No. 06-12117-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MONSANTO COMPANY, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLANS COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, and PHARMACIA CORPORATION,

Appellants,

v.

WENDELL F. GILLEY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiff's opposition brief contains mistaken statements of law, unsupported accusations of misdeeds by defendants, and arguments about events unrelated to the issues before this Court – too many, in fact, to be addressed in this reply brief. For the most part, these are distractions. We clarify the following points to assist the Court in resolving this appeal: (1) no matter how plaintiff tries to spin it, the settled law of this Circuit is that a claim for benefits may not be dressed up as an equitable action to avoid the requirements of the Plan; and (2) nothing in ERISA or its regulations authorizes a court to substitute its own method for the accepted method of calculating vesting service that is detailed in the plan, as the district court did here. The Employee Benefits Committee thoughtfully considered Mr. Gilley's claim for benefits and applied the terms of the Plan, and the trial court was obligated to uphold the Committee's decision.

ARGUMENT

I. THE DISTRICT COURT'S JUDGMENT IGNORES THE LIMITATIONS OF RELIEF UNDER ERISA §502(A)(3).

A. Plaintiff Sought, And Was Awarded, Benefits That Are Not "Other Appropriate Equitable Relief."

Plaintiff's First Amended Complaint (Doc. 35, pp. 9-12) sought relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), but this section provides only "other appropriate equitable relief." It is not a substitute for a claim for benefits under

ERISA § 502(a)(1)(B). Plaintiff's claim is an attempt to dress a claim for benefits in the garb of equity and should be rejected under controlling Supreme Court and Circuit authority.

As the Supreme Court has observed, ERISA is a "comprehensive and reticulated statute" adopted after a decade of congressional study. Mertens v. Hewitt Assocs., 508 U.S. 248, 251, 113 S. Ct. 2063 (1993) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361, 100 S. Ct. 1723 (1980)). The Court has "therefore been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209, 122 S. Ct. 708 (2002) (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147, 105 S. Ct. 3085 (1985)).

Against this background, the Supreme Court has held that "other appropriate equitable relief" available under ERISA §502(a)(3) refers only to "those categories of relief that were *typically* available in equity." Mertens, 508 U.S. at 256. "'Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiffs are suits for 'money damages," as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" Great-West, 534 U.S. at 210 (quoting Bowen v. Massachusetts, 487

U.S. 879, 918-919 (1988) (Scalia, J., dissenting)). As the Court observed, "'[m]oney damages are, of course, the classic form of *legal* relief.'" Id. (quoting Mertens, [508 U.S.] at 255, 113 S. Ct. 2063). Thus, in Mertens, the Supreme Court rejected a claim that sought "nothing other than compensatory *damages*." 508 U.S. at 255-56. Likewise, Great-West rejected a claim "for a contractual obligation to pay money – relief that was not typically available in equity." 534 U.S. at 210.

Furthermore, where relief is provided under another of ERISA's remedial provisions, a remedy under §502(a)(3) is not an "appropriate" remedy. Thus, courts have consistently refused to allow claims under §502(a)(3) that are essentially claims for benefits under §502(a)(1)(B). See, e.g., Katz v. Comprehensive Plan of Group Ins., Alltel, 197 F.3d 1084 (11th Cir. 1999); Tolsen v. Avondale Indus., 141 F.3d 604 (5th Cir. 1998); Wald v. Southwestern Bell Corp. Customcare Med. Plan, 83 F.3d 1002 (8th Cir. 1996); Forsyth v. Humana Inc., 114 F.3d 1467 (9th Cir. 1997), *aff'd on other grounds*, 525 U.S. 299 (1999).

Plaintiff complains that he is caught in a "rundown play" between §502(a)(3) and §502(a)(1)(B) and that he is entitled to relief under §502(a)(3) because "no adequate remedy exists elsewhere in ERISA's statutory framework" (Plaintiff's Brief ("Plf's Br.") 20, 22). But this argument distorts the meaning of "adequate" remedy and has been rejected by this Court at least twice in cases

where the plaintiffs sought payment of benefits under §502(a)(3). In Katz v. Comprehensive Plan of Group Ins., 197 F.3d 1084, and Ogden v. Blue Bell Creameries U.S.A., Inc., 348 F.3d 1284 (11th Cir. 2003), this Court held that the plaintiff had no claim for benefits under §502(a)(3), because §502(a)(1)(B) provided an adequate remedy – even though the claim for benefits was unsuccessful (Katz) or barred by res judicata (Ogden). Whether a remedy is "adequate" is determined without regard for whether the plaintiff presents a winning claim for benefits.

