

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PAUL E. DALL,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 97-48-P-C
)	
THE CHINET COMPANY, et al.,)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

The defendants in this action move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the plaintiff's complaint, which seeks damages and other relief under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the analogous provisions of the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* For the reasons that follow, I recommend that the motion be granted in part and denied in part.

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to

allegations in the complaint; the court may not consider factual allegations, arguments, and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

I. Factual Background

The complaint makes the following assertions that are relevant to the pending motion: The plaintiff was an employee of defendant The Chinet Company (“Chinet”) or its corporate predecessor, Keyes Fibre Company, in Waterville, Maine from 1966 to 1994. Complaint (Docket No. 1) at ¶ 4. The other defendants are The Chinet Company Salaried Employees’ Retirement Plan (the “Retirement Plan”) and the Group Insurance for Employees of The Chinet Company (the “Health Plan”), both employee benefit plans within the meaning of ERISA. *Id.* at ¶ 5-7. At all relevant times, Chinet was the plan administrator of, and the plaintiff a participant in, both plans. *Id.* at ¶¶ 5, 8.

Under the Retirement Plan, a Chinet employee with at least 15 years of service could receive certain early retirement benefits at age 55 upon giving Chinet 30 days’ notice. *Id.* at ¶ 9. Additionally, in 1993, Chinet announced a program whereby employees opting for such early retirement would receive additional “gap” payments, apparently to make up for the fact that retirees are not entitled to Social Security benefits until age 62. *Id.* at ¶¶ 10, 18.

The plaintiff wrote to his employer’s personnel department in March 1993 to request an opportunity to examine the Retirement Plan documents. *Id.* at ¶ 11. In response, he received a plan document with an effective date of January 1, 1987, disclosing no amendments after that date. *Id.* at ¶ 12. Chinet published a brochure on or about April 22, 1993 summarizing changes to the Retirement and Medical plans effective on June 1, 1993. *Id.* at ¶ 13. The plaintiff submitted two

written requests in May 1993 to examine the amendments to the Retirement Plan occasioned by the changes announced in April. *Id.* at ¶ 15. An official of Chinet replied that letters distributed to the plaintiff and other employees in April comprised “a summary of material modifications for substantive plan changes.” *Id.* at ¶ 16.

In February 1994, Chinet notified the plaintiff and certain other employees that they would be laid off. *Id.* at ¶ 17. At that point, the plaintiff was 52 years old with approximately 28 years of service to his employer. *Id.* at ¶ 19. The plaintiff learned that employees who were subject to the 1994 layoff, but were 55 years of age with 15 years of service as of December 1994, would receive early retirement benefits, including the “gap payments” until age 62 and lifetime major medical coverage. *Id.* at ¶ 18. As a result of his age, the plaintiff was ineligible for the early retirement benefits. *Id.* at ¶ 19. Instead, he received only a “six-month medical payment”¹ and one week of pay for each year of credited service with the employer. *Id.*

It was not until April 1995 that Chinet furnished the plaintiff with a copy of the Retirement Plan document, which indicated that the Retirement Plan had been amended in 1992 to provide for a limited voluntary early retirement program at Chinet’s Waterville plant. *Id.* at ¶ 27. The document also disclosed amendments to the Retirement Plan made in 1993 relative to the voluntary retirement program announced that year and in 1994 related to the “downsizing” that took place then. *Id.*

II. The Age Discrimination Claims

The defendants request dismissal of the ADEA claims (Counts I and III), contending that the only discrimination alleged by the plaintiff is reverse discrimination, not enjoined by the ADEA, and

¹ I take this to mean the plaintiff received six months of employer-paid health insurance.

that the benefits program at issue in this litigation is a bona fide employee benefit plan explicitly protected by certain safe-harbor provisions of ERISA. I agree with the former proposition.

