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

JAMES TOBLER	:	CIVIL ACTION
	:	
v.	:	
	:	
VERIZON, PA INC.	:	NO. 04-5708

MEMORANDUM AND ORDER

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE July 13 , 2005

The Defendant has filed a Motion to Dismiss, or, in the alternative, a Motion for Summary Judgment in this Employee Retirement Income Security Act, ("ERISA"), case. The Plaintiff's many claims involve the failure of Verizon to allow him to participate in an Enhanced Income Security Plan, ("EISP"), which would have resulted in an additional $66,000 in Mr. Tobler's pocket, but for his termination. The Defendant contends that Mr. Tobler's termination on November 19, 2001, resulted in his ineligibility for the EISP. The Plaintiff contends that the Plaintiff remained an employee of Verizon on or after November 19, 2001. Therefore, he was eligible for the EISP and Verizon's failure to inform him of the EISP violates ERISA and several federal common law principles recognized to fill in ERISA's gaps.

At the outset, we note that it is clear from reading the Defendant's Motion, Plaintiff's Response, and the Reply, that counsel are not on the same page, metaphorically speaking. The Plaintiff, both in the Amended Complaint and in the Response to the Motion to Dismiss, focuses on the Defendant's failure to notify Plaintiff of his eligibility for the EISP. The Defendant counters by arguing that notification is irrelevant, because he was not eligible for the enhanced benefit, having been terminated on November 19, 2001.

We expected the Motion and Response to focus on the Plaintiff's termination – the Plaintiff arguing that it was pretextual and that the actual reason Verizon fired him was to avoid having to pay him the additional benefits pursuant to the EISP. Instead, the Plaintiff's Response again focuses on the Defendant's failure to provide the necessary paperwork to apply for the EISP.

For the reasons that follow, we find that the Plaintiff was not eligible for the EISP because he was terminated from employment before the qualifying dates for the benefit. Therefore, the Plaintiff's argument, that the Defendant failed to provide him with the necessary paperwork, does nothing to promote his case. We also find that the Plaintiff has not presented sufficient evidence to allow a factfinder to conclude that the Defendant's stated reason for terminating Plaintiff's employment was pretextual. Therefore, we will enter judgment in favor of the Defendant.

Facts

On November 15, 2001, Tobler, a Verizon Pennsylvania employee, was arrested by the Philadelphia Police after he was observed purchasing a bag of cocaine while in a company vehicle. (Tobler Dep., at 27-28). In the early morning of November 16, Tobler left a message on his supervisor's voice mail, requesting a short notice vacation day on the 16th.[1] Tobler remained in custody until the evening of the 16th. (Tobler Dep., at 28-29).

After his release, Tobler contacted Mike McNally, his union representative, explained the circumstances of his arrest, and requested to speak with his supervisor, Al

[1]Plaintiff fabricated a reason for needing a short notice vacation day, claiming in the voice mail that he had been a witness to a shooting.

Longmore. During the telephone conversation with Mr. Longmore on Saturday, November 17, Tobler apologized for his mistake, but Mr. Longmore stated that he couldn't discuss it. (Tobler Dep., at 31-32).

When Tobler reported for work on Monday, November 19, he was told he was being terminated. He was required to turn in his employee identification, truck keys, cell phone, and beeper, and was also told to leave the premises. (Tobler Dep., at 17-18, 46). At that point, Tobler had 32 years of service. Plaintiff was paid for the three hours that he was in the office that day, but received no further paychecks from Verizon. (Tobler Dep., at 46).

On the same day, November 19, 2001, the EISP was offered to certain employees. Pursuant to the EISP, the offer period opened on November 19, 2001, and closed on December 18, 2001. During that period, an eligible employee would have to complete the EISP application and return it to Verizon. Additionally, the employee would be required to remain on the active payroll until December 29, 2001, and to retire at that point. (Hanson Dep., at 13, 19, 21, 22, 24-26, 40; Verizon Income Security Plan, § 2.3.1; Verizon Human Resources Letter, 11/19/01, ¶ 1; Questions and Answers for ISP/EISP Offer, at 6Q). Anyone who took advantage of the EISP was entitled to an increase in his/her pension benefit of 5%, a termination allowance of $2,200 times the number of completed years of service up to 30 years, and a relocation/re-education stipend. The Defendant agrees that, but for Plaintiff's termination on November 19, 2001, he would have been eligible for the EISP and would have received a $66,000 termination allowance had he remained on the active payroll until December 29, 2001. (Hanson Dep., at 14).