Here, as in Mertens, plaintiff "dances around the word" but actually seeks compensatory damages in the form of pension payments. 508 U.S. at 255. The First Amended Complaint describes plaintiff's application for benefits and administrative appeal of the denial of his application and prays for "all benefits due under the terms of the plan" (Doc. 35, 7-8, 16). Plaintiff's brief on appeal again characterizes his demand as "claims for benefits under §502(a)(3)" and a "claim for benefits due under a plan" (Plf's Br. 20, 24). The judgment ordered defendants to "pay accrued benefits" and "continue to pay retirement benefits as they accrue" (Doc. 117). And the district court applied the "heightened arbitrary and capricious" standard of review, which governs claims for benefits under certain circumstances in this Circuit (Doc. 116 p.2). In short, plaintiff sought and was awarded "the classic form of *legal* relief."

In an attempt to skirt controlling precedent, plaintiff labels his demand as restitution in the form of a constructive trust or an equitable lien (Plf's Br. 24-25). Although equitable restitution is among the remedies available under §502(a)(3), that concept cannot be stretched so broadly as to cover this case. The Supreme Court's recent decision in Sereboff v. Mid Atlantic Medical Services, Inc., 126 S. Ct. 1869 (U.S. 2006), shows why this is so. In Sereboff, the Court allowed a claim for equitable restitution to proceed where "Mid Atlantic sought 'specifically identifiable' funds that were 'within the possession and control of the Sereboffs'" as a result of Mid Atlantic's application for an injunction to segregate and retain the funds and a resulting stipulation among the parties under which the Sereboffs agreed to preserve the funds in an investment account. Id. at 1873-74.

In contrast, the Court in Great-West held there was no restitutionary remedy under §502(a)(3), where the funds to which the plaintiff claimed entitlement had been placed in a Special Needs Trust under California law. Sereboff, 126 S. Ct. at 1874. For the same reason, equitable restitution is not available here. Plaintiff does not seek "specifically identifiable" funds but rather a lifetime stream of monthly pension payments from defendants' assets generally. Defendants Monsanto Company, Pharmacia Corporation, Employee Benefits Plans Committee and Monsanto Company Employee Benefits Executive Committee do not possess pension funds at all. As for the Plan, its assets are held in trust for all rightful

beneficiaries in the same way that the funds in Great-West were not subject to equitable restitution because they had been placed in a Special Needs Trust. (Def. Ex. 4 at §§1.1, 1.4, 13.3; Plf's Br. at 27 (acknowledging that Plan is funded by non-reversionary trust)).

Sereboff differs from this case in a second critical way. The plan fiduciary's action to recover medical expenses paid on behalf of the Sereboffs looks nothing like a claim for benefits. The Sereboffs were participants in Mrs. Sereboff's employer's health insurance plan. When the Sereboffs were injured in an automobile accident, the plan paid the couple's medical expenses. After the Sereboffs settled their tort claim against third parties, the plan's fiduciary sought to recover from the Sereboffs the medical expenses paid by the plan. The plan fiduciary's claim to enforce the plan's "Acts of Third Parties" provision is not covered by any other subpart of §502. For the plan fiduciary, it was §502(a)(3) or nothing. Gilley, on the other hand, faces no such problem. Because §502(a)(1)(B) fits his situation, relief under §502(a)(3) cannot be "appropriate."

Plaintiff's reliance on Jones v. American General Life & Accident Ins. Co., 370 F.3d 1065 (11th Cir. 2004), meets the same obstacle. In Jones, the plaintiffs were former employees of an insurer acquired by American General. They alleged that they had been promised company-paid life insurance in retirement. They sued after the plan was amended to eliminate free life insurance coverage and sought