This court has previously held that the ADEA does not protect plaintiffs who claim they suffered discrimination because they were too young. *Parker v. Wakelin*, 882 F.Supp. 1131, 1140 (D. Me. 1995). The plaintiff does not disagree with the principle laid out in *Parker*, but contends it is inapplicable. According to the plaintiff, his are not claims of reverse age discrimination but rather rest on the theory that the defendants violated the ADA and the amendments to it contained in the Older Workers Benefit Protection Act (“OWBPA”), 104 Stat. 978 (1990), by illegally “us[ing] pension eligibility as a proxy for age with regard to eligibility for lifetime health benefits” and imposing “an illegal age requirement for eligibility for pension benefits.” Plaintiff’s Response to Defendants’ Motion to Dismiss (Docket No. 4) at 5. According to the plaintiff, OWBPA makes it absolutely illegal to use age as a factor in any sense for determining eligibility for pension benefits.

Prior to enactment of OWBPA, the ADEA contained a provision explicitly providing that it is not illegal for an employer “to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA].” 29 U.S.C.A. § 623(f)(2) (1985). Construing this provision, the Supreme Court held in 1989 that

when an employee seeks to challenge a benefit plan as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation.

Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 181 (1989). Congress thereafter enacted OWBPA to supercede the Supreme Court’s holding in the *Betts* case. OWBPA at § 101.

Specifically, Congress sought to “restore” the original legislative intent, “which was to prohibit discrimination *against older workers* in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.” *Id.* (emphasis added). Thus, as amended by OWBPA, section 623(f) of the ADEA now provides that an employee benefit plan may not “require or permit the involuntary retirement of any individual [who is at least 40 years of age], because of the age of such individual,” and that the burden is on the employer to prove it is observing the terms of a bona fide employee benefit plan that is “consistent with the relevant purpose or purposes of [the ADEA].” 29 U.S.C. § 623(f), as amended by OWBPA § 103. Having clarified the ADEA in light of *Betts*, Congress did nothing in OWBPA to alter the fundamental principle that it is only illegal under federal law to discriminate based on age as opposed to youth.

Because the plaintiff’s ADEA claims seek only to vindicate allegations of reverse age discrimination, which are not protected by the federal statute, it is not necessary to consider the defendants’ alternative position that they are otherwise in compliance with the ADEA’s safe-harbor provisions governing bona fide employee benefit plans.

The defendants seek dismissal of the plaintiff’s claims of age discrimination under the Maine Human Rights Act (Counts II and IV) on the grounds that they are time-barred and preempted by ERISA. A plaintiff is obligated to commence an action under the Human Rights Act “not more than 2 years after the act of unlawful discrimination complained of.” 5 M.R.S.A. § 4613(2)(C). The plaintiff commenced this litigation in February 1997, more than two years after the events in 1993 and 1994 described in his complaint. Nevertheless, he contends that his state-law claims are not time-barred because he only learned the extent of the defendants’ discriminatory acts in April 1995 when they provided him with complete plan documents. The plaintiff cites no authority for this

proposition, and research discloses that neither the Law Court nor the Maine Legislature have ever suggested that the limitation period in the Human Rights Act may be tolled in such circumstances. In an analogous case — involving a plaintiff’s claim that a defendant negligently failed to obtain insurance coverage — the Law Court refused to apply a “discovery” rule and determine that the cause of action accrued when the plaintiff learned of the absence of coverage, as opposed to the earlier date on which the coverage was needed but not available. *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 582 A.2d 978, 980 (Me. 1990). A discovery rule was inappropriate because there was nothing “inherently unknowable” about the wrong alleged. *Id.* (citation omitted). Even assuming that Maine law would apply a discovery rule to the limitation period in the Human Rights Act, the allegations in the complaint plainly reveal that the basic facts were not inherently unknowable by the plaintiff at the time of his discharge in 1994. Although Chinet did not furnish an up-to-date copy of the Retirement Plan document until 1995, the only reasonable inference is that the plaintiff knew at the time of his discharge that he would not receive certain benefits that other departing employees would receive because they had attained age 55.