Mr. Tobler was not sent the EISP offer letter. However, his union later negotiated the five percent increase in Mr. Tobler's pension. (Tobler Dep., at 114).[2] Thereafter, the Plaintiff grieved his termination, but it was upheld by a labor arbitrator in a decision dated October 17, 2002.

The Plaintiff then filed suit for the $66,000 EISP termination benefit to which he claims he is entitled.

Legal Standard

A Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), is appropriate if "it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1996). In contrast, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Construed as a Motion for Summary Judgment, the moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477

[2]To the extent Tobler argues that the company's granting him the 5% increase in his pension band establishes his continued employment after November 19, and his eligibility for the $66,000 lump sum payout, see Amended Complaint, at ¶ 86, we reject the argument. To accept such logic would result in no good deed going unpunished. The fact that the union was able to negotiate the 5% increase in Tobler's pension, in spite of his valid termination, will not be held against Verizon. Moreover, the plan document sets different eligibility parameters for receiving the 5% increase and the lump sum payout. The former requires only that the employee must retire "between November 20, 2001, and December 31, 2001." See Verizon Human Resources EISP Letter, 11/19/01, at ¶ 5. The latter, however, requires that "your last day on active payroll will be December 29, 2001." See Verizon Human Resources EISP Letter, 11/19/01, at ¶ 1.

U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra, at 323.

Argument

1. Administrative Exhaustion

Before discussing the main issue in this case, we pause momentarily to reject Defendant's contention that the case should be dismissed because the Plaintiff failed to comply with the administrative exhaustion procedures provided for in the EISP. According to the Defendant, "[e]very employee benefit plan sponsored by Verizon contains detailed procedures for applying for benefits and appealing claim denials . . . ." (Motion, at 10). Because Tobler failed to follow those procedures, the Defendant urges us to dismiss his claim.

We find a flaw in the Defendant's logic. Plaintiff's claim is that he was never offered the EISP. Thus, he was not given the packet containing the information regarding the benefits, the application, or appeals process. To the extent the Defendant argues that Plaintiff

became aware of the EISP through the grapevine, we hardly find this appropriate notice of the administrative appellate processes. Therefore, we will proceed to address the core of Plaintiff's Complaint.

2. § 510 ERISA Violation

Packaged in a dozen different ways, the Plaintiff's Complaint boils down to a claimed violation of § 510 of ERISA, which prohibits the interference with an employee's attainment of ERISA benefits. Section 510 specifically states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

For a Plaintiff to establish a violation of § 510, the Third Circuit has explained the burden-shifting analysis to be employed by the court. First, the Plaintiff must establish a *prima facie* case, that is, "the plaintiff must show (1) that an employer took specific actions (2) for the purpose of interfering (3) with an employee's attainment of pension benefit rights." DeWitt v. Penn-Del Directory Corp., 106 F.3d 514, 523 (3d Cir. 1997)(citing Gavalik v. Cont'l Can Co., 812 F.2d 834, 852 (3d. Cir.), *cert. denied*, 484 U.S. 979 (1987)). "[O]nce a plaintiff makes a prima facie showing, the employer has the burden of articulating a legitimate non-discriminatory reason for his conduct. Then, the burden shifts back to the plaintiff to show that the employer's rationale was pre-textual and that the cancellation of benefits was the 'determinative influence' on the employer's actions." Id. (citing DiFederico v. Rolm Co., 201 F.3d 200, 205 (3d Cir. 2000)).

In moving for summary judgment, the Defendant argues that the only evidence that Plaintiff has proffered to support the theory that Defendant terminated Plaintiff for the purpose of interfering with ERISA benefits is the timing of his termination. The Plaintiff contends in the Amended Complaint that he was not, in fact, terminated until the arbitrator upheld the decision to terminate him on October 17, 2002. See Amended Complaint, at ¶ 77. Thus, argues the Plaintiff, he was eligible for the EISP and the Defendant's failure to notify him of the offer is the true violation of ERISA.