restoration of company-paid insurance. On appeal, the plaintiffs claimed entitlement to relief under §502(a)(3) because their breach of fiduciary duty claim was based not on the withholding of a vested benefit but rather a systematic pattern of misrepresentation that caused them to believe their insurance would not be changed during their retirement. 370 F.3d at 1071. Relying on Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065 (1996), this Court explained that "other appropriate equitable relief" was not available under §502(a)(3) if "plaintiffs also had a cause of action, based on the same allegations, under Section 502(a)(1)(B) or ERISA's other more specific remedial provisions." 370 F.3d at 1073. In Varity Corp., the plaintiffs had been induced to leave their company pension plan and to join the plan of a spun-off subsidiary and, therefore, were no longer plan participants with standing to sue for benefits. 516 U.S. at 515. In Jones, the plaintiffs were not seeking payment of insurance benefits but rather company-paid premiums on insurance policies. In both cases, therefore, a claim for benefits under §502(a)(1)(B) was unavailing.

Unlike the plaintiffs in Varity Corp. and Jones, Gilley claims entitlement to pension benefit payments, and that is precisely what the district court awarded. If plaintiff's argument were accepted, a run-of-the-mill claim for benefits would be converted into a claim for injunctive relief to block enforcement of plan terms or for equitable restitution. The Supreme Court cautioned against this result in Varity

and urged that courts keep in mind the "special nature and purpose of employee benefit plans" and respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others" such that there is no need for further equitable relief where Congress provided for recovery elsewhere in ERISA. Varity Corp., 516 U.S. at 515 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 107 S. Ct. 1549 (1987)).

Plaintiff's cases from other circuits sustained claims based upon the participant's reliance on inaccurate information and are thus distinguishable on their facts. In Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440 (4th Cir. 2004), the plaintiff could elect to receive his severance payment in the form of a lifetime annuity or a lump sum. His employer informed him that the lump sum payment could be rolled over tax-free into an IRA or other qualified retirement account. When this information turned out to be wrong and taxes were withheld from his payment, the plaintiff sought rescission of his election of a lump sum option. Mathews v. Chevron Corp., 362 F.3d 1172 (9th Cir. 2004), concerned a failure to communicate an anticipated severance package to employees prior to their retirement. Mathews followed Varity in affirming an injunction that made the plaintiffs participants in the severance plan. Harte v. Bethlehem Steel Corp., 214 F.3d 446 (3d Cir. 2000), upheld a claim for breach of fiduciary duty based on the

plan administrator's alleged failure to communicate accurate information on break in service rules.

Each of these cases concerned inaccurate information that caused the plaintiff to place himself in a position where benefits were not available or would be severely taxed. The duty to communicate and reliance, however, played no role in the judgment entered below, which followed a trial on overtime hours in 1972 and which recalculated service under formulas the district court considered more favorable to Gilley.

B. Central Laborers' v. Heinz and the Anti-Cutback Provision of ERISA §204(g) Do Not Apply To Plaintiff's Claim for Vested Benefits.

Plaintiff argues that application of the 95-Hour Rule somehow violates ERISA and, therefore, the amendment of the Plan to add this equivalency must be invalidated.[1/] The gaping hole in this argument, and in the district court's analysis,

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1/ While irrelevant to the substance of this appeal, defendants are compelled to correct plaintiff's misstatement of the facts. Plaintiff asserts that the 95-Hour Rule was added to the Plan after employees at the Sand Mountain plant were on layoff status (Plf's Br. 21). Plaintiff elsewhere admits that the 95-Hour Rule was adopted in 1979 after final federal regulations on equivalencies were approved (Plf's Br. 7), and application of the equivalency to non-exempt employees was considered and endorsed by the Committee in September 1979 (Def. Ex. 5 pp. MON-01-003796-MON-01-003798). Plaintiff was not placed on lay-off until March 1981 (Doc. 101, p. 105:13-14). There is no dispute that plaintiff's benefits were not vested at the time the 95-Hour Rule was added to the Plan, and no dispute that the Committee's interpretation of the Plan was adopted long before contemplation of plaintiff's lay-off.

is that they fail to identify any violation of ERISA or its regulations. Plaintiff relies on Central Laborers' Pension Fund v. Heinz, 541 U.S. 739, 124 S. Ct. 2230 (2004), and the anti-cutback rule of ERISA §204(g), but both concern *accrual* – not vesting – of benefits and therefore have no application to the present case.

