

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

WILLIAM W. ADAMS, of	)	
Millinocket, County of	)	
Penobscot, et al., all of the	)	
State of Maine,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil No. 00-12-B-C
	)	
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**

Defendants, Bowater Incorporated (“Bowater”) and the Bowater Incorporated Pension Plan for Certain Employees of Great Northern Paper, Inc. (“the Plan”), have moved for summary judgment on Counts II and III of the Complaint. (Docket No. 40). In response, Plaintiffs have requested that the court defer ruling on the motion pending additional discovery and have filed a supporting affidavit pursuant to Rule 56(f). (Docket No. 56). Finding no reason to defer ruling pending further discovery, I recommend that the Court **DENY** the 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 that might affect the outcome of the suit under governing law.” Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co., Inc., 167 F.3d 1, 6 (1st Cir. 1999). “A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is ‘sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.’” De-Jesus-Adorno v. Browning Ferris Ind., 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting Nat’l Amusements v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995)). The Court views the record on summary judgment in the light most favorable to the nonmovant. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 50 (1st Cir. 2000). However, summary judgment is appropriate “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, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by “placing at least one material fact in dispute.” FDIC v. Anchor Props., 13 F.3d 27, 30 (1st Cir. 1994) (citing Darr v. Muratore, 8 F.3d 854, 859 (1st Cir. 1993)).

## Facts<sup>1</sup>

The Count II and III Plaintiffs are ten employee participants in the Plan, employed by Great Northern Paper, Inc. (“GNP”). Under the pension plan, GNP employees could choose among various options for early retirement. Defendants’ Statement of Material Facts at ¶ 28; Declaration of James T. Wright at ¶ 4, Exhibit B. Those three options are explained in greater detail in the Wright declaration, but essentially they consisted of what are referred to as the 55/15 Option, the 55/28 Option, the 55/29 Option, the 55/30 Option, and the 60/30 Option. In 1999 Bowater sold GNP and in connection with that sale announced a change in the name of the Plan and a decision to amend the Plan to eliminate certain of these benefits.

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 at ¶ 6. 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 at ¶ 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

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<sup>1</sup> The material facts are culled from the statements of fact submitted by both parties. The first twenty-eight paragraphs of Defendants’ statement are essentially identical to the facts established on the Count I motion and are stated in summary form in this decision. For a more thorough explication of the various early retirement options, see the earlier Recommended Decision (Docket No. 23). Although Plaintiffs have submitted voluminous additional “facts” (some of which are conclusory and not properly supported by record references), I have limited my discussion to those facts that directly bear on the issue of mootness, the sole issue raised by Defendants.

by preventing GNP employees from growing into their early retirement benefits.

Defendants' Statement of Material Facts at ¶ 23.

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 at ¶ 16. On March 7, 2000, the Plan

Administrator issued an administrative determination regarding the amendment. The

Plan Administrator determined,

[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 at ¶ 25. On April 25, 2000, Bowater amended the disputed section to confirm with the Plan Administrator's determination to permit

plan participants to receive credit for their Continuous Service at GNP. Defendants'

Statement of Material Facts at ¶ 27. The 2000 amendment applies retroactively to

August 1999. Id.

The Count II Plaintiffs, Cannon, McAlister, Melanson, and Trueworthy, applied for and received early retirement pension benefits under one of the options detailed in the Plan in approximately October 1999. Defendants' Statement of Material Facts at ¶ 29.

The Count III Plaintiffs, Boynton, Carter, Crawford, Farrar, Pennington, and Shepperd, Jr., elected to receive early retirement benefits under the 55/15 Option at approximately

the same time. Id. at ¶ 30. All Plaintiffs remain in the employ of GNP, having elected the lump sum benefit rather than monthly “retirement” payments.<sup>2</sup> Id.

In October, 2000, the Plaintiffs received a Notice regarding their right to supplemental distributions from the Plan should they continue in GNP’s employ. Defendants’ Statement of Material Facts at ¶ 31. According to Plaintiffs’ expert, this Notice of supplemental distributions, if actually implemented by the Plan, would undo completely the consequences of the August 1999 amendment and allow the Plaintiffs to receive full benefits under the Plan. Id. at ¶ 32. However, Plaintiffs’ expert is also of the opinion that

there are two further requisites to the assured fulfillment of Bowater’s proposals: a. The plan should be amended to clarify that its provisions are consistent with the proposals made in the October 2000 supplemental distribution notice. b. Steps should be taken to assure that pension plan trust assets are adequate to discharge the plan’s commitments.

Plaintiffs’ Response to Defendants’ Statement of Material Facts at ¶ 32. The Notice provided to Plaintiffs contained the following proviso: “This Notice summarizes provisions of the Plan. If the Notice conflicts with the terms of the Plan, the Plan controls.” Plaintiffs’ Response to Defendants’ Statement of Material Facts at ¶ 31.

The Plan’s actual terms provide that participants may “retire” under one of several options. (See Ex. 10, Plaintiffs’ Exhibits in Response to Defendants’ Motion for Summary Judgment on Counts II and III, Section 6, p. 26, Pension Plan for Certain Employees of Great Northern Paper, Inc.) The Plan itself does not speak in terms of supplemental distributions for those who have already received lump sum distributions from the Plan.