The Plaintiff has provided no support for the proposition that the date of the arbitrator's decision was the termination date. There is no evidence that such a provision was included in the collective bargaining agreement and we have been unable to find caselaw to support such a conclusion. Moreover, at his deposition, the Plaintiff admitted that his employment was terminated on November 19, 2002. (Tobler Dep., at 17-18).

The Plaintiff also argues that the Defendant mislead him regarding his termination and he should not be punished because he relied on his employer's misrepresentations to his detriment. According to the Plaintiff, both Mike McNally, the union representative, and Don Babnew, the vice president of the local union, told him that a third level foreman, Hud Manion, was going to bring him back to Verizon after the first of the year (2002). (Tobler Dep., at 20). At his deposition, Mr. Manion denied that he was going to bring Tobler back to work and denied ever making such a statement. (Manion Dep., at 27). Although this presents an issue of fact, we do not believe that Mr. Manion's statement, if it occurred, is actually material to determination of the ERISA claim.

If Plaintiff's eligibility for the EISP was contingent upon only his timely application for the benefit, the delay caused by such a misstatement might be material. However, the record in this case is uncontradicted as to the Defendant's position that Plaintiff was not eligible for the benefit because he was not on the "active payroll" on December 29, 2001, the date specified in the EISP.

In other words, even if Tobler had made a timely application for the benefit, he would have still failed to meet one of the conditions precedent for receipt of the benefit – being on the active payroll on December 29, 2001. While the Court finds it a bit puzzling that a benefit, obviously designed to encourage retirement, would contain a provision requiring one to stay on the payroll until a date certain, our job is not to rewrite the employer's plan language. All of the evidence before us, including the deposition of Helen Hanson, the Verizon human resources official produced by the company for the deposition, and the actual language of the plan supports the Defendant's position that the termination benefit required an employee to be on the active payroll on December 29, 2001. See Hanson Dep., at 13, 19, 21, 22, 24-26, 40; Verizon Income Security Plan, § 2.3.1; Verizon Human Resources Letter, 11/19/01, ¶ 1; Questions and Answers for ISP/EISP Offer, at 6Q.

Having disposed of Plaintiff's arguments that Verizon's failure to notify him of the EISP constituted the violation of ERISA, we return our focus to the real issue in this case: whether the Plaintiff's termination was motivated by Defendant's desire to render Tobler ineligible for the EISP, i.e. that its stated reason (drugs on the job) was pretextual.

The Defendant first argues that any argument regarding the Defendant's motivation in firing Mr. Tobler is barred by collateral estoppel because the issue was arbitrated. The Plaintiff

responds, however, by pointing out that the issue of Mr. Tobler's eligibility for the EISP was never presented to the arbitrator. Thus, argues the Plaintiff, collateral estoppel is inapplicable. We agree. In order for a prior adjudication/arbitration to have preclusive effect, the following requirements must be met: (1) the issue decided in the prior adjudication must be identical with the one presented in the later action; (2) there must have been a final judgment on the merits; (3) the party against whom collateral estoppel is asserted must have been a party or in privity with the party to the prior adjudication; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question in the prior adjudication. Witkowski v. Welch, 173 F.3d 192, 199 (3d Cir. 1999)(citing Bortz v. Workmen's Compensation Appeal Bd., 546 Pa. 77, 81-82, 683 A.2d 259, 261 (1996)).

We find that estoppel is inappropriate in this case for two reasons. First, the issue decided by the arbitrator, although related to the current claim for ERISA benefits, is not identical. Review of the arbitrators' decision reveals that, although the arbitrators found that Mr. Tobler's termination "was for proper cause," Plaintiff's eligibility for the EISP was not an issue in the arbitration.

In addition, we believe there remains some question whether Plaintiff's representation by the union at the arbitration may undermine the Defendant's argument that he had a full and fair opportunity to litigate the issue. In Seborowski v. Pittsburgh Press Co., 188 F.3d 163 (3d Cir. 1999), in distinguishing the facts of a Supreme Court case upon which the Plaintiff relied, the Third Circuit questioned the applicability of collateral estoppel when the party against whom it is asserted was represented by the union at the arbitration.

