

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

BARRY SHOENBERGER,)	
)	Civil Action
Plaintiff)	No. 04-CV-03766
)	
vs.)	
)	
AGERE SYSTEMS, INC.,)	
)	
Defendant)	

V E R D I C T¹

NOW, this 28th day of September, 2007, upon consideration of the non-jury trial held April 16, 17, 18, 19, 20, 23 and 24, 2007; after closing arguments; upon consideration of the testimony and evidence adduced at trial; upon consideration of the pleadings and record papers; upon consideration of the parties' pre-trial submissions; and for the reasons expressed in the accompanying Adjudication, including Findings of Fact, Conclusions of Law, and Discussion:

The undersigned finds in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger, on

¹ On April 20, 2007, after trial without jury conducted April 16, 17, 18, 19 and 20, 2007, I issued a Partial Verdict in favor of defendants Lucent Technologies, Inc., Kevin Pennington, Patricia Ann Schuster and Edgar Lee Tanner, Jr. I found in favor of these defendants and against plaintiff on plaintiff's claims alleging violations of section 404 of ERISA, 29 U.S.C. § 1104, regarding Lucent's Voluntary Retirement Program and the Lucent Retirement Income Plan. The section 404 was the sole claim asserted against defendant Lucent Technologies, Inc. Accordingly, defendant Lucent Technologies was dismissed from the action as a result of the Partial Verdict.

By Order dated April 23, 2007, I granted the oral Motion for Judgment as Matter of Law of behalf of individual defendants Kevin Pennington, Patricia Ann Schuster and Edgar Lee Tanner, Jr. made April 20, 2007. Accordingly, defendants Pennington, Schuster and Tanner have all be dismissed from this action.

plaintiff's Section 510 claim, 29 U.S.C. §1140, for pension benefits under the Agere Systems Inc. Represented Pension Plan and related Enhanced Facility Closing Program.

The undersigned finds in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger, on plaintiff's Section 510 claim, 29 U.S.C. §1140, for pension benefits under the Agere Systems Inc. Pension Plan for management employees and related Agere Force Management Program.

Finally, the undersigned finds in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger on plaintiff's claim for reimbursement of costs and attorney fees pursuant to 29 U.S.C. § 1132(g).

IT IS FURTHER ORDERED that judgment is granted in favor defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger on all remaining claims..

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger.

IT IS FURTHER ORDERED that all parties shall have until October 19, 2007 to submit petitions for counsel fees and costs regarding any claim for reimbursement pursuant to 29 U.S.C. § 1132(g).

IT IS FURTHER ORDERED that the Clerk of Court shall mark this matter closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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

BARRY SHOENBERGER,)	
)	Civil Action
Plaintiff)	No. 04-CV-03766
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vs.)	
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AGERE SYSTEMS, INC.,)	
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Defendant)	

* * *

APPEARANCES:

RAYMOND G. BUSH, ESQUIRE
On behalf of Plaintiff

RACHEL A. O'DRISCOLL, ESQUIRE
ROBERT W. CAMERON, ESQUIRE
On behalf of Defendant

* * *

JAMES KNOLL GARDNER,
United States District Judge

A D J U D I C A T I O N

This matter is before the court after trial without jury held April 16, 17, 18, 19, 20, 23 and 24, 2007. Closing arguments were conducted on April 24, 2007. The remaining issues before the court include plaintiff's entitlement to benefits pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA")² under the Agere Systems Inc. Represented Pension Plan and related Enhanced Facility Closing Program, and the Agere

² 29 U.S.C. §§ 1001-1461.

Systems Inc. Pension Plan for management employees and related Agere Force Management Program.

At trial, ten witnesses testified. Plaintiff Barry B. Shoenberger testified on his own behalf. In addition, plaintiff called as witnesses Edgar L. Tanner, Jr., Dinh Tran, Dino Sinatore, Patricia A. Schuster, Kevin Pennington, Dr. Joseph Cesanek and Gregory A. Boyle. Defendants called Paul J. Bento and Nanci Mulzet. Plaintiff introduced 55 exhibits and defendant introduced 21 exhibits into evidence at trial.

