

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Williams W. Adams of Millinocket)	
County of Penobscot, et al.,)	
all of the State of Maine,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 00-12-B
)	
)	
Bowater Incorporated; and Bowater)	
Incorporated Pension Plan for Certain)	
Employees Of Great Northern Paper, Inc.;)	
and DOES 1 THROUGH 20, all doing)	
business in the State of Maine)	
)	
)	
Defendants)	

Recommended Decision on Defendants’ Motion for Summary Judgment and Plaintiffs’ Motion for Summary Judgment

Presently before me for recommended decision are Defendants' Motion for Summary Judgment (Docket No.7) and Plaintiffs' Motion for Summary Judgment (Docket No. 13). Both motions seek judgment as a matter of law on whether Defendants violated section 204(g) of the Employment Retirement and Income Security Act (ERISA), codified at 29 U.S.C. § 1054(g). Plaintiffs' specific allegation is that Defendants violated section 204(g) by enacting a plan amendment that eliminated Plaintiffs' rights to receive accrued early retirement benefits. For reasons explained below, I recommend that the Court GRANT Defendants' Motion for Summary Judgment and DISMISS Count I as MOOT and DENY Plaintiffs' Motion for Summary Judgment.

Summary Judgment Standard

Summary judgment is appropriate only 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). Here, however, Plaintiffs did not file an opposing statement of material facts as required by the local rule. *See* Loc. R. 56 (b). ("A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts.") As required by the local rule I will accept Defendants' statement of material facts as true. *See* Loc. R. 56 (e). ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly converted.").

Facts

Plaintiffs, retirees and employees of Great Northern Paper (GNP), bring this suit alleging that prior to the sale of GNP, Bowater violated ERISA by enacting an amendment to the GNP pension plan that prevented GNP employees from "growing into" their early retirement benefits after September 1, 1999. 29 U.S.C. § 1054(g)(1). Before reciting the facts that led to this suit, it is important to understand the contents of the pension plan at issue.

Under the pension plan, GNP employees could chose three options for early retirement. Declaration of Aaron Whitlock, ¶ 3, Exhibit A. First, the plan provided early retirement for those employees that reached age fifty-five and had thirty years of service at GNP (55/30 pension). Once age sixty, the pension plan provided those 55/30 employees the same retirement benefits they would have received had they been 65. *Id.* Further, those employees who retired between the ages of fifty-five and fifty-nine would receive a four percent reduction for each year their retirement date preceded their sixtieth birthday. *Id.*

Second, the plan offered early retirement benefits to those employees who reached age fifty-five and completed fifteen years of service with GNP (55/15 pension). Under the plan, those employees received a pension reduced by five to six percent a year from the date of the employee's sixty-fifth birthday. *Id.*

Third, the plan provided early retirement to those employees who reached age sixty and completed thirty years of service (optional retirement). This optional retirement offered enhancements to retire by providing additional monthly payments above the pension the employee was entitled to under the plan. *Id.*

In the summer of 1999 Bowater announced that in connection with the sale of Great Northern Paper (GNP) the name of the pension plan for GNP employees would be changed to Bowater Incorporated Pension Plan for Certain Employees Of Great Northern Paper (hereinafter referred to as "the Plan"). Defendants' Statement of Material Facts ¶ 5. Bowater then amended the Plan to state the following: "Participants shall not receive additional credit for Continuous Service on account of employment with the Employer

[i.e. GNP] . . . from and after the Closing Date." Defendants' Statement of Material Facts

¶ 6. On August 17, 1999, Bowater sold its subsidiary, Great Northern Paper (GNP).

Beginning in the fall of 1999 Plaintiffs' counsel contacted Defendants' counsel about the impact the amendment would have on current GNP employees. Defendants' Statement of Material Facts ¶ 7. Specifically, Plaintiffs asked for information on whether the amendment would prevent certain retirees from "growing into" their early retirement benefits. During their discussion Plaintiffs' counsel made clear to Defendants' counsel that, in the Plaintiffs' view, the amendment violated ERISA by preventing GNP employees from growing into their early retirement benefits. Defendants' Statement of Material Facts ¶ 13.

