UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, DENNIS REED BOWEN, CLYDE FREEMAN, GEORGE MOYERS, JIM MATTHEWS, and HENRY MILLER, on their own behalf and on behalf of a class of persons similarly situated,	)	**Case No.: 8:06-CV-00373-RBH**
Plaintiffs,	)	
vs.	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO COUNT FOUR OF THE AMENDED COMPLAINT

TABLE OF CONTENTS

Page:

Table of Authorities ii

I. Pertinent Facts Regarding Count Four 1

II. Standard Governing Motion for Summary Judgment 2

III. Argument 3

A. Duke Applied Lower Interest Crediting Rates Than Called for by the Plain Terms of the Duke Retirement Cash Balance Plan During Most Quarters in 1997 and 1998 3

1. Relevant Terms of the Plan 3

2. Impact of the Reference Date Methodology 4

3. Standard of Review 6

4. The Plain Language of the Duke Plan Controls 7

IV. Conclusion 9

TABLE OF AUTHORITIES

Cases: **Page:**

Adams v. Louisiana-Pacific Corp., 177 Fed. Appx. 335 (4th Cir. 2006) 7

Berger v. Xerox Retirement Income Guar. Plan, 231 F.Supp.2d 804 (S.D.Ill. 2002), *aff'd*, 338 F.3d 755, 762 (7th Cir. 2003) 5

Bouchat v. Balt. Ravens Football Club, 346 F.3d 514 (4th Cir. 2003) 3

Brink v. DaLesio, 667 F.2d 420 (4th Cir. 1981) 8

Carden v. Aetna Life Ins. Co., 2007 U.S.Dist. LEXIS 81678 (D.S.C. Nov. 2, 2007) 8

Carter v. Monsanto Co., 635 F. Supp. 2d 479 (S.D. W. Va. 2009) 9

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 9

Colucci v. AGFA Severance Pay Plan, 431 F.3d 170 (4th Cir. 2005) 7

Dawkins v. Owens Corning Hourly Employees Ret. Plan, 2007 U.S. Dist. LEXIS 73409 (D.S.C. Sept. 30, 2007) 8

Esden v. Bank of Boston, 229 F.3d 154 (2nd Cir. 2000) 5

Glocker v. W.R. Grace & Co., 974 F.2d 540 (4th Cir. 1992) 9

Johnson v. Michelin N. Am. 658 F.Supp. 732 (D.S.C. 2009) 7

Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Retirement Income Trust, 134 F. Supp. 2d 189 (D. Mass. 2001) 5

Licensed Div. Dist. No. 1 MEBA/NMU, AFL-CIO v. Defries, 943 F.2d 474 (4th Cir. 1991) 7

Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 2, 3

Murch v. Prudential Welfare Benefit Plan, 2006 U.S. Dist. LEXIS 32613 (W.D. Wash. May 23, 2006) 8

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 5

Sejman v. Warner-Lambert Co., 845 F.2d 66 (4th Cir. 1988) 9

Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115 (4th Cir. 1991) 8

United States v. Aramony, 166 F.3d 655 (4th Cir. 1999) 9

West v. AK Steel Corp. Retirement Accumulation Plan, 484 F.3d 395 (6th Cir. 2007) 5

Wheeler v. Dynamic Engineering, Inc., 62 F.2d 634 (4th Cir. 1915) 7

<u>Statutes and Rules of Court</u>:

29 U.S.C. § 1054(g)(1); ERISA § 204(g)(1) 5

29 U.S.C. § 1054(g)(2)(A); ERISA § 204(g)(2)(A) 5

29 U.S.C. § 1132(a)(1); ERISA § 502(a)(1) 9

Rule 56 F.R.Civ. P. 2

The Plaintiffs, Kenneth George, Dennis Bowen, George Moyers, Jim Matthews, and Henry Miller, individually and as class representatives of the "Interest Rate Class" certified by this Court's Order dated September 4, 2009 (Dkt. 251), and Plaintiff Clyde Freeman individually, do respectfully move this Honorable Court for summary judgment as to Count Four of the Amended Complaint, as follows:

I. PERTINENT FACTS REGARDING COUNT FOUR

Plaintiffs commenced this action, individually and on behalf of all others similarly situated, seeking relief including a determination that Duke did not apply the correct interest crediting rate during 1997 and 1998 under two different iterations of § 3.9 of the Duke Retirement Cash Balance Plan. Ex. 1: Duke Plan (1997) Excerpts; Ex. 2: 1997 Plan (July 1997) Excerpts. During various quarters in 1997 and 1998, Duke applied a lower interest crediting rate to participants' account balances than called for by the Plan. As a result, participants who retired and received lump sum distributions or monthly annuity payments did not receive the full amount to which they were entitled under the Plan. Also, participants who have not yet retired will not receive the full amount of benefits they are entitled to unless the error is corrected and their cash balance accounts credited with the additional interest.