In Heinz, the Supreme Court held that ERISA's rule against reduction of accrued benefits was violated by a plan amendment that expanded the types of post-retirement employment that would trigger the suspension of pension benefits. As Heinz explains, accrual and vesting are distinct concepts: "§204(g) belongs to the section of ERISA that sets forth requirements for benefit accrual (the rate at which an employee earns benefits to put in his pension account), see 29 U.S.C. §1054, whereas §203(a)(3)(B) is in the section that regulates vesting (the process by which an employee's already-accrued pension account becomes irrevocably his property), see 29 U.S.C. §1053." 541 U.S. at 749. ERISA §204 protects *accrued* benefits – that is, the amount of a participant's benefit – while plaintiff's allegations involve *vesting* – that is, whether a participant has earned entitlement to a benefit at all. See Hoover v. Cumberland, Md. Area Teamsters Pension Fund, 756 F.2d 977, 983 (3d Cir. 1985) ("Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable").

Heinz likewise does not support plaintiff's attempt to invoke §502(a)(3) by characterizing his claim as one seeking equitable relief in the form of an order invalidating the 95-Hour Rule Plan amendment (Plf's Br. 24). First, Heinz does not state which subsection of ERISA §502 forms the basis of the class plaintiffs' claims and says nothing about the limits of relief available under §502(a)(3). Second, Heinz addresses a plan amendment that expanded the forms of disqualifying employment and therefore equally affected all participants. The amendment itself was found to violate ERISA's anti-cutback rule. Here, in contrast, plaintiff has identified no statutory violation (apart from the frivolous argument regarding §204(g)). His complaint is not that the 95-Hour Rule violates ERISA, but rather that application of the 95-Hour Rule to his particular circumstances results in a different calculation of his vesting service. Properly viewed, plaintiff's claim is exposed as nothing more than a claim for benefits under §502(a)(1)(B).[2/] As further explained in defendant's opening brief and in the following section, the 95-Hour Rule is authorized by ERISA regulations and the terms of the Plan. The ERISA regulations expressly approve the use of equivalencies, including the 95-Hour Rule, to calculate service prior to ERISA's effective date on January 1, 1976.

2/ This is certainly how the district court viewed it (Doc. 116 at 2 ("The court finds and concludes that the defendants' denial of plaintiff's retirement benefits is to be reviewed under a 'heightened arbitrary and capricious' standard. . .")).

Since the accrual provisions of §204 are so plainly inapplicable, it is fair to ask why plaintiff has avoided the seemingly obvious vesting provisions of §203. A review of that section, however, shows why it affords no relief. First, reclassifying plaintiff's claim under the vesting rules of ERISA §203 does not change the fact that his claim for benefits is not available under §502(a)(3). In Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees, 382 F.3d 587, 593-97 (6th Cir. 2004), cert denied, 544 U.S. 976, 125 S. Ct. 1844 (2005), the Sixth Circuit held that a former employee's claim for violation of ERISA §203 was not "other appropriate equitable relief." The former employee alleged that use of a mortality discount to calculate his lump sum pension benefit violated the anti-forfeiture provision of §203, where he was entitled to the pension payment upon leaving employment after vesting but before reaching the eligible age for retirement. The plaintiff sought to recalculate his pension benefit without a mortality discount. Although the plaintiff characterized the relief as a constructive trust, the Sixth Circuit found the case governed by Great-West and vacated the judgment.

Second, §203(c) parallels the anti-cutback provision of §204(g) but places limits only on plan amendments that change a plan's *vesting schedule* – that is, the

number of years required to obtain a nonforfeitable retirement benefit.[3/] Nothing in §203 prohibits a plan from changing the *method of calculating vesting service*, so long as the method otherwise complies with ERISA and its regulations. For this reason, plaintiff cites no statutory prohibition against changing the method of calculating vesting service, and no case in ERISA's 30-year history in which a court found that such a change amounted to a violation of ERISA.