I find in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger, on plaintiff's section 510 claim, 29 U.S.C. §1140, for pension benefits under the Agere Systems Inc. Represented Pension Plan and related Enhanced Facility Closing Program.

I find in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger, on plaintiff's section 510 claim, 29 U.S.C. §1140, for pension benefits under the Agere Systems Inc. Pension Plan for management employees and related Agere Force Management Program.

Finally, all parties in the within action shall have until October 19, 2007 to submit petitions for counsel fees and costs regarding any claim for reimbursement pursuant to 29 U.S.C. § 1132(g).

FINDINGS OF FACT

Based upon the testimony and evidence adduced at trial,³ the stipulations of the parties, the agreements of counsel, the pleadings, record papers and the parties' pre-trial submissions, including stipulated and proposed findings of fact and conclusions of law and briefs, I make the following Findings of Fact.

Lucent and Agere

1. Lucent Technologies Inc. ("Lucent") was the former telecommunications systems group of AT&T.
2. Lucent is a publicly-traded company that designs and delivers networks for the world's largest communications service providers.
3. In August 2000 Lucent announced it planned to form Agere Systems, Inc. ("Agere").
4. Agere was incorporated as a separate wholly-owned subsidiary in August 2000.
5. Agere identifies itself as a global leader in semiconductors for storage, wireless data, and public and enterprise networks.
6. At time it was formed, Agere was comprised of facilities, employees, assets and liabilities from Lucent's former Microelectronics Division.
7. On February 1, 2001, Agere entered into a Separation and Distribution Agreement with Lucent pursuant to which Agere operationally separated from Lucent and assumed the

³ My Findings of Fact reflect my determinations of credibility regarding the testimony and evidence presented at trial. Credibility determinations are within the sole province of the finder of fact, in this case the court. Fed.R.Civ.P. 52. See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739, 745 (1986). Implicit in these findings is the conclusion that I found the testimony of witnesses credible in part, and have rejected portions of each of their testimony as more fully explained in my discussion.

former Microelectronics Division's assets, liabilities, operations and employees.⁴ This process was referred to as the Agere spinoff.

8. On February 1, 2001, employees of Lucent's Microelectronics division ceased being employees of Lucent.

9. Agere's initial public stock offering ("IPO") occurred on March 28, 2001.

10. Agere remained a majority-owned, but separate, publicly held subsidiary of Lucent until June 3, 2002, when Lucent fully completed Agere's spinoff by distributing shares of Agere's stock it then owned to Lucent's shareholders.

11. Pursuant to the Employee Benefits Agreements between Lucent and Agere, the first dated February 1, 2001, and the second, amended and restated as of May 31, 2002, Agere employees who had formerly been employed by Lucent continued to participate in Lucent's pension plans until the spinoff was fully completed on June 3, 2002.⁵

12. When the spinoff of Agere was fully completed on June 3, 2002, certain benefits of Agere employees under Lucent's pension plans, including pension benefits, were transferred to Agere's pension plans. This transfer included time credits for vesting purposes.

Plaintiff's Employment

13. Plaintiff Barry B. Shoenberger is a former management employee of defendant Agere Systems, Inc.

14. Plaintiff was hired in 1973 by Western Electric Company and was a member of the International Brotherhood of Electric Workers ("IBEW") Local 1522 until he was laid off in the early 1980s.

15. Plaintiff was rehired in 1984 by Western Electric Company and was a member of IBEW Local 1560 until 1985.

16. In 1985, plaintiff resigned from his union position and accepted a position with AT&T Bell Labs as a non-

⁴ See Defendants' Exhibit 51.

⁵ Defendants' Exhibits 57 and 58.

union supervisor in the MOS-V operations at the Allentown, Pennsylvania facility.

17. Plaintiff was employed in a non-union supervisor position in the MOS-V operations at the Allentown, Pennsylvania facility until his termination from Agere on January 1, 2004.

18. However, plaintiff became an employee of the Microelectronics Division of Lucent Technologies, Inc. when AT&T spun off its telecommunications group into Lucent.