> The facts of *McDonald* [*v. City of West Branch*, 466 U.S. 284 (1984)], however, are readily distinguishable from those here. There, the plaintiff was represented by

> the union before the arbitrator; thus, the union's lack of vigorous advocacy on the plaintiff's behalf prevented that plaintiff from having the opportunity to fully and fairly litigate his § 1983 claim. Here, by contrast, the Union did not appear on behalf of Appellants before the arbitrator. Rather, Appellants themselves appeared, represented by counsel, and the Union was an adversary. The Union's actions therefore cannot be held to have affected Appellants' ability to present their case before the arbitrator.

Seborowski, at 171. Because Tobler was represented by the union at the arbitration and the issue of his eligibility for the EISP was not considered in that proceeding, we do not believe collateral estoppel is appropriate in this instance.

In arguing that the Defendant's purpose in terminating Mr. Tobler was to interfere with his attainment of the EISP, the Plaintiff relies heavily on the timing of his termination – the day the EISP offer was sent out. Although it has been said that "timing is everything," such is not the case in ERISA.

> [W]here the only evidence that an employer specifically intends to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence sufficient to separate that intent from the myriad of other possible reasons for which an employer might have discharged him.

DeWitt, at 523. Thus, timing, alone, is not sufficient to establish the Defendant's motivation.

In the factual section of the Plaintiff's Response to the present motion, the Plaintiff raises the issue of pretext, presenting three arguments to support his position that the reason given for his termination was pretextual: (1) the company gave differing reasons for Tobler's termination; (2) he was not given the opportunity to participate in an Employee Assistance Program, (EAP); and (3) he was treated differently than two similarly situated employees. In addition, the Plaintiff argues that the savings of $66,000 supports a finding of pretext. We do not find that any of these arguments is strong enough to meet the Plaintiff's burden of establishing pretext.

In order to "discredit the employer's articulated reason" the Plaintiff must "point to weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could find them unworthy of credence, and hence infer that the proffered nondiscriminatory reason did not actually motivate the employer's action." Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644 (3d Cir. 1998). We do not find that the Plaintiff's allegations could cause a reasonable factfinder to question the legitimacy of Verizon's stated reason for firing Plaintiff.

First, the Plaintiff contends that the company gave differing reasons for Plaintiff's termination at different times. Looking at the specifics of the Plaintiff's argument, it is easily rejected. "Over the course of the grievance procedures Defendant offered several different, and inconsistent, reasons for Plaintiff's termination at various times, including an allegation that Plaintiff lied to his superior, used a company vehicle while purchasing a controlled substance, and purchased a controlled substance while on duty." (Response, at 4). What the Plaintiff fails to acknowledge is that all of these infractions actually occurred and all of them arose from the same incident -- that of November 15, 2001. Mr. Tobler (1) purchased cocaine in a company vehicle, (2) did so on company time,[3] and (3) left an untrue message for his supervisor, asking for a vacation day because he had witnessed a shooting. Communications Workers of America, Local 13000 v. Verizon, AAA Case No. 14 0388 02 (Arbitration Decision, Dec. 9, 2002) at 5, 7.

The company's Code of Business Conduct, as quoted at length in the arbitration decision, specifically states that the employees "are prohibited from possessing alcohol, illegal drugs, or

[3]Plaintiff later argued that he was actually on his lunch break at the time he purchased the cocaine.

controlled substances in company vehicles." Local 13000, at 9-10. The fact that the Defendant referred to all of the infractions arising from Plaintiff's actions on November 15, 2001 is not sufficient to raise an inference of pretext.

The Plaintiff also argues that the company's failure to allow Plaintiff to participate in the EAP, rather than immediately terminating him supports his argument. We disagree. It is clear from the company's policies that the company encourages the employees to seek help with alcohol or drug addition. However, merely because the company established programs to help employees with problems should not tie the employer's hands in disciplinary proceedings when the rules of conduct are broken.