II. THE COMMITTEE'S CALCULATION OF PLAINTIFF'S VESTING SERVICE IS SUPPORTED BY ERISA AND ITS REGULATIONS

A. The District Court Erred in Applying a Heightened Arbitrary and Capricious Standard of Review.

The district court viewed plaintiff's cause of action as a claim for benefits, and applied a "heightened arbitrary and capricious" standard for review of the decision to deny the benefits (Doc. 116 at 2). The use of this elevated standard of review is erroneous, because the Committee, which denied the benefit, did not operate under a conflict of interest. There is no dispute that the Plan is funded by a non-reversionary trust (Plf's Br. at 27), and this funding arrangement makes the Committee independent of any possible conflict of interest (Defendants' Opening

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3/ Historically, ERISA has provided two types of vesting schedules: cliff and graded. Compare ERISA §203(2)(A), 29 U.S.C. §1053(2)(A) (5 years of service required to obtain a full nonforfeitable normal retirement benefit ("cliff vesting")) with ERISA §203(2)(B), 29 U.S.C. §1053(2)(B) (after 3 years of service, 20% of normal retirement benefit is nonforfeitable; 40% after 4 years; 60% after 5 years; 80% after 6 years; and 100% after 7 years ("graded vesting")).

Brief ("Def's Br.") at 27-28). Plaintiff's brief simply ignores the case law cited by defendants establishing that this is not a conflict of interest and that a heightened standard of review is inappropriate in this situation (Def's Br. at 28).

Instead, plaintiff seeks to divert the Court's attention by asserting that the decision being reviewed is not the decision to deny plaintiff benefits, but whether the Plan amendment violates ERISA. Defendants agree that if the issue were whether there is a violation of ERISA, the proper standard of review is *de novo*, and the Committee's decision is entitled to no deference. But there are two problems with plaintiff's assertion: the trial court reviewed "defendants' denial of retirement benefits," and it identified no violation of ERISA (Doc. 116)

B. The 95-Hour Rule Does Not Violate ERISA and Was Properly Applied By the Committee.

The 95-Hour Rule does not violate ERISA, and the trial court did not rule that it does. Plaintiff's only arguments that the inclusion of the 95-Hour Rule in the Plan was invalid are that (1) it is somehow discriminatory, (2) defendants failed to notify him of the change, and (3) it is illegal to change the method of calculating service retroactively. None of these arguments has merit.

Although plaintiff claims to be a victim of discrimination, no evidence supports the claim. The controlling regulation, 29 C.F.R. §2530.200b-3(c)(3), states that "the use of a permissible equivalency for some, but not all, purposes or the use of a permissible equivalency for some, but not all, employees may, under

certain circumstances, result in discrimination prohibited under section 401a of the Code," but plaintiff does not claim that he was treated differently than any other employee. Instead, he asserts that it was somehow discriminatory not to treat him differently than other employees – a novel theory that finds no basis in ERISA, its regulations, or the case law (Plf's Br. 31-32). Throughout the proceedings below, plaintiff asserted (with no factual support) that non-exempt employees worked longer hours than salaried executives and that, therefore, any decision to credit employees based upon the 95-Hour Rule was discriminatory, because those workers would have fared better than the executives under a system that counted actual hours (Doc. 102 pp. 160:11-161:4; 288:3-290:3). There is no record that clerical and technical employees worked longer hours than management. Nor is there any authority that an equivalency is discriminatory because clerical employees would have benefited more from a different scheme.[4/]

Plaintiff fares no better when he asserts that inclusion of the 95-Hour Rule was invalid because he did not receive notice of it. This argument is raised for the

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4/ If the use of the 95-Hour Rule was less generous than the counting of actual hours for some employees at some times, it was more generous for many others, depending on how much overtime the employee worked. Even as to a given employee, the amount of overtime worked varied over time (Doc. 101 p. 184:21-25 (stating that amount of overtime eventually "dwindled" and that in later years Gilley would only work overtime "now and then.")). The evidence adduced at trial was that the employee who studied the equivalency concluded that it would benefit most clerical and technical employees by crediting them with 95 hours per semi-monthly period (Def Ex. 5, MON-01-003796-3798).

first time on appeal. It was never pleaded, it is outside the scope of the issue of how many hours plaintiff worked that was tried before the lower court, and the trial court made no findings as to the notice plaintiff did or did not receive and no finding of a violation of the notice requirements of ERISA §104(b), 29 U.S.C. §1024(b). Moreover, the cases cited by plaintiff hold merely that a plan amendment must be made formally, in writing. See Depenbrock v. Cigna Corp., 389 F.3d 78, 86 (3d Cir. 2004) ("Even if Depenbrock had been notified of the proposed [rule] . . . such notice was insufficient to have implemented the amendment because ERISA provides that amendments to a plan may only occur if made in writing."); Smith v. Nat'l Credit Union Admin. Bd., 36 F.3d 1077, 1081 (11th Cir. 1994) ("[W]e hold that any modification or amendment to an ERISA plan can be implemented . . . only *after* the amendment has been appropriately adopted in a formal, complete and written form."). There is no dispute that the 95-Hour Rule was adopted in a formal, complete and written form (Def. Ex. 3 §18.5(f); Def. Ex. 4 §17.5(f)).