During 1997 and 1998, Duke used reset dates for the interest crediting rate other than as described in the Plan documents. Duke used trigger dates as described in the Summary Plan Description ("SPD"), which was not even disseminated until September 5, 1997, and which determined the dates in a different way than the Plan document directed. Ex. 3: 1997 SPD; Ex. 4: Diagram of Rate Selection – Plan vs. SPD. The result was that the interest rate applied by Duke to calculate interest credits on all cash balance accounts was, for seven of eight quarters, lower than the rate that should have been used:

QUARTER	PLAN DATE	PLAN RATE	SPD DATE	SPD RATE (USED)	RATE DIFFERENCE	IMPACT ON PARTICIPANTS
1/1/1997	9/13/1996	7.07	12/20/1996	6.63	-0.44	Participants Lose
4/1/1997	12/13/1996	6.56	3/21/1997	6.97	0.41	
7/1/1997	3/14/1997	6.89	6/20/1997	6.69	-0.20	Participants Lose
10/1/1997	9/12/1997	6.64	9/19/1997	6.43	-0.21	Participants Lose
1/1/1998	12/12/1997	6.07	12/19/1997	5.96	-0.11	Participants Lose
4/1/1998	3/13/1998	5.93	3/20/1998	5.89	-0.04	Participants Lose
7/1/1998	6/12/1998	5.72	6/19/1998	5.67	-0.05	Participants Lose
10/1/1998	9/11/1998	5.26	9/25/1998	5.14	-0.12	Participants Lose

The interest rates were understated, interest credits were understated and, consequently, benefits were understated. Ex. 5: Decl. of Claude Poulin 4/1/10 ¶¶ 5 – 11.

On September 4, 2009, this Court certified a class action on Count Four of the Amended Complaint, defining the class as follows:

> Interest Rate Class - All present and/or former employees of Duke who were participants in Duke's Cash Balance Plan at any time between January 1, 1997 and December 31, 1998, excluding participants who had retired on or before December 31, 1996.[1]

By the same Order, this Court named as class representatives the movants herein, Messrs. George, Bowen, Moyers, Matthews, and Miller. Dkt. 251.

II. STANDARD GOVERNING MOTION FOR SUMMARY JUDGMENT

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Under Rule 56(c) of the Federal Rules of Civil Procedure, the court should grant summary judgment if the record shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.

Summary judgment is not solely a defensive mechanism: Rule 56 expressly contemplates

[1] The definition was later amended to add the word "vested" in describing the participants included in the class. Dkt. 253.

the availability of summary judgment to a claimant. See Fed. R. Civ. P. 56(a). The fact that a movant bears the ultimate burden of proof or persuasion is not an obstacle to a summary judgment award in favor of that party, so long as the requirements of Rule 56 are otherwise satisfied. *Bouchat v. Balt. Ravens Football Club*, 346 F.3d 514, 521-22 (4th Cir. 2003).

Regardless of who ultimately is responsible for proof and persuasion, the party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met that burden, the nonmoving party must come forward and demonstrate that such an issue does exist. *See Matsushita Elec. Co., Ltd. v. Zenith Radio Corp.*, *supra*, 475 U.S. at 586-87 (1986).

III. ARGUMENT

A. Duke Applied Lower Interest Crediting Rates Than Called for by the Plain Terms of the Duke Retirement Cash Balance Plan During Most Quarters in 1997 and 1998.

Count Four of the Amended Complaint asserts that during the 1997 and 1998 Plan years, Duke failed to follow the procedures specified in the Plan for calculating the appropriate rate for crediting monthly interest to participants' cash balance accounts. Specifically, Duke used the provisions in the SPD dated September 5, 1997, to calculate interest credits to participants' cash balance accounts, rather than the different, and generally more beneficial, provisions set forth in the actual Plan documents. Ex. 6: Decl. of Poulin, 8/15/08, ¶¶ 46-48. Had Duke used the higher interest rates called for by the Plan, participants would have received increased benefits.

1. Relevant Terms of the Plan.

Initially, the Duke Power Company Retirement Cash Balance Plan, as amended and restated effective January 1, 1997, provided that:

The interest factor for a particular month shall be the average yield on 30-year

> Treasury bonds published in the Federal Reserve Statistical Release H.15 for the end of the third full business week prior to the beginning of the calendar quarter preceding the first day of the calendar quarter in which the particular month occurs[.]

Ex. 1: 1997 Plan Excerpts at DE-006238-9 at ¶ 3.9 (emphasis added).

The Plan was subsequently amended and restated on July 16, 1997 to provide:

> The interest factor for a particular month shall be the average yield on 30-year Treasury bonds published in the Federal Reserve Statistical Release H.15 for the end of the third full business week prior to the beginning of the calendar quarter in which the particular month occurs[.]

Ex. 2: 1997 Plan (July 1997) Excerpts at DE-000107-8 at ¶ 3.9 (emphasis added).

During September 2007, Duke disseminated a Summary Plan Description (SPD) which identified the reference date for the quarterly resetting of the interest crediting rate as:

> The annual interest crediting rate in effect for the quarter will equal the annual yield on 30-year Treasury bonds at the end of the third full week of the last month of the preceding quarter.