The company's Alcohol and Controlled Substance Testing Policy, also quoted at length in the arbitration decision, provides for an Employee Assistance Program "to encourage individuals with alcohol and/or substance abuse problems or other personal difficulties to seek help." Local 13000, at 10. However, the policy goes on to state that "[a]lthough an employee's rehabilitation effort will be strongly supported, participation in EAP or other rehabilitation efforts will not serve as protection against a normal disciplinary process associated with job performance and behavior." Local 13000, at 11. Adherence to the stated policy of the company does not establish that the company acted to interfere with Tobler's attainment of the EISP, nor does it give rise to an inference of pretext.

Although adherence to a stated policy will not support a discriminatory intent, inconsistent adherence to a policy could. In his statement of facts, the Plaintiff mentions that Verizon had referred other similarly situated employees to the EAP, rather than terminating their employment. If Plaintiff provided specific evidence to support this assertion, we might have

found that he had produced enough evidence of pretext to let the case go forward. However, no such supporting evidence is provided.

In his deposition testimony, Mr. Tobler stated that he knew one employee in the mid-1980's who had been arrested for purchasing drugs and offered rehabilitation. (Tobler Dep., at 116). The arbitrators discussed two individuals who had been arrested for purchasing drugs on the job. Local 13000, at 6. However, the arbitrators found that these individuals were not "similarly situated" to the Plaintiff because both of these incidents occurred prior to the implementation of the current Drug and Alcohol Policy.

> Two incidents occurring approximately ten years before the incident resulting in the grievant's termination do not constitute a binding precedent sufficient to raise an issue of disparate treatment. This is especially true where both incidents occurred prior to the implementation of the current Drug and Alcohol Policy.

Local 13000, at 11-12. The arbitrators went on to observe that the current Drug and Alcohol Policy "makes discipline mandatory instead of discretionary and emphasizes disciplinary consequences rather than rehabilitative aspects." Local 13000, at 12 (citing CWA v. Bell Atlantic, Case No. AAA 14 300 00284 98 J (1999)).

In responding to the Defendant's Motion, the Plaintiff merely states that "similarly situated" employees had been referred to the Employee Assistance Program. However, he fails to proffer any fact as to why these employees are "similarly situated." Indeed, Tobler has not even given us their names. We are left to assume that he is referring to the same individuals mentioned at the arbitration. For the reasons previously discussed, however, we do not believe they are "similarly situated." Their terminations would not permit a reasonable factfinder to conclude that the reason for Plaintiff's termination was pretextual.

Finally, the Defendant argues that Tobler's $66,000 is "hardly substantial enough to be viewed as a 'motivating factor,' especially since Verizon is a multi-billion dollar company." See Defendant's Motion, at 20. The Plaintiff, relying on a similar case from the Eastern District of Virginia, Smith v. Logan, 363 F.Supp.2d 804 (E.D. Va. 2004), argues that the additional benefit, while not having a significant impact on the Defendant, as a whole, could have a significant impact on the bonuses received by Tobler's direct supervisors.

After reviewing the Smith case, the reply by the Defendant, and the relevant cases from our Circuit, we conclude that the additional payout of $66,000 in the present case is not sufficient to allow a reasonable factfinder to conclude that Defendant acted with the specific intent to interfere with Plaintiff's eligibility for the EISP.

The Plaintiff in Smith was an employee of Verizon Virginia. When she was turned down for an enhanced benefit similar to that at issue in this case, she brought suit in state court. Following removal to federal court by the defendant, the District Judge faced a motion to remand by plaintiff, who argued that she was not making an ERISA claim, but was simply bringing a tort action against her supervisor. In rejecting this argument, the District Judge noted that a claim under § 510 of ERISA did exist. In his discussion of the facts, the Honorable James R. Spencer noted that the budgets of the workgroups were directly affected by the number of people who chose the enhanced retirement plan and the supervisor's bonus was directly affected by their workgroups' budgets. Relying on Judge Spencer's observation, the Plaintiff in our case argues that, although the loss of $66,000 may seem minimal to Verizon, as a whole, the individual supervisors had a substantial interest in eliminating Tobler's eligibility for the payout.