Because I conclude that the plaintiff’s claims under the Maine Human Rights Act are time-barred, it is not necessary to address the defendants’ contention that these claims are preempted by ERISA.

III. The ERISA Claim

Count V of the plaintiff’s complaint alleges that the defendants violated section 104(b)(1) of ERISA, 29 U.S.C. § 1024(b)(1), and seeks civil penalties pursuant to section 502(c)(1) of the Act, 29 U.S.C. § 1132(c)(1). This civil penalty provision states in relevant part:

Any [ERISA plan] administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by [ERISA] to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1). Section 104(b)(1), in turn, requires the administrator of an ERISA plan to provide certain documents and information to participants. 29 U.S.C. § 1024(b)(1). Specifically, the provision requires the administrator to furnish a copy of the summary plan description to the participant within 90 days after the participant attains such status or, if later, within 120 days of the plan becoming subject to the ERISA reporting and disclosure requirements. *Id.* Section 104(b)(1) further requires the furnishing of an updated summary plan description every five years when amendments are made, and every ten years otherwise. *Id.* Finally, the provision requires that,

[i]f there is a modification or change described in section 1022(a)(1) of this title . . . , a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

Id. A separate provision — section 104(b)(4) — requires the administrator,

upon written request of any participant or beneficiary, [to] furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Id. at § 1024(b)(4). Although the complaint alleges a violation of the automatic disclosure provisions of section 104(b)(1), the plaintiff plainly intends to claim a violation of the upon-request provisions of section 104(b)(4) and, consistent with the concept of notice pleading, I so construe his complaint.

The defendants contend they are entitled to dismissal of the ERISA claim because they read the complaint as alleging not a failure to provide documents to the plaintiff on a timely basis but rather a failure to draft plan documents that themselves met ERISA's requirements. According to the defendants, such a transgression is not among those covered by section 502(c)(1) of the statute. The complaint states that the failure to disclose giving rise to the ERISA claim "occurred on April 23, 1993, and continued until April 6, 1995 when the Defendant Plan complied with the requirement to disclose." Complaint at ¶ 45. According to the defendants, assuming the allegations in the complaint to be true, they may have furnished inaccurate information in April 1993 — i.e., a Retirement Plan document dating from 1987 that did not reflect changes made to the plan subsequently — but nevertheless complied fully with any disclosure requirements.

The civil penalty provision of ERISA section 502(c) "is in the nature of punitive damages designed more to punish the intransigent administrator and to teach ERISA fiduciaries a needed lesson than to compensate the [plan participant] for actual loss." *Mohalley v. Kendall Health Care Prods. Co.*, 903 F. Supp. 1530, 1539 (M.D.Ga. 1995) (citation omitted). In my view, it would reward rather than punish intransigence to conclude that a plan administrator may avoid these civil penalties by providing inaccurate and/or out-of-date plan documents rather than simply ignoring the participant's request for information altogether. The defendants cite no cases for such a proposition, my own research discloses none, and I believe it would be improvident to conclude that Congress so intended. Although, as the defendants point out, ERISA provides a remedy for those who rely to their detriment on plan documents, *see generally Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 522-23 (1st Cir. 1988), the lack of any prejudice to the participant is merely a relevant factor — as opposed to a bar to recovery — when a plaintiff seeks penalties under section 502(c),

Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 588 (1st Cir. 1993); *Mohalley*, 903 F.Supp. at 1539 (citation omitted). The plaintiff states a valid claim for violation of ERISA.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss the complaint be **GRANTED IN PART AND DENIED IN PART** as follows: granted as to Counts I and III (ADEA claims) and Counts II and IV (Maine Human Rights Act claims), and denied as to Count V (ERISA claim).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 6th day of August, 1997.

David M. Cohen
United States Magistrate Judge