On January 6, 2000, Plaintiffs sent the Plan's counsel a letter asking for written assurance that certain GNP employees would be allowed to "age into" early retirement. Defendants' Statement of Material Facts ¶ 16. Plaintiffs received a January 22, 2000 letter from the Plan's counsel stating that the Plan Administrator will treat their requests for information as "claims for benefits under the Plan." Defendants' Statement of Material Fact ¶ 18.

In a letter dated January 26, 2000, Plaintiffs responded to Defendants' decision to treat Plaintiffs' request for information as a claim for benefits under the Plan. Plaintiffs stated "[m]y requests for information are NOT claims" and withdrew their requests for information. Defendants' Statement of Material Fact ¶ 20. The parties subsequently wrote each other letters detailing their legal opinions regarding the legality of the amendment. Defendants' Statement of Material Facts ¶¶ 23-25. On March 7, 2000, the Plan Administrator issued an administrative determination regarding the amendment.

After outlining the requests made, and subsequently withdrawn by Plaintiffs, the Plan Administrator determined that:

[T]he Plan, as amended, does not limit the GNP service credited toward early retirement eligibility or to be used to determine the early commencement reduction factors. Thus, as long as a participant is employed by Great Northern Paper, Inc., his or her employment will continue to count for purposes of determining (1) whether he or she is eligible for early or optional retirement and (2) his or her applicable early commencement reduction factor.

Defendants' Statement of Material Facts ¶ 26. On April 25, 2000, Bowater amended the disputed section to permit plan participants to receive credit for their Continuous Service at GNP. Defendants' Statement of Material Facts ¶ 28. The 2000 amendment applies retroactively to August 1999. *Id.*

Analysis

Count I – Alleged Violation ERISA Section 204(g)

a. ERISA Section 204(g)(1)

In 1984 Congress amended ERISA by enacting the Retirement Equity Act (REA). *Williams v. Cordis Corp.*, 30 F.3d 1429, 1431 (11th Cir. 1994). The REA amended section 204(g) of ERISA to read:

- (g) Decrease of accrued benefits through amendment of plan
- (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment in section 1082(c)(8) or 1441 of this title.
- (2) For purposes of paragraph (1), a plan amendment which has the effect of –
 - (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined by regulation), or
 - (B) eliminating an optional form of benefit,with respect to benefits attributable to service before the amendment shall be treated as reducing the accrued benefit.

Section 204(g), recognized as the "anti-cutback" rule, bars employers from preventing employees from "growing into" their early retirement benefits. *Williams*, 30

F.3d at 1431. As two legal scholars wrote the REA provides that "a plan may not be amended to eliminate or reduce an early retirement benefit or a 'retirement-type' subsidy with respect to benefits attributable to service before the amendment." John H. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law* 142-43 (2d ed. 1995), *quoted in Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir. 1996).

Plaintiffs allege that Defendants' 1999 amendment violated the "anti-cutback" rule embodied in Section 204(g) by preventing employees from receiving credit for 'Continuous Service' at GNP after September 1, 1999. For example, in the Plaintiffs' point of view, the 1999 plan amendment would have prevented an employee at age fifty-two with twenty-seven years of service from ever growing into the 55/30 benefit under the plan. This practice, Plaintiffs argue, was the very thing Congress sought to prevent by amending section 204(g) in 1984.

b. Mootness

Defendants move for judgment as a matter of law on Count I of Plaintiffs' Complaint that the 1999 Plan amendment violated ERISA Section 204(g). Although Defendants dispute Plaintiffs' assertion that it violated Section 204(g) they argue that even if they did violate that section by enacting the 1999 amendment, that issue is now moot because Plaintiffs received the relief requested under the count, namely that Bowater amend the Plan to permit plan participants to grow into their early retirement benefits.

To determine whether this count is moot I must conclude "'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v.*

McCormack, 395 U.S. 486, 496 (1969)). An issue is moot when "(1) it can be said with reasonable assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (internal citations and quotations omitted).