19. On February 2, 2001, plaintiff became an employee of Agere Systems, Inc. as a result of the spinoff of Agere from Lucent.⁶

20. Beginning February 2, 2001, plaintiff's paychecks stated that he was being paid by Agere.

21. Plaintiff's federal IRS W-2 forms from 2001 and 2002 designate plaintiff's employer as Agere.

22. Agere offered its employees two applicable ERISA pension plans, the Agere Systems Inc. Represented Pension Plan ("Agere Represented Plan") and the Agere Systems Inc. Pension Plan for management employees ("Agere Management Plan").⁷

23. When the Agere spinoff from Lucent was fully completed on June 3, 2002, plaintiff's accumulated pension benefits from the Lucent Retirement Income Plan were transferred into the Agere Management Plan, including for vesting purposes.

24. Thus, from June 3, 2002 until January 1, 2004, plaintiff was a participant in the Agere Management Plan and plaintiff's pension rights had vested.

⁶ On April 20, 2007, on the fifth day of a seven-day trial without jury, I entered a Partial Verdict (Document 56) in favor of defendants Agere Systems, Inc.; Lucent Technologies, Inc.; Kevin Pennington; Patricia Ann Schuster; and Edgar Lee Tanner, Jr. I found in favor of these defendants and against plaintiff on plaintiff's claims alleging violations of section 404 of ERISA, 29 U.S.C. § 1104, regarding Lucent's Voluntary Retirement Program and the Lucent Retirement Income Plan.

In that Partial Verdict I found that plaintiff failed to sustain his burden of proof by a fair preponderance of the evidence that he was an employee of defendant Lucent Technologies, Inc. any time on or after February 2, 2001. Accordingly, that factual finding is established for the purpose of the within Adjudication.

⁷ Plaintiff's Exhibits 14 and 39.

Force Management Program and Plaintiff's Termination

25. On August 14, 2002, Agere notified its Allentown employees that by December 2003 Agere's workforce would be downsized by 4,000 employees.⁸

26. Plaintiff was also notified that the facility in which he worked (MOS-V) would be shut down by December 2003.⁹

27. Certain employees whose employment was selected to be eliminated received the Agere Force Management Program ("FMP").¹⁰

28. The FMP provided benefits to employees who were terminated under certain circumstances, including a reduction in force.¹¹

29. The FMP sets forth a specific process for identifying individuals who will be "Retained" or placed "At Risk."¹²

30. On October 2, 2004, plaintiff was placed "At Risk" pursuant to the FMP with a November 30, 2004 off-role date.¹³

31. Plaintiff was on a leave of absence pursuant to the Family and Medical Leave Act ("FMLA") from September 24, 2003 to November 3, 2003.

32. Plaintiff received his FMP notification package between September 24, 2003 and November 3, 2003 while on his authorized FMLA leave of absence.¹⁴

33. Plaintiff admitted that he received an FMP notification package.

⁸ Defendants' Exhibit 13.

⁹ Defendants' Exhibit 12 and 13.

¹⁰ Defendants' Exhibits 23 and 60.

¹¹ Plaintiff's Exhibit 44.

¹² Plaintiff's Exhibit 41.

¹³ See Defendants' Exhibits 23 and 41.

¹⁴ Defendants' Exhibits 23.

34. Because Plaintiff was on an FMLA leave of absence when he received his FMP notification, his off-roll date was changed to January 1, 2004 after he received the FMP package.

35. Plaintiff was not compelled to prematurely return to work from his FMLA leave of absence.¹⁵

36. Plaintiff applied for a number of positions within Agere in an effort to continue his employment, but he did not receive a position at Agere.¹⁶

37. Plaintiff identified three individuals who filled positions at Agere who did not have his level of supervisory experience, but does not know the specific qualifications they possess or the requirements for the positions which they filled.¹⁷

38. After receiving his notice of termination, plaintiff applied for educational leave in June 2003, but Agere denied his request.¹⁸

39. Agere did not grant anyone an educational leave of absence after Agere's August 14, 2002 closing announcement.¹⁹

40. Plaintiff's employment with Agere ended on January 1, 2004.

41. In plaintiff's pre-trial deposition, he testified "there was good possibility" that he could be terminated because Agere "was downsizing."²⁰

¹⁵ Plaintiff's Exhibits 103, 104, 105, 106, 107, 108 and 110.

