to accept employment at FP&L and maintain their severance benefits. Plaintiff seeks specific enforcement of the Plan and/or an award of damages under the Plan.

Presently before the Court is Defendants' Partial Motion to Dismiss and Motion to Transfer Venue. Defendants move to dismiss Count I of the Complaint with respect to Exelon Generation and Count II of the Complaint in its entirety. Defendants also seek to transfer the case to the U.S. District Court for the Northern District of Illinois. Plaintiff, in his response to the Motion, agrees to dismiss Count II.

II. Motion to Transfer Venue

Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2), governs the determination of venue under the Act:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Defendants acknowledge that venue is proper in this district under the third prong of the venue provision because Exelon Corporation "may be found" in Pennsylvania, but contend that transfer is appropriate "for the convenience of the parties" and "in the interest of justice" pursuant to 28 U.S.C. § 1404(a). Defendants argue that the case should be transferred to the Northen District of Illinois for the following reasons: (1) plaintiff is a resident of Florida; (2) the Plan is administered in Chicago; (3) Exelon Corporation is headquartered in Chicago; (4) many potential witnesses reside in Illinois, including eight individuals interviewed regarding the decision to deny plaintiff's claim for benefits, the individual who conducted the investigation in connection with plaintiff's claim for benefits, and several executives of Exelon Corporation and Exelon Generation;

and (5) the breach, if any, occurred in Chicago, where the decision to deny benefits was made, or in Florida, where benefits would have been paid.[2]

Plaintiff, in opposition, argues that his choice of venue should not be disturbed and that defendants have not met their burden of demonstrating that the case should be transferred to Illinois. In support of his argument plaintiff states: (1) plaintiff was employed by defendant in this district and resided here for 16 years; (2) while plaintiff no longer resides in Pennsylvania, he maintains close, personal ties to Pennsylvania and travels here on a regular basis; (3) many of the witnesses reside and work in Pennsylvania, including Mark Relken, Exelon Nuclear Director of Human Resources for the Mid Atlantic Regional Operating Group, Ron DeGregorio, V.P. at Limerick, Bill Levis, V.P. of Mid Atlantic Operating Group, Jim Armstrong, Director Operations Support, Bob Braun, V.P. at Peachbotton, and several former Exelon employees/retirees; (4) the facts and circumstances giving rise to the claim occurred in Pennsylvania, including alleged conversations between plaintiff and agents of Exelon; (5) while several Exelon executives maintain their primary offices in Chicago, they travel regularly to Pennsylvania on business; and (6) depositions can be scheduled in Illinois or in conjunction with the executives plans to travel to Pennsylvania.

In determining whether venue is proper, the Court is guided by the Third Circuit's ruling that a plaintiff's choice of forum is of paramount concern and should not be lightly disturbed. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d. Cir. 1970). While § 1404(a) "gives the district courts discretion to decide a motion to transfer based on an individualized, case-by-case

[2] The Court notes that "[t]he Third Circuit has provided no guidance for deciding where a breach of an ERISA plan takes place." Keating v. Whitmore Mfg. Co., 981 F. Supp. 890, 892 (E.D. Pa. 1997) (Van Antwerpen, J.). Plaintiff argues that the events underlying this action occurred in Chester County, Pennsylvania, where the plaintiff was employed by defendant. The Court need not resolve the issue of where the claim arose because it concludes that this issue is not dispositive of whether venue is proper in the instant case.

consideration of convenience and fairness, such motions are not to be liberally granted." Dinterman v. Nationwide Mut. Ins. Co., 26 F. Supp. 2d 747, 749 (E.D. Pa. 1998). The burden of establishing the need for transfer rests with the defendant. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

The Court concludes that venue is proper in Eastern District of Pennsylvania. While Illinois may be a more convenient forum for defendants' witnesses and production of documents, it does not appear from the record that the necessary witnesses and documents would be "unavailable for trial" if venue is retained in the Eastern District of Pennsylvania. See Jumara, 55 F.3d at 879 (the convenience of witnesses and location of records are relevant "only to the extent that the witnesses [and records] may actually be unavailable for trial in one of the fora"). Furthermore, a transfer to Illinois "would merely shift the inconvenience associated with choice of venue from [defendants to plaintiff]. This is insufficient to warrant a transfer of venue under 28 U.S.C. § 1404(a)." Trustees of the Nat'l Elevator Indus. Pension v. Ramchandani, 1999 U.S. Dist. LEXIS 3182 (E.D. Pa. Mar. 12, 1999) (Giles, C.J.).

The Court's conclusion is also in accord with ERISA's broad policy of providing "ready access to the Federal Courts." 29 U.S.C. § 1001(b); see Turner v. CF&I Steel Corp., 510 F. Supp. 537, 542 (E.D. Pa. 1981) (quoting Bonin v. Am. Airlines, Inc., 621 F.2d 635, 636, n.1 (5th Cir. 1980) ("A potential ERISA plaintiff is granted a wide choice of Federal court venue.")). On this issue, the House Committee on Education and Labor's report on ERISA draft legislation stated:

> The enforcement provisions have been designed specifically to provide both the Secretary and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and *to remove jurisdictional and procedural obstacles* which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.

H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 17 (1973), reprinted in 1974 U.S. Code Cong. &

Admin. News p. 4639, 4655 (emphasis added); see also Keating, 981 F. Supp. at 891-92.

In light of this authority and the strong presumption in favor of the plaintiff's choice of forum, defendant's motion to transfer venue is denied.