Defendants have a heavy burden of demonstrating that "there is no reasonable expectation that the alleged violation will recur." *Nunez-Soto v. Alvarado*, 956 F.2d 1, 3 (1st Cir. 1992) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

i. Whether there is a reasonable expectation that the alleged violation will recur

Defendants argue that by enacting the April 25, 2000, amendment that permits GNP employees to "grow into" their benefits, there is no reasonable expectation that the alleged violation will recur. Plaintiffs argue that it cannot be said with reasonable assurance that the alleged violation will not recur. Plaintiffs point out that it took several months for Defendants to rescind the illegal amendment and that even today, Defendants argue that the amendment they rescinded was legal under ERISA. Plaintiffs also speculate that Defendants could enact an amendment in the future that "perhaps less obviously violates Section 204(g) of ERISA." Pls'. Response at p.8.

I find Plaintiffs' arguments unpersuasive. The fact that Defendants *may* amend the Plan that *may* less obviously violate Section 204(g) of ERISA is entirely too speculative to present a legally cognizable claim. *See Paciello v. UNUM Life Ins. Co.*, 188 F.R.D. 201, 204 (S.D.N.Y. 1999) ("Plaintiff's speculation that her benefits might be withdrawn in the future, and that she might then receive a defective denial of benefits letter, does not mean that she has a live case in controversy at this moment."). Further, I fail to see how Defendants amending the plan nine months after enacting the alleged

illegal amendment is proof that the alleged violation will recur. *See Bozych v. Hartford Fire Ins. Co.*, No. 85 C 9875, 1989 WL 27444 at *4 (N.D. Ill. Mar. 20, 1989) (finding the claim moot even though the defendant remedied the alleged violation two years after its initial denial and four days before the close of discovery).

ii. Whether Defendant has demonstrated that it has completely and irrevocably eradicated the effects of the 1999 amendment

Defendants argue that by enacting the 2000 amendment the alleged effects of the 1999 amendment have been completely and irrevocably eradicated. Plaintiffs contend that that is not true and point out that "no damages have been computed or paid in this case for the eight-month period during which the illegal amendment was in place." Pls' Response at p.8. In their Response, Plaintiffs do not specify what damages they contend they are entitled to under Count I. In their Reply to their Motion for Summary Judgment Plaintiffs mention that damages may exist for those Plaintiffs who wanted to retire immediately and could not because of the 1999 amendment. At the very least, Plaintiffs ask that they be permitted to conduct discovery on the issue. However, Plaintiffs do not explain how discovery would help them identify which Plaintiffs postponed retirement because of the 1999 amendment. Plaintiffs themselves have the information necessary to identify those Plaintiffs who were injured by Defendants. If certain named Plaintiffs were injured as Plaintiffs allege they could have easily identified which ones by the time the parties filed the dispositive motions now before me.¹

Plaintiffs next maintain that in addition to outstanding damages, the issue of whether Plaintiffs are entitled to attorney fees prevents their claim from being rendered

¹ In any event, even if Plaintiffs could identify certain Plaintiffs that postponed retirement because of the 1999 amendment, that claim sounds more in a breach of fiduciary claim as stated in Counts II and III than in Count I.

moot. As support, Plaintiffs cite one case, *Nunez-Soto v. Alvarado*, 956 F.2d 1, 3 (1st Cir. 1992). However, that case does not stand for the proposition that the need to determine if counsel is entitled to attorney fees is enough to preclude a conclusion that a claim is moot. In *Nunez-Soto*, the Court remanded the case and stated that if the plaintiff "is able to show by a preponderance of the evidence that her reinstatement was the result of her lawsuit" she would be entitled to attorney fees. *Id.* Nowhere in the decision did the Court state that a determination of whether a party is entitled to attorney fees precludes a court from finding an issue moot.

In fact, in ERISA cases, a determination of attorney fees can occur after the case was dismissed as moot or settled. *See Bozych*, 1989 WL 27444 at *4 (stating that "[a]n award of attorneys' fees is not necessarily precluded in this case simply because no judgment on the merits has been entered and the complaint is dismissed as moot."); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1017 (W.D.N.Y. 1990) (determining that the plaintiff was entitled to attorney fees after the entry of a settlement). This concept is not unique to ERISA litigation, but is commonly recognized when a party seeks attorney fees pursuant to a statutory provision. *See Young v. City of Chicago*, 202 F.3d 1000, 1001 (7th Cir. 2000) ("A defendant cannot defeat a plaintiff's right to attorney fees by taking steps to moot the case after the plaintiff has obtained the relief he sought, for in such a case mootness does not alter the plaintiff's status as a prevailing party."). Based on the cases cited above, and the absence of any authority to the contrary, I am satisfied that the unresolved issue of attorney fees does not preclude me from concluding that Plaintiffs' claim is moot.