¹⁶ Notes of Testimony of the non-jury trial held before the undersigned ("N.T.") on April 18, 2007 at 32-36.

¹⁷ N.T. April 18, 2007 at 32-36.

¹⁸ N.T. April 18, 2007 at 36-37.

¹⁹ N.T. April 18, 2007 at 37.

²⁰ See stipulated Findings of Fact and Conclusions of Law filed March 20, 2007 at Stipulation 46, quoting deposition of Barry Shoenberger, November 9, 2006, at 151.

Agere Management Plan

42. The Agere Management Plan provides a Service Pension and a Deferred Vested Pension.

43. Agere Management Plan participants could retire with a full Service Pension under this plan when they were at least 50 years of age and their net service credit was 15 years or more.²¹

44. Under the terms of the Agere Management Plan, if an Agere employee is involuntarily terminated from the active payroll under the provisions of Agere's Force Management Program and he is within one year of the age (50) and/or service requirements (15 years) for a Service Pension, the Agere Management Plan allows him to attain the Service Pension requirements by requesting a Transitional Leave of Absence ("TLA").²²

45. The relevant provisions of the TLA provide that the TLA begins on the day after the eligible employee is terminated under a force management program and ends on the earlier of the first anniversary of that date or the date he attains the required age and/or net credited service to become eligible for a Service Pension.²³

46. On January 1, 2004, plaintiff was 48 years old (plaintiff was born June 12, 1955) and approximately six months away from being eligible for a full Service Pension under the Agere Management Plan.²⁴

47. On January 1, 2004, Agere believed that plaintiff was eligible for a Deferred Vested Pension under the Agere Management Plan.²⁵

²¹ Plaintiff's Exhibit 38.

²² Plaintiff's Exhibit 38.

²³ Plaintiff's Exhibit 38.

²⁴ Defendants' Exhibit 1 and Plaintiff's Exhibit 38.

²⁵ Defendants' Exhibit 34.

Agere Represented Plan

48. Agere's pension plan for bargaining unit employees is the Agere Represented Plan.²⁶

49. To be a "participant" in the Agere Represented Plan, an employee must be employed "in a bargaining unit represented by a union" that expressly provided for participation in the Agere Represented Plan.²⁷

Enhanced Facility Closing Program

50. On February 19, 2002, Agere and IBEW System Council EM-3 (on behalf of a number of local unions, including IBEW Local 1522) executed an agreement known as the "Enhanced Facility Closing Program" ("EFCP").²⁸

51. The EFCP provides in relevant part that if Agere notifies IBEW Local 1522 that it will be closing a facility, Agere will amend the Agere Represented Plan to provide a service credit of up to five years to enable bargaining unit employees who are within five years of pension eligibility to obtain full Service Pension eligibility.²⁹

52. Agere has offered EFCP benefits to eligible bargaining unit employees who were laid-off since the adoption of the EFCP.

53. In order to be eligible for the EFCP, an Agere employee must be in a collective bargaining unit.³⁰

54. The EFCP remained in effect, and Agere offered EFCP benefits to eligible IBEW Local 1522 bargaining unit employees who were laid-off through 2006.

²⁶ Plaintiff's Exhibit 14.

²⁷ Plaintiff's Exhibit 14.

²⁸ Defendants' Exhibit 59.

²⁹ Defendants' Exhibit 59.

³⁰ Plaintiff's Exhibits 30 and 32.

Return-to-Unit Policy

55. Prior to August 14, 2002, Agere had a policy under which management employees who were formerly in the bargaining unit could request to be returned to the bargaining unit.³¹

56. The return-to-unit policy gave Agere the right to return management employees to the bargaining unit. The decision to return an employee to the bargaining unit was at the sole discretion of Agere.³²

57. Agere permitted management employees to return to collective bargaining units when there were available positions.

58. Effective with the facility closing announcement on August 14, 2002, Agere decided that it would no longer permit managers to return to the bargaining unit.³³

59. Agere's decision to discontinue the return-to-unit policy was based on the fact that there were no vacancies in the bargaining unit as a result of its choice to cease operations at its facility.³⁴

60. On August 15, 2002, Agere communicated to IBEW Local 1522 that effective August 14, 2002, Agere would not return any management employees back into bargaining unit positions.³⁵

61. Written confirmation of Agere's decision to end the return-to-unit policy effective August 14, 2002 was sent to the President of IBEW Local 1522 on October 10, 2002.³⁶

62. No management employees were returned to the unit after August 14, 2002.³⁷

³¹ N.T. April 16, 2007 at page 52

³² N.T. April 24, 2007 at page 34.