Finally, the 95-Hour Rule did not illegally "impact adversely on plaintiff's entitlement" (Doc. 116 p. 2). Nothing in ERISA prohibits a plan from changing the

way that vesting service is calculated.[5/] The district court asserts as an *ipse dixit* that the 95-Hour Rule does not apply because "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement." (Doc. 116 p.2). The court cites no case, no regulation, and no other authority for this proposition. As discussed above, ERISA §204(g) prohibits a plan from reducing the amount of accrued benefits and ERISA §203(c)

5/ Plaintiff also quotes a regulation to suggest in his facts section (but not in his argument) that the equivalency was impermissible because the crediting of actual hours would have been more generous than the use of the equivalency (Plf's Br. P. 14, n. 24). This suggestion turns the concept of an equivalency on its head. The regulations expressly allow use of equivalencies, among other times, where the records to determine actual hours do not exist for pre-ERISA service (prior to January 1, 1976). The regulation states, "if, however, existing records do not accurately reflect the actual number of hours of service with which an employee is entitled to be credited, a plan must either develop and maintain adequate records or use one of the permitted equivalencies." 29 C.F.R. §2530.200b-3(a) (emphasis added). It cannot be, then, that a Plan must examine non-existent records of actual hours before electing among the permitted equivalencies. The undisputed evidence shows that the Plan elected to use this equivalency after considered analysis of the circumstances at the time (Def. Ex. 7 at MON-01-003796-MON-01-003798). The portion of the regulation quoted by plaintiff allows the use of methods other than the permitted equivalencies, and states that any such method will be judged against actual hours of service.

prohibits certain changes in vesting schedules, but ERISA does not prohibit changing the method for calculating hours of vesting service.[6/]

C. Because the District Court Identified No Violation of ERISA, It Had No Basis for Substituting Its Own Method of Calculation for the One Found in the Plan.

The district court purported to reject the 95-Hour Rule because amendments cannot retroactively "impact adversely on plaintiff's entitlement," but the court did not then apply the prior elapsed time method of calculation. Instead, the court

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6/ The 95-Hour Rule did not reduce the number of hours of Vesting Service to which plaintiff would have been entitled under the prior method. The elapsed time method was used under the 1976 Plan, and the 95-Hour Rule is more generous to participants than the elapsed time method. (Def's Br. 36). Plaintiff seeks to read the elapsed time method out of the Plan by asserting that it is not mentioned in the 1976 Summary Plan Description ("SPD"). But the terms of the Plan are contained in the Plan, not the SPD, which is a *summary* document. Heffner v. Blue Cross and Blue Shield of Ala., 443 F.3d 1330, 1341 (11th Cir. 2006) (describing an SPD as "a document that describes, in summary fashion, the relevant features" of the plan, which "does not necessarily contain all of the information about a plan). Plaintiff pleaded a claim for estoppel based on the contents of the SPD, but this claim was not tried. In any event, plaintiff could not meet the elements of an estoppel claim based upon the SPD. There was no conflict between the Plan and the SPD. Id. ("[W]here a plan participant or beneficiary relies on a provision in the SPD that conflicts with the plan, he or she may enforce the terms of the SPD over the terms of the plan."). The SPD states that a full year of Vesting Service will be credited upon attaining 1,000 hours, but does not say how those hours are to be calculated, and silence on an issue in the SPD does not amount to a conflict between the SPD and the Plan. See Curran v. Kemper National Services, Inc., 2005 WL 89840, *4 (11th Cir. March 16, 2005) ("If the EDP [Extended Disability Plan] were silent on the issues of claims administration and discretion, such silence would not create a conflict with the SPD."). Plaintiff also could not prove the element of reliance, since he acknowledged that he did not recall ever seeing the 1976 SPD (Doc. 102 pp. 214:19-25).