Even though I am recommending that the Court find Count I moot, Plaintiffs may still recover attorney fees if they can demonstrate that they were the "prevailing party". *Bozych*, 1989 WL 27444 at *4. This is especially true when the company, as it appears here, adopts "a better late than never" attitude in correcting the alleged violation. I will note that I am not impressed by Defendants' claim that even if it committed a violation by enacting 1999 amendment it quickly corrected it by enacting the 2000 amendment. Defendants were put on notice by Plaintiffs' attorneys regarding the legality of the 1999 amendment and nevertheless enacted the amendment. While Defendants' decision to amend the plan as requested by Plaintiffs may be sufficient to moot Count I it does not minimize the efforts by Plaintiffs' counsel to ensure that a change to the Plan was made to allow workers to "grow into" their retirement benefits.

To recover attorney fees as the "prevailing party" Plaintiffs must prove that the section 204(g) claim was causally related or acted as a catalyst in obtaining the relief. *Id.* Therefore, in this case, Plaintiffs must prove that its action against Defendants was causally related or acted as a catalyst in Defendants' decision to enact the 2000 amendment.²

Plaintiffs last argue that even if the section 204(g) claim is now moot because of Defendants' decision to amend the plan, a determination of whether Defendants violated section 204(g) is needed because whether Defendants violated that section is interrelated with their fiduciary duty claims under Count II and III. However, whether Defendants breached their fiduciary duty is not before me now and, in any event, whether the Court will need to determine if the 1999 amendment violated section 204(g) depends on certain

² When the question of attorney fees is ripe for decision, there may be a need for limited discovery on whether Plaintiffs' claim was causally related to or acted as a catalyst in Defendants' decision but those matters are better left until the case is finally resolved.

events happening or not happening in the future. For example, Plaintiffs have yet to put forward named Plaintiffs who were injured as described under Counts II and III. If Plaintiffs never put forward a Plaintiff that was damaged as alleged under Count II and III the issue of whether the amendment violated section 204(g) will not have to be addressed. On the issue that is the subject of the dispositive motions now before me, whether Defendants' amendment violates section 204(g), Plaintiffs have received the relief they requested, namely that Defendants retroactively amend the plan and permit employees to "grow into" their retirement benefits.³

Conclusion

I recommend that the Court GRANT Defendants' Motion for Summary Judgment on Count I and DISMISS that claim as MOOT. This recommendation is based on my conclusion that Plaintiffs have received the requested relief under that claim and my conclusion that it can be said with reasonable assurance that there is no reasonable expectation that the alleged violation will recur, and that the 2000 amendment enacted by Defendants completely and irrevocably eradicated the effects of the alleged violation.

³ In their Response, Plaintiffs indicate that it does not "appear" that Bowater validly enacted the 2000 amendment. Pls' Response at p.7. Defendants' disagree and point out that they did properly amend the plan. Defendants' Statement of Material Facts ¶ 28. Having failed to file an opposing statement of material facts that properly controverts Defendants' assertion that the amendment was validly enacted, I must accept Defendants' representation as true. Loc. R. 56. I appreciate that Plaintiffs were confronted with a "moving target" and that Defendants did not amend the Plan until late in the briefing schedule. However, if they believed that discovery was necessary on that issue, they could have sought it pursuant to Fed R. Civ. P. 56(f).

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) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of 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.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 2nd day of August, 2000.

COMPLX

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-12

ADAMS, et al v. BOWATER INC, et al

Filed:

01/25/00

Assigned to: JUDGE GENE CARTER

Demand: \$0,000

Nature of Suit: 791

Lead Docket: None

Jurisdiction: Federal

Question

Dkt# in other court: None

Cause: 29:1001 E.R.I.S.A.: Employee Retirement

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DOES 1-20
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