³³ Plaintiff's Exhibits 20, 23, 24 and 28.

³⁴ Plaintiff's Exhibits 25 and 28.

³⁵ N.T. April 24, 2007 at page 35.

³⁶ Plaintiff's Exhibit 28.

³⁷ N.T. April 16, 2007 at 52-55; see also Plaintiff's Exhibit 24.

63. After August 14, 2002, several management employees, including plaintiff, inquired about returning to the bargaining unit, but no employees were permitted to return.³⁸

64. On September 11, 2002, plaintiff's attorney sent a letter to representatives of Agere requesting that plaintiff be transferred from Agere management into the bargaining unit.³⁹

65. Plaintiff was never transferred back to a collective bargaining unit because plaintiff could not exercise the return-to-unit option after August 14, 2002.

CONCLUSIONS OF LAW

1. The Agere Management Plan is an ERISA plan within the meaning of 29 U.S.C. § 1003(a)(1).

2. The Agere Represented Plan is an ERISA plan within the meaning of 29 U.S.C. § 1003(a)(1).

3. Plaintiff was not an eligible plan participant in the Agere Represented Plan as defined by 29 U.S.C. § 1002(7), and therefore has no standing to assert a claim for benefits under the Agere Represented Plan. 29 U.S.C. § 1132(a).

4. Plaintiff has not shown by a preponderance of the evidence that Agere's discontinuation of the return to unit policy was implemented or applied to plaintiff with an intent to discriminate against him or for the purpose of interfering with his right to receive ERISA benefits under the Agere Represented Plan. See 29 U.S.C. § 1140.

5. Plaintiff was eligible for a Deferred Pension under the Agere Management Plan.

6. Plaintiff has not shown by a preponderance of the evidence that he was discharged from Agere or otherwise discriminated against by Agere because he was an ERISA beneficiary under the Agere Management Plan who was within six months of qualifying for a Service Pension. See 29 U.S.C. § 1140.

³⁸ Plaintiff's Exhibits 18, 19, 20, 22 and 124.

³⁹ Plaintiff's Exhibit 19.

DISCUSSION

Applicable Law

Under ERISA a beneficiary of a benefits plan may bring an action to recover benefits due to him under the plan.

29 U.S.C. § 1132(a)(1)(B). Plaintiff in the within action has asserted claims for interference with his protected rights to benefits pursuant to Section 510 of ERISA.

Section 510 provides in part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan,...or 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.

Section 510 was designed to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." Gavalik v. Continental Can Comapny, 812 F.2d 834, 851 (3d Cir. 1987). Thus, a "fundamental prerequisite to a Section 510 action is...that the employer-employee relationship...was changed in some discriminatory or wrongful way." Stout v. Case Bethlehem Steel Corporation, 957 F.Supp. 673, 694 (E.D.Pa. 1997) (citation omitted)(emphasis added).

Burden of Proof

To prove a prima facie Section 510 case, Plaintiff must prove more than just a loss of ERISA-protected benefits.

Sharp v. BW/IP International, Inc., 991 F.Supp. 451, 458 (E.D.Pa. 1998). A plaintiff must show that (1) an employer took specific actions (2) for the purpose of interfering (3) with an employee's attainment of pension benefit rights. Eichorn v. AT&T Corporation, 248 F.3d 131, 149 (3d Cir. 2001)(internal citations and quotations omitted).

Plaintiff has the burden of proving that defendant had the "specific intent" to violate ERISA section 510. DiFederico v. Rolm Company, 201 F.3d 200, 204-205 (3d Cir. 2000). Plaintiff must show that the defendant made a conscious decision to interfere with plaintiff's attainment of greater pension rights. DeWitt v. Penn-Del Directory Corporation, 106 F.3d 514, 522 (3d Cir. 1997).

