



bipolar disorder, anticipated that upon becoming eligible for LTD benefits following a six-month waiting period, this limitation might be applied to him. In February 1994 Campagna was informed by Fortis that his condition did appear to fall under the mental/nervous limitation and that benefits could be considered only for the two-year period. He was granted LTD benefits effective January 20, 1994. These payments ceased effective January 19, 1996.

In October 1995, the Equal Employment Opportunity Commission (“EEOC”) took jurisdiction over Campagna’s MHRC Complaint, leading to its filing in November 1997 of the instant action against both BIW and Fortis on behalf of Campagna and others similarly situated. The EEOC action targeted the mental/nervous disorder differentiation in the LTD policy, which the agency alleged violated Title I of the Americans with Disabilities Act (“ADA”). Campagna filed a separate action with this court in December 1997 against BIW and Fortis alleging discrimination in violation of the Maine Human Rights Act and Titles I and III of the ADA. His causes of action, like that of the EEOC, hinged upon the distinction in the LTD policy between mental/nervous and other disorders. Campagna subsequently moved to intervene in the EEOC case and to consolidate his case with that of the EEOC. That motion was granted, simultaneously with the granting of the defendants’ motion to dismiss Campagna’s individual Title I cause of action.

The operative scheduling order entered in the consolidated case required that pleadings be amended by June 18, 1998. Now pending is Campagna’s motion, filed on June 22, 1998, seeking leave to enlarge the time for amendment and to amend the consolidated complaint to add two new counts premised upon alleged violations of the Employment Retirement Income and Security Act (“ERISA”). Both defendants object. For the reasons that follow I recommend that Campagna’s request for leave to amend the complaint be granted.

## I. Applicable Legal Standards

Under Fed. R. Civ. P. 15(a), a party must seek leave of the court to amend a pleading after the deadline for the filing of such an amendment has expired or if the party already has amended its pleading once within the time allotted by the rule. Such leave “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Leave to amend should be granted in the absence of reasons “such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . .” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

## II. Discussion

The defendants argue that Campagna’s motion to amend falters on nearly every potential ground enumerated in *Foman*. Specifically, they contend, the motion is untimely, inexcusably delayed, will cause them undue prejudice and would import two futile causes of action into this case. Although I agree that Campagna’s excuses for delay are weak, I recommend that his motion be granted on the bases that the delay was *de minimis* and that his two new causes of action cannot, on the record presently before the court, be dismissed as futile. The defendants correctly perceive that the addition of the ERISA claims — which delve into the handling of Campagna’s LTD application — will impact the scope of discovery in this case. However, any resultant prejudice can be mitigated by an appropriate modification of the scheduling order.

The issue of the viability of the two new claims is central to the disposition of this motion. The defendants argue that each of Campagna’s proposed new counts is doomed to fail, on separate grounds.

The defendants first argue that with respect to proposed new Count IV (premised upon alleged misclassification of Campagna's condition as "mental/nervous" rather than physical), Campagna failed to exhaust his administrative remedies. In matters of contract interpretation, ERISA plaintiffs must exhaust available administrative remedies before resorting to court. *See, e.g., Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988). However, litigants are excused from doing so to the extent such remedies can be shown to have been inadequate or their exercise futile. *Id.* In the context of this motion, Campagna makes a compelling argument that he could not discern how to exercise such remedies as may have been available to him. His failure to avail himself of those remedies, hence, was excusable.

Information provided in BIW's Summary Plan Description ("SPD") is scant, at best. It does not state that any internal appeal is necessary prior to resort to court, that there is any deadline within which to invoke such an appeal, or that there is any particular process to follow in pursuing one. The section of the SPD dealing with LTD benefits is silent on the issue of internal appeal, discussing only the time limit within which an employee must bring a "legal action." *See* SPD, included in Exh. 7 to Defendant, Fortis Benefits', Objection to Plaintiff Anthony F. Campagna's Motion for Leave to File Amended Complaint with Incorporated Memorandum of Law ("SPD Exhibit") (Docket No. 17) at 30. The Statement of ERISA Rights at the back of the SPD contains one reference to an internal appeals process, stating in its entirety: "You have the right to have the Administrator review and reconsider your claim." SPD Exh. at 55. Confusingly, the Statement of ERISA Rights also proclaims: "If you have a claim for benefits that is denied or ignored, in whole or in part, you may file suit in a state or federal court." *Id.* There is no reconciliation or prioritization of the two avenues listed as available for redress, let alone a warning that an employee's rights might be

jeopardized by failure to invoke administrative review.