substituted its own method, based upon an equivalency never used by the Plan (Doc. 116). Neither the trial court nor the plaintiff have cited any authority that allows this rejection of the Plan's terms, and the regulations make clear that the choice of equivalency is left to the Plan. 29 C.F.R. §2530.200b-3(a) ("a plan must either develop and maintain adequate records or use one of the permitted equivalencies"); 29 C.F.R. §2530.200b-3(c)(1) ("[T]he equivalencies may be used even if such records are maintained").[7/]

D. Even if His Actual Hours Were Counted, Plaintiff Would Lack Ten Years of Vesting Service.

Despite setting trial on the number of hours actually worked by plaintiff in 1972, the district court did not make a finding on this issue and ignored the issue in reaching its conclusion. When the figure is properly derived, it does not come close to 1,000 hours.

First, there is no basis for the trial court's substitution of an 870-hour threshold for the 1,000-hour threshold found in the Plan. Both the 1981 Plan and the 1976 Plan state that a participant will be credited with a full year of Vesting

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7/ The court justified its substitution by citing "the defendants' failure to keep adequate records" but identified no authority for the proposition that defendants violated a record-keeping obligation or the appropriate remedy, if they had violated such an obligation, was for the court to impose the equivalency of its choice on the Plan. No such authorities exist. To the contrary, the regulations recognize that ERISA does not retroactively impose record-keeping requirements for pre-ERISA service, and explicitly allow plans to use an equivalency for such service. 29 C.F.R. §2530.200b-3(a).

Service upon attaining 1,000 hours. The regulation cited by the trial court provides that 870 hours is treated as equivalent to 1,000 hours only if the Plan elects to use an equivalency based upon hours of employment, a method never used by the Plan. See 29 C.F.R. §2530.200b-3(d)(1). Instead, the Plan used the 95-Hour Rule and the elapsed time method during plaintiff's employment – both of which are based upon periods of employment and neither of which includes the 870-hour requirement. See 29 C.F.R. §2530.200b-3(e); 29 C.F.R. §2530.200b-9.

Second, the calculations used by the trial court are predicated upon figures that are contradicted by all of the evidence. Plaintiff's personnel records reflect a base salary in 1972 of $5,040 per year, which corresponds to a 2,080-hour year (or 52 40-hour weeks), with additional compensation paid for overtime worked over and above 40 hours per week (Def. Brf 11-13). The trial court disregarded the Plan and all of the company's records showing plaintiff's Standard Work Year was 2,080 hours and instead based its calculation on a standard work year of either 2,256 or 2,460 hours, the effect of which was to drastically lower the plaintiff's hourly rate for "straight-time hours" and drastically increase the number of hours he could have worked and still earned the $2,149.68 that he was paid (Doc. 116).

There is no factual or legal authority for altering the hours in a standard work year. Indeed, the district court's approach violates the Plan's terms, which provide that company records are dispositive on the dates and terms of

employment (Def. Ex. 4, p. 46 §§12.4, 12.5). Whether he was required to work overtime has nothing to do with how many hours were included in his standard pay or the Plan's Standard Work Year (Def. Ex. 4 §17.7; Def. Ex. 2, §18.7, Def. Ex. 7, MON-01-001239 ("standard week (hours minimum) 40:00"); MON-01-001251-1252 ("standard weekly hours of work in work week: 40")). The evidence confirms that plaintiff's base salary could be expressed as an hourly rate of $2.42 per hour and, at that rate, he could not have worked 1,000 hours in 1972 and still earned $2,149.68.

Plaintiff's brief does not dispute that the district court's calculations improperly credit plaintiff with vacation, sick leave and personal time for 1972 that he never took that year (Doc. 101, p.132:9-13). A participant is not awarded any Vesting Service credit for vacation, sick days, or other leave that he did not take and for which he was not paid. The Plan states that: "An 'Hour of Service' means an hour for which an employee is directly or indirectly compensated by the Employers. . . . (a) To the extent not otherwise treated as Hours of Service, the following shall constitute Hours of Service: * * * (iii) *Hours of absence from active work* because of regular paid vacations or holidays." (Def Ex. 4, ¶17.5 (emphasis added); *see also* Doc. 102 pp. 365:23-366:22; 367:22-372:18; 397:21-398:1). Otherwise, there would be double-counting of such time – when it was earned and when it was used. Vacation is credited when the employee uses the

time, because that is when he is paid (Doc. 102 pp. 397: 21-398:1). This point is further shown by the fact that Gilley was paid for unused vacation time from prior years at the time he was laid off in 1981. (Def Ex. 7 MON-01-002066). The trial court explicitly stated that vacation and leave time could not be credited under the Plan until they were actually used, but the figures it used do just that (Doc. 116 p.2). See also 29 C.F.R. §2530.200-2(b)(3) ("Rule against double credit").