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<sup>2</sup> According to the parties the overwhelming majority of GNP “retirees” elect the lump sum payment rather than a monthly annuity. Thus although the participants “retire” after selecting one of these options, it is not uncommon for them to remain as GNP employees as all ten named Plaintiffs have chosen to do.

## Discussion

Defendants have moved for judgment on Counts II and III on a very limited issue, maintaining that the controversy is moot and that this Court's decision on Count I controls the outcome. At the time I entered my Recommended Decision on Count I (Docket No. 23), the First Amended Complaint requested the following relief in regard to Count I: (1) that the Court declare that Bowater had violated Section 204(g) of ERISA by amending the Plan in August, 1999; and (2) that the Court order Defendants to retroactively amend the Plan to allow Plaintiffs to "grow into" eligibility for the various optional retirement benefits. The Plan had already been retroactively amended at the time I issued my recommended decision and there was no logical reason for the Court to make a determination that Section 204(g) of ERISA had been violated in the absence of evidence that a fiduciary duty to particular Plaintiffs had been breached.

As I indicated in my earlier recommended decision, a claim is moot when "the issues present 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. (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)).

The relief sought by the 500, more or less, named Plaintiffs in Count I was quite specific, a retroactive amendment of the Plan. That objective had been accomplished and it was clear that events had completely eradicated the effects of any alleged violation as to those Plaintiffs. The only specter that the alleged violation would recur was a speculative assertion that the Plan might subsequently be re-amended at some future date. The relief sought by these ten Plaintiffs in Counts II and III is more complex in that they are seeking to undo the effects of the alleged prior violation. Each of these Plaintiffs has a “live” controversy because of the concern as to whether or not the Plan authorizes the sort of supplemental distribution described in the October 2000 notice they received.

The Important Notice Regarding Supplemental Distributions (See Ex. 4, Plaintiffs’ Exhibits in Response to Defendants’ Motion for Summary Judgment on Counts II and III) applies to “individuals who have already received lump sum distributions.” Its application might therefore be limited to those people who actually took a distribution during the period from August 1999 to March 2000.<sup>3</sup> On the other hand, there may be people working at GNP now who want to avail themselves of this opportunity and “retire” but continue their employment with an eye toward growing into a supplemental distribution at a later time. Apparently this option was never available to anyone under the Plan prior to this litigation. Assuming that the Notice was intended

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<sup>3</sup> Apparently Defendants take the position that the Supplemental Benefit Notice is applicable to all employees whether or not they are similarly situated to the Counts II and III Plaintiffs. In their Memorandum in Support of the Motion to Dismiss Count IV of the Second Amended Complaint, Section III, p. 9, Defendants indicate that pursuant to this Notice a current employee at age 55 with 25 years of Continuous Service could elect the 55/15 lump sum distribution, continue to work for GNP for five years and become eligible for greater benefits, the 60/30 Option. Obviously the employees who did so effective as of today’s date would not be similarly situated to Count II and III Plaintiffs because they would not be taking the lump sum payment in reliance upon the August 1999 plan amendment. They would elect the lump sum payment solely in reliance upon the supplemental distribution notice, which by its own terms would be of no effect if it were contrary to the plan’s terms. The uncertainties created by Defendants’ own argument provide Count II and III Plaintiffs with strong support for their contention that the notice of supplemental distribution may not provide them complete relief.

only for the benefit of the ten named Plaintiffs and others similarly situated, *i.e.*, people who have already received a lump sum distribution in reliance upon representations made about the allegedly illegal plan amendment, it appears to me that without a Plan amendment or a court order entitling them to this remedy those individuals face an uncertainty about their entitlement to future relief.

Any mootness analysis necessarily involves an examination of the relationship between the actual parties to the case in controversy. According to Count II of the Complaint those participants with 28 years of GNP service who were induced to apply for early retirement benefits received only 50% of their previously earned 55/30 pension option when they made the election in October 1999. Two years later, in October 2001, they apparently will cross the threshold and become eligible for the 55/30 pension option. Until they cross that threshold and actually receive their supplemental benefit, given the history of the case and nature of the controversy, I do not think that anyone can argue with a straight face that “events have completely and irrevocably eradicated the effects of the alleged violation.” If the August 1999 Amendment was a violation of § 204(g) and if these Plaintiffs did indeed take early retirement benefits because of misrepresentations Bowater made to them, they have suffered a substantial financial loss for which they have not yet been made whole. Accordingly, the case is not moot.

### **Conclusion**

Based upon the foregoing analysis, I recommend that the Court **DENY** the Motion for Summary Judgment as to Counts II and III.<sup>4</sup>

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<sup>4</sup> I have deliberately not discussed Plaintiffs’ Rule 56(f) affidavit and their request for further discovery in this decision as I believe it unnecessary to do so. I agree with Defendants’ analysis that the additional discovery is irrelevant to the issue of mootness.

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 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.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated May 11, 2001

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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BOWATER INC PENSION PLAN FOR DANIEL A. PILEGGI, ESQ.  
CERTAIN EMPLOYEES OF GREAT (See above)  
NORTHERN PAPER INC [COR LD NTC]  
defendant

DOES 1-20  
defendant