Two Fortis documents in the record are even less illuminating. Both the Fortis certificate of group insurance and the Fortis LTD policy are silent on the issue of administrative review of any sort by either Fortis or an employer. Both merely reference the time limit within which an employee may bring a claim in court. *See* Exh. B to Affidavit of Plaintiff Anthony F. Campagna (“Campagna Aff.”) (Docket No. 21) at 13; Exh. D to Campagna Aff. at 20.

Campagna received only two written communications from Fortis, dated February 22, 1994, and February 23, 1994, and none from BIW, concerning the disposition of his request for LTD benefits based on a physical condition. Campagna Aff. ¶¶ 13-15. Neither letter from Fortis enumerated reasons why, in Fortis’s view, Campagna’s primary disabling condition appeared to be “mental/nervous,” nor did either indicate that a final decision on that question had been reached or that Campagna possessed any right of internal appeal. *See* Exhs. G, H to Campagna Aff. To the contrary, Fortis suggested in its February 22nd letter that its inquiry into the nature of Campagna’s illness was ongoing, and that further information would be sought from his treating physician. Exh. G to Campagna Aff. Fortis did indeed write Campagna’s treating physicians for further information, to which the treating physicians responded. *See* Exhs. I, J to Campagna Aff. Campagna had no further written communication from Fortis. Campagna Aff. ¶ 15. These circumstances bolster Campagna’s contention that “I remain today unaware of what specific appeal steps I was offered as a plan participant . . . .” Campagna Aff. ¶ 19.

The SPD and Fortis notifications, taken as a whole, fall short of ERISA requirements, detailed in 29 C.F.R. §§ 2560.503-1(e) and (f), that claimants whose claims are wholly or partly denied be furnished written notice setting forth the “specific reason or reasons for the denial” and

“[a]ppropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.” They are, moreover, the type of sketchy notifications that have been found to excuse the exhaustion requirement. *See, e.g., McLean Hospital Corp. v. Lasher*, 819 F. Supp.110, 125 (D. Mass. 1993) (excusing exhaustion requirement in case in which denial letters lacked notice of review, appeal rights); *Ring v. Confederation Life Ins. Co.*, 751 F. Supp. 296, 297-98 (D. Mass. 1990) (excusing exhaustion requirement on similar facts).

Turning next to Count V, which alleges breach of fiduciary duty based upon mishandling of Campagna’s claim, the defendants argue that assertion of this new count would be futile because barred by the applicable statute of limitations. Per 29 U.S.C. § 1113(2), an ERISA claim of this nature must be filed, *inter alia*, within three years of the date that a plaintiff possesses “actual knowledge of the breach or violation.” “Actual knowledge,” for this purpose, equates to “a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim for breach of fiduciary duty or violation under ERISA.” *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 954 (5th Cir. 1995) (internal quotation marks and citation omitted). *See also Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987). The defendants assert that Campagna possessed such “actual knowledge” no later than February 1994, the date of the Fortis communications, and thus his suit was time-barred after February 1997. Because, however, neither defendant gave Campagna proper written notice of final action regarding his LTD request, I find that he could not have been in a position to have “actual knowledge” of the accrual of all elements of his claim until January 1996, when payment of his benefits stopped. His claim thus would be filed well within the three-year statute of limitations.

### III. Conclusion

For the foregoing reasons, I recommend that Campagna's motion for leave to amend be **GRANTED**. If my recommendation is accepted by the court, the Clerk's office shall promptly thereafter schedule a conference with counsel to consider necessary modifications to the scheduling order.

#### 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, 1998.*

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*David M. Cohen  
United States Magistrate Judge*