Unfortunately for Mr. Tobler, the facts in Smith are materially different from the facts in this case. In response to Mr. Tobler's argument, Verizon has included the uncontested certification of the Director of Labor Relations of Verizon-Pa. Maryanne Crompton explains that, unlike the plan in Virginia, the EISP offered in Pennsylvania did not affect the budgets of the workgroups. Thus, Smith is simply inapposite.

3. Breach of Fiduciary Duty

In his third claim, the Plaintiff alleges a breach of fiduciary duty under ERISA based on the Defendant's refusing Plaintiff the opportunity to participate in the EISP and failing to inform him of the EISP. Again, the problem with the Plaintiff's argument is that he has overlooked the fact that, regardless of Verizon's failure to send him the EISP paperwork, he was not eligible for the EISP because he was not on the active payroll on December 29, 2001. Moreover, to the extent Plaintiff alleges that he was wrongfully terminated to deprive him of the opportunity to participate in the EISP, we have already determined that the Plaintiff has failed to support this argument with sufficient evidence to allow the case to go forward.

4. Common Law Claims

Finally, the Plaintiff has advanced several common law theories for his entitlement to the EISP benefit. The Defendant has moved for dismissal of the "common law" claims, asserting that ERISA preempts such state law claims. The Plaintiff counters that the claims are actually federal common law claims. Before addressing the claims, we note the development and existence of federal common law designed to fill the gaps left by ERISA. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)); see also Van Orman v. Am. Ins. Co., 680 F.2d 301, 312 (3d Cir. 1982)(quoting

United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973)) (Congress intended to permit federal courts to develop common law – "to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress."). That being said, however, Plaintiff's "common law claims" provide no basis for relief in this case.

All of the "common law claims" again focus on the company's failure to inform Mr. Tobler about the EISP. In Count Five, Plaintiff asserts negligent misrepresentation on the part of the Defendant because Verizon never informed him of his eligibility for the EISP. In Count Six, he brings a claim for estoppel, which requires a material misrepresentation; reasonable and detrimental reliance; and extraordinary circumstances. Fisher v. Philadelphia Elec. Co., 96 F.3d 1533, 1543 (3d Cir. 1996). Count Seven raises a claim of fraud based on the same alleged misrepresentations.[4] In Count Eight, Plaintiff asserts a claim for bad faith.[5] Counts Nine and Ten are contract-based, alleging tortious interference and breach, again premised on the company's failure to inform him of the EISP.

As previously discussed, any alleged misrepresentation cited by the Plaintiff is simply immaterial to his eligibility for participation in the EISP. Participation in the EISP was not contingent merely upon applying for the benefit, as the Plaintiff would have us believe. Rather, the employee had to have been on the active payroll on December 29, 2001, to participate in the

[4]The Third Circuit recognized a common law claim for fraud with regard to pension plans in Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters and Employers Pension Fund, 847 F.3d 113, 115 (3d Cir. 1988).

[5]We find absolutely no support for the existence of a federal common law claim for bad faith. Because we believe § 510 adequately addresses Plaintiff's claim for benefits and provides a basis for relief if the facts warranted such, we find no need to create a federal common law claim for bad faith.

EISP. (Hanson Dep., at 25-26; Verizon Human Resources Enhanced Income Security Plan; Questions and Answers for ISP/EISP Offer, 6Q). Since Tobler was never eligible for the EISP, the company's failure to inform him of the benefit is immaterial.

An appropriate Order follows.

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

JAMES TOBLER	:	CIVIL ACTION
	:	
v.	:	
	:	
VERIZON, PA INC.	:	NO. 04-5708

O R D E R

AND NOW, this 13th day of July , 2005, upon consideration of the Defendant's Motion to Dismiss, or in the alternative Motion for Summary Judgment, the response, thereto, the Defendant's Reply, the accompanying exhibits, and for the reasons stated in the accompanying Memorandum, IT IS HEREBY ORDERED that the Defendant's Motion, construed as one for Summary Judgment, is GRANTED. Judgment is entered in favor of the Defendant and against the Plaintiff.

BY THE COURT:

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JACOB P. HART
UNITED STATES MAGISTRATE JUDGE