Plaintiff's brief also fails to address the double-counting of holidays (which are taken in lieu of work days, and not in addition to them) and the district court's arithmetic errors (which inflate the standard work year by over 100 hours) (Def's Br. 18). When these errors are corrected, the record shows that plaintiff worked well less than 1,000 hours that year (Def's Br. 11-12, 15-18, 37).

Even if actual hours were otherwise required to be counted, however, the undisputed testimony at trial showed that the payroll records reflecting plaintiff's actual work hours in 1972 no longer exist (Doc. 102 pp. 399-402). ERISA regulations contemplate this very situation and solve the problem by allowing the Plan to elect and apply an equivalency. 29 C.F.R. §2530.200b-3(b). This is exactly what the Committee did, and its actions were appropriate and supported by controlling regulations.

Plaintiff misquotes testimony from the trial to insinuate that his payroll records were available but hidden from him – and in his fevered imagination

something improper was done with these records – but there is no evidence to support his conspiracy theory (Doc. 102 p. 400:2-10 (records of the amount of time that Mr. Gilley worked would have been maintained by the payroll group but such records no longer exist)). In the absence of the records, as ERISA and its regulations make clear, a plan administrator may use a permitted equivalency to determine a participant's service. That is exactly what the Committee did here, and there was no basis for the trial court to disregard its considered judgment (Def. Ex. 5 pp. MON-01-3774-MON-01-3781; MON-01-003796-MON-01-003798).[8/]

III. THE COMMITTEE IS THE ONLY PROPER DEFENDANT.

Plaintiff does not identify any facts showing that any of the other defendants exercised any discretion over the question of whether to award him benefits. The only other defendant even tangentially involved in the denial of his benefit was Monsanto, which supplied data on which the service calculations depended (Doc. 102 pp. 253:22-254:17). This does not make Monsanto a fiduciary with regard to the decision to deny benefits, but only fulfills the company's duties under the Plan

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8/ Plaintiff asserts that his termination date was disputed and may have been as late as September 27, 1982 (Plf's Br. 10 n. 19). The testimony at trial showed that the September date in company records reflected an address change, not a termination date (Doc. 102 pp. 328:23-330:4; Defs' Ex. 7 at MON-01-001187). In any event, the Plan allowed plaintiff to earn, at most, twelve months of Vesting Service following his lay-off on March 31, 1981, not enough to reach the requisite ten years (Doc. 101 pp. 105:13-14; Defs' Ex. 7 at MON-01-001185; Defs' Ex. 4 §17.5(h)(i)).

to supply information (Def. Ex. 4 §12.4). Plaintiff seeks to obscure the distinctions between the defendants by terming them collectively "the Corporation." Plaintiff cannot define his way out of the inescapable conclusion that the Committee is the only possible proper defendant here.

Respectfully Submitted,

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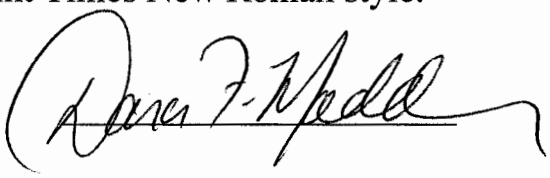
Date: June 29, 2006

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this entire brief contains 6,750 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2002 processing program in 14 point Times New Roman style.



Certificate of Service

I certify that a copy of the foregoing Reply Brief of Appellant was mailed to the following counsel of record on this 29th of June, 2006 by U.S. Mail:

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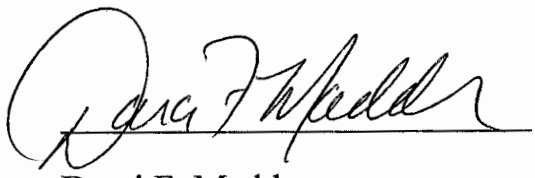

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