Once a plaintiff makes a prima facie showing, the employer has the burden of articulating a legitimate non-discriminatory reason for its conduct. Gavalik v. Continental Can Company, 812 F.2d 834, 852 (3d Cir. 1987); Schwartz v. Independence Blue Cross, 299 F.Supp.2d 441, 446 (E.D.Pa. 2003). If the employer meets its burden, the plaintiff must then show that the employer's rationale was merely pretextual and that

cancellation of benefits was the determinative influence on the employer's actions. Eichorn, 248 F.3d at 149.

To satisfy its evidentiary burden of proving an ERISA violation, plaintiff must demonstrate more than a detrimental effect on his benefits. For example, the United States Court of Appeals for the Third Circuit has held that "[w]here the only evidence that an employer specifically intend 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 reasons which an employer might have discharged him." DeWitt, 106 F.3d at 523.

As a threshold matter, to be entitled to benefits under ERISA, a plaintiff must demonstrate that he is a "participant" in the plan under which he seeks benefits within the meaning of the ERISA statute. Schwartz v. Independence Blue Cross, 299 F.Supp.2d 441, 446 (E.D.Pa. 2003); 29 U.S.C. § 1132(a). ERISA defines the term "participant" to mean "any employee or former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7).

To establish participant status, a plaintiff must satisfy two requirements. First, plaintiff must be a common law employee; and second, the plaintiff must be, according to the language of the plan itself, eligible to receive a benefit under

the plan. Bauer v. Summit Bancorp, 325 F.3d 155, 160 (3d Cir. 2003). An individual who fails on either prong lacks standing to bring a claim for benefits established pursuant to ERISA. Id.

The United States Supreme Court has held that ERISA's definition of "employee" is completely circular. Therefore, the common law test for determining who qualifies as an employee under ERISA is utilized. Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318, 323-324, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581, 588-589 (1992).

Plaintiff's Agere Represented Plan Claim

Plaintiff's Section 510 claim for benefits under the Agere Represented Plan asserts that he was wrongfully prevented from transferring from his management position back to a position in the bargaining unit. Plaintiff avers that if he had been able to return to the bargaining unit, he would have been eligible for a full Service Pension under the Agere Represented as supplemented by the Enhanced Facility Closing Program.

Plaintiff contends that he, not Agere, possessed the right to invoke the return to the bargaining unit procedure. Plaintiff avers that the return-to-unit policy was retroactively terminated after plaintiff's attorney attempted to invoke the policy. Plaintiff further argues that Agere's refusal to return him to the bargaining unit amounts to an intentional interference with his pension benefits.

Thus, plaintiff claims that Agere terminated plaintiff's employment with the specific purpose of preventing him from claiming his right to return to the bargain unit and receive increased pension benefits. Moreover, plaintiff asserts that Agere's purported reasons for the refusal to return him to a bargaining unit are mere pretext.

As an initial matter, in opposition to plaintiff's argument, Agere contends that plaintiff does not have standing to assert a Section 510 claim. Agere argues that plaintiff was an ineligible non-bargaining unit employee with no entitlement to benefits. Because only participants may assert ERISA claims, Agere asserts that plaintiff lacks standing and the merits of plaintiff's claim need not be reached by the court.

Agere further argues that plaintiff's Section 510 claim fails on the merits. Agere avers that it, not plaintiff, possessed the right to return management employees to the bargaining unit. Agere asserts that it permissibly terminated the return-to-unit policy after it decided to engage in large-scale layoffs in its Allentown, Pennsylvania facility. Agere contends that as a result of its corporate strategy, effective August 14, 2002 it would no longer allow employees to return to bargaining unit positions because there would be no jobs remaining because of the layoffs. Agere argues that it

discontinued its policy without regard to plaintiff's eligibility for benefits.

In support of its argument that there was no pretext, Agere avers that no employees were returned to the bargaining unit after August 14, 2002, although several management employees made requests to do so. Moreover, Agere asserts that plaintiff did not request to be returned to a bargaining unit until one month after August 14, 2002.