III. Motion to Dismiss

A. Standard of Review

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Discussion

1. *Count I*

Defendants move to dismiss Count I of the Complaint with respect to Exelon Generation on the ground that Exelon Generation, plaintiff's employer, is not a proper defendant in an action to recover benefits under the Plan pursuant to § 502(a)(1)(B) of ERISA. Defendant argues that only the "administrator" of the Plan is a proper defendant in an action to recover benefits under § 502(a)(1)(B) and an employer is not a proper defendant.

Plaintiff takes the position that although an employer is not a proper party in a suit to recover benefits, Exelon Generation can be held liable under ERISA as a fiduciary of the Plan because its executives had discretionary authority in the administration of the Plan. Moreover, plaintiff alleges that Exelon Generation is liable because it breached its fiduciary duty when its executives made affirmative misrepresentations regarding the non-competition provision resulting

in the denial of plaintiff's benefits and discriminated against plaintiff by awarding benefits to similarly situated employees. (Pl. Brief at 3-4).

In their Reply, defendants argue that Exelon Generation did not assume a fiduciary role because there is no evidence that anyone other than the Plan administrator exercised any discretion with regard to the decision to deny plaintiff's benefits claim. Defendants take the position that even if Exelon Generation is found to be a fiduciary, plaintiff's claims should be dismissed because ERISA only authorizes fiduciary duty claims where a plaintiff is unable to obtain relief under ERISA's other enforcement provisions.

a. *Exelon Generation is a Fiduciary*

Under ERISA, a person is a fiduciary to the extent that the person exercises discretionary authority with respect to the management or administration of the plan. 29 U.S.C. § 1002(21(A); Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994) ("the linchpin of fiduciary status under ERISA is discretion"). Plaintiff alleges that Exelon Generation executives exercised discretionary authority in denying plaintiff's benefits and that Exelon Corporation and the Plan simply "rubber stamped that decision." (Pl. Brief. at 6-7). Moreover, plaintiff avers that Exelon Generation's executives made affirmative misrepresentations to him that employment with FP&L would not violate the non-competition provision. Taking these allegations as true and viewing them in the light most favorable to the plaintiff, the Court concludes that Exelon Generation is a fiduciary. Id. ("ERISA broadly defines a fiduciary"); Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1500 (3d Cir. 1994) (fiduciaries can be liable under § 502(a)(1)(B) of ERISA if they mislead plan participants or misrepresent the terms of the plan).

b. *Plaintiff may not seek relief under ERISA § 502(a)(3) against Exelon Generation*

ERISA's civil enforcement provision, § 502(a)(1)(B), allows a participant in an ERISA plan to bring a civil action "to recover benefits due to him under the terms of his 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." 29 U.S.C. § 1132(a)(1)(B). Under this section, a plan participant may file an action seeking damages for breach of fiduciary duty. Haberern, 24 F.3d at 1501.

Section 502(a)(3) authorizes suits for individualized equitable relief for breach of fiduciary duty, Ream v. Frey, 107 F.3d 147, 152 (3d Cir. 1997), and permits a beneficiary to sue: "(A) to enjoin any action or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). However, such relief is available only where a plaintiff has no alternative remedy under other provisions of § 502. See Varity Corp. v. Howe, 516 U.S. 489 (1996); Ream v. Frey, 107 F.3d 147, 152-53 (3d Cir. 1997).

In Varity Corp. v. Howe, 516 U.S. 489, the Supreme Court held that § 502(a)(3) authorizes lawsuits for individualized equitable relief for breach of fiduciary duty, but cautioned that "we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief [i.e. under § 502(a)(3)] normally would not be "'appropriate.'" Id. at 515. In concluding that relief was available under § 502(a)(3), the Varity Court stated that such relief was "appropriate" because the plaintiffs could not proceed under any other subsection of 502 and would therefore be without any remedy if § 502(a)(3) relief was denied. See also Ream, 107 F.3d at 152-53 (advising courts to use a cautious approach when considering granting "appropriate equitable relief" under § 502(a)(3) and

holding that "Ream, like the plaintiffs in Varity, had no alternative means of recovering for his losses").

In this case (unlike the plaintiffs in Varity) plaintiff has asserted a claim for benefits under § 502(a)(1)(B). Therefore, he cannot pursue the same claim based on breach of fiduciary duty under the "safety-net" provisions of § 502(a)(3). Varity, 516 U.S. at 512 (section 502(a)(3) acts as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy"); see also Kuestner v. Health & Welfare Fund of the Phil. Bakery Emplrs. & Food Driver Salesmen's Union Local No. 463, 972 F. Supp. 905, 911 (E.D. Pa. 1997) (DuBois, J.) (granting defendants' motion to dismiss plaintiff's § 502(a)(3) claim because plaintiff had available equitable relief under § 502(a)(1)(B)); Feret v. CoreStates Fin. Corp., 1998 U.S. Dist. LEXIS 11512, at *15-16 (E.D. Pa. July 27, 1998) (Yohn, J.) (same); Reilly v. Keystone Health Plan East, Inc., 1998 U.S. Dist. LEXIS 11337, *15-16 (E.D. Pa. July 27, 1998) (same). For that reason, plaintiff's claims against Exelon Generation in Count I of the Complaint are dismissed.

1. *Count II*

Plaintiff, in his Opposition to defendant's Motion to Dismiss, agrees to dismiss of Count II of the Complaint. (Pl. Br. at 1). Therefore, Count II of the Complaint is dismissed.

IV. CONCLUSION

For the foregoing reasons, defendants' Motion to Transfer Venue is denied. Defendants' Motion to Dismiss Count I of the Complaint as to Exelon Generation and Count II of the Complaint in its entirety is granted.

BY THE COURT:

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JAN E. DUBOIS, J.