Standing

I must first consider the threshold issue of standing. Applying ERISA's definition of "participant" as one who may be eligible for benefits, plaintiff could be a plan participant and have standing if he demonstrated that he was both a common law employee and was otherwise eligible for the plan. There is no dispute among the parties that plaintiff was a common law employee of Agere, and sufficient evidence of this fact was presented during the trial of this matter.

However, I find that plaintiff did not establish by a preponderance of the evidence that he was eligible for the Agere Represented Plan. Based on the evidence presented at trial, I concluded that Agere, not plaintiff, controlled the right of return to a unit, and that it was a discretionary policy.

Moreover, the terms of the Agere Represented Plan clearly condition benefit eligibility on being employed in the bargaining unit by Agere. There is no right to return specified in the plan itself. Thus, the return-to-unit policy was not a benefit or right which was part of the plan. Therefore, in order to be a plan participant, plaintiff would have to have first been transferred from his management position, which he was not.

Accordingly, plaintiff does not have standing pursuant to 29 U.S.C. § 1132(a). Notwithstanding this determination, I briefly consider the merits of plaintiff's claim for benefits under the Agere Management Plan.

Analysis

The facts adduced at trial demonstrate that plaintiff's Section 510 claim for benefits under the Agere Represented Plan must fail. Agere made a decision to terminate the return-to-unit policy. Although this may have arguably changed the employer-employee relationship, it did not do so in a discriminatory way. The evidence establishes that plaintiff was treated in the same way as all other management employees. No employee was permitted to return to the bargaining unit after the August 14, 2002 cut-off date.

The return-to-unit policy was discontinued by Agere because it had announced a large number of layoffs. The policy had been utilized to allow management employees to return to the

bargaining unit when there were available positions within the unit, not at times when many of the company's employees were being discharged.

The evidence demonstrates that Agere made a legitimate business decision to cease offering an internal transfer policy which no longer suited its business needs and applied that decision to all management employees simultaneously. It does not demonstrate a specific intent to deprive plaintiff of his ERISA benefits.

Even if I construed Agere's rationale as pretextual, plaintiff has failed to provide any evidence that the cancellation of ERISA benefits was the sole or primary motivation for Agere's decision to terminate the return-to-unit policy. Accordingly, plaintiff has failed to prove his claim pursuant to Section 510 for benefits under the Agere Represented Plan by a preponderance of the evidence.

Plaintiff's Agere Management Plan Claim

Plaintiff's Section 510 claim for benefits under the Agere Management Plan asserts that Agere terminated plaintiff's employment in a deliberate attempt to interfere with his rights to attain greater pension benefits. Plaintiff contends that if he had remained employed by Agere for an additional six months he would have been eligible for a Service Pension under the Agere Management Plan. Plaintiff avers that Agere's purported reasons

for denying plaintiff's attempts at extending his employment show both specific intent and pretext.

Plaintiff argues that he has presented evidence which demonstrates that he was singled out for disparate treatment relative to other Agere employees. First, Agere improperly called him back early from FMLA leave in order to terminate his employment. Second, Agere denied plaintiff's request for an educational leave of absence. Third, plaintiff applied for, but did not receive, positions for which he was qualified, while other less qualified individuals received offers of continued employment. Plaintiff contends that all of the foregoing acts indicate Agere's intention to interfere with his ability to accrue greater pension benefits.

Agere contends that plaintiff cannot establish a prima facie case, and even if he could, he cannot prove that Agere's legitimate, non-discriminatory reason for his termination was pretextual. Agere avers that it is undisputed that on August 14, 2002, it announced that by the end of December 2003 it would cease manufacturing at the Allentown facility where plaintiff worked and reduce its company-wide workforce by several thousand employees. Agere asserts that it was in conjunction with these company-wide layoffs that plaintiff's employment terminated, and plaintiff himself has acknowledged this fact.

Agere argues that plaintiff has no evidence of Agere's intent other than the fact that if plaintiff had been employed for an additional six months he would have accrued additional pension benefits. Agere asserts that this averment alone is insufficient as a matter of law to infer Agere's intent to interfere with plaintiff's attainment of greater pension benefits.

Even if plaintiff has met his initial burden, Agere contends that ending plaintiff's employment as part of a company-wide reduction in force is a legitimate, non-discriminatory reason, and that there is no evidence of pretext. Agere further argues that the sole inquiry is not on the ultimate wisdom of Agere's decision to end plaintiff's employment when it shut down the operations where plaintiff worked, but whether a desire to effect a large-scale reduction in force was the real reason for its behavior. Agere asserts that plaintiff has admitted that Agere was downsizing and has admitted receiving a FMP package in connection with a reduction-in-force program.

Many of plaintiff's factual assertions are not supported by the evidence introduced at trial, and are, concomitantly, contradicted by my factual findings. Plaintiff did not prove by a preponderance of the evidence that he was treated differently than others so as to deprive him of pension

benefits which would have accrued if he had been employed by Agere for an additional period of time.

Plaintiff did not demonstrate that he was compelled to return early from FMLA leave. Plaintiff's own doctor testified that he was unfamiliar with many of the forms setting the time period in which plaintiff would return. Furthermore, the evidence at trial established that no employees were given educational leave of absences after layoffs were announced.

Plaintiff did not prove that he applied for positions for which he was qualified and was discriminated against because they would result in him accruing increased benefits. Plaintiff admitted that he was unfamiliar with the qualifications of the applicants who were applying. Moreover, plaintiff admitted that he did not apply for certain jobs for which he earlier contended that he was qualified.

Plaintiff has not demonstrated by a preponderance of the evidence that he was singled out by Agere in any way. To the contrary, the evidence indicates that the adverse employment actions plaintiff faced were part of a large scale reduction in force.

Plaintiff has not demonstrated by a preponderance of the evidence that Agere had specific intent to interfere with the attainment on his benefits. The only items of evidence plaintiff had presented against Agere are the detrimental effects on his

ERISA benefits caused by Agere's corporate policies, including ending the return-to-unit policy and not approving educational leave of absence requests after Agere decided to reduce its personnel.

Thus, plaintiff has not satisfied his burden of proof to demonstrate either that Agere acted with the specific intent to deprive plaintiff of benefits, or to show that the reason for plaintiff's discharge was pretextual. Accordingly, plaintiff has failed to prove by a preponderance of the evidence his claim pursuant to Section 510 for benefits under the Agere Management Plan.

Counsel Fees and Costs

ERISA does not require an award of attorney's fees to a prevailing party. Section 502(g)(1) provides that "[i]n any action...by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Thus, attorney's fees are a discretionary matter for the court.

Martorana v. Board. of Trustees of Steamfitters Local Union 420 Health, Welfare, & Pension Fund, 404 F.3d 797, 804-805 (3d Cir. 2005).

In determining whether to grant attorney's fees and costs in ERISA cases, courts consider the following five factors: (1) culpability or bad faith; (2) ability to satisfy an award of

attorneys' fees; (3) deterrent effect of an award; (4) benefit conferred on pension plan members as a whole; and (5) relative merits of parties' positions. Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983).

The parties in this action (including the four dismissed defendants) have not submitted briefs on the issue of counsel fees and costs. The award of counsel fees and costs in the ERISA context is a fact-sensitive inquiry that should only be undertaken after each party has an opportunity to persuade the court whether an award is appropriate.

Accordingly, the parties shall have until October 19, 2007 to file petitions for counsel fees and costs pursuant to 29 U.S.C. § 1132(g).

CONCLUSION

For all the foregoing reasons, I find in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger, on plaintiff's section 510 claim, 29 U.S.C. §1140, for pension benefits under the Agere Systems Inc. Represented Pension Plan and related Enhanced Facility Closing Program.

I find in favor of defendant Agere Systems, Inc. and against plaintiff Barry B. Shoenberger, on plaintiff's section 510 claim, 29 U.S.C. §1140, for pension benefits under the Agere Systems Inc. Pension Plan for management employees and related Agere Force Management Program.

Finally, all parties in the within action shall have until October 19, 2007 to submit petitions for counsel fees and costs regarding any claim for reimbursement pursuant to 29 U.S.C. § 1132(g).