Ex. 3: 1997 SPD excerpts at DE-000406 (emphasis added).

Finally, the 1999 Amended and Restated Duke Energy Corporation Retirement Cash Balance Plan, effective January 1, 1999, included language that provided for a reference date that matched the date described in the 1997 SPD:

> The interest factor means, for a particular month, the average yield on 30-year United States Treasury bonds as published in the United States Federal Reserve Statistical Release H.15 for the end of the third full business week of the month prior to the beginning of the calendar quarter in which such month occurs[.]

Ex. 7: 1999 Plan Excerpts at DE-000278 at ¶ 2.38.

2. *Impact of the Reference Date Methodology*

Plainly, the various iterations of the plan altered the reference date by which the interest factor was identified. By way of illustration, the interest factor applicable under the explicit terms of the Plan to each month in the first quarter of 1997 would be identified as follows:

> The Interest Factor for a particular month shall be the average yield on 30-year Treasury bonds published in the Federal Reserve Statistical Release H.15 for [**a**] the end of the third full business week prior to [**b**] the beginning of the calendar quarter preceding [**c**] the first day of the calendar quarter in which the particular month occurs.

Ex. 1: 1997 Plan Excerpts at DE-006238-9 at ¶ 3.9. Starting with clause [c], the first day of the calendar quarter in this example is January 1, 1997. Clause [b] references the beginning of the calendar quarter preceding this date, which is October 1, 1996. Looking at Clause [a], the end of the third full business week prior to October 1, 1996 is September 13, 1996. *See* Ex. 4: Diagram of Rate Selection – Plan vs. SPD. The interest crediting rate for September 13, 1996 was 7.07%. Ex. 8: Interest Rate Chart. This methodology remained in the Plan until the July 16, 1997 amendment.

While the July 16, 1997 amendment purports to be retroactive, as a practical matter it could not negate interest credits that should already have accrued to the hypothetical account balances, so the earliest quarter the revised description of the reset date would apply to would be the fourth quarter of 1997.[2] Under the July 1997 Plan ¶ 3.9, the interest crediting rate for the fourth quarter and subsequent quarters would be determined using this methodology:

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[2] Except in certain limited situations not presented here, ERISA prohibits an employer from reducing a plan participant's already accrued benefit by amending the plan. *See* ERISA § 204(g)(1); 29 U.S.C. § 1054(g)(1) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan."). This prohibition applies to both the participant's basic accrued benefit and to any early retirement benefit or "retirement-type subsidy." ERISA § 204(g)(2)(A); 29 U.S.C. § 1054(g)(2)(A). *See Berger v. Xerox Retirement Income Guar. Plan*, 231 F.Supp.2d 804 (S.D.Ill. 2002), *aff'd*, 338 F.3d 755, 762 (7th Cir. 2003) (citing IRS Notice 96-8 for proposition that "benefits attributable to interest credits are in the nature of accrued benefits ... and thus, once accrued, must become nonforfeitable"); *Esden v. Bank of Boston*, 229 F.3d 154 (2nd Cir. 2000); *West v. AK Steel Corp. Retirement Accumulation Plan*, 484 F.3d 395 (6th Cir. 2007); *Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Retirement Income Trust*, 134 F. Supp. 2d 189 (D. Mass. 2001) (all accord). This law follows from ERISA's policy of protecting vested benefits. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980) (stating that Congress wanted to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it").

> The interest factor for a particular month shall be the average yield on 30-year treasury bonds published in the Federal Reserve Statistical Release H.15 for [**a**] the end of the third full business week prior to [**b**] the beginning of the calendar quarter in which the particular month occurs.

Clause [b] in this example would reference the beginning of the fourth quarter of 1997 or October 1, 1997. Clause [a] would involve counting backward by three full weeks and looking to the end of that week. The reference date in this example is September 13, 1997. Ex. 4: Diagram of Rate Selection – Plan vs. SPD. The interest crediting rate for that quarter should have been 6.64%. Ex. 8: Interest Rate Chart.

Instead of identifying reference dates by the initial Plan methodology and then by the July 1997 Plan methodology, Duke used the method set out in the later-distributed SPD which produces a different reset date and, in most instances, a smaller interest crediting rate. For example, the SPD methodology produces a reference date for first quarter 1996 of December 20, 1996 and an interest crediting rate for that quarter of 6.63% – 44 basis points below the 7.07% the Plan required. Ex. 4; Ex. 8.

3. Standard of Review.

This Court previously concluded by Order dated June 3, 2008 that:

> . . . Duke's refusal to provide the requested information regarding the interest rate credits that were applied to participants' accounts during the 1997 and 1998 Plan years on the basis that the retrieval of such information would require "significant effort and cost" is further evidence that exhaustion would have been futile. In summary, the court finds that Plaintiffs adequately exhausted their administrative remedies with regard to count four. However, even if Plaintiffs could have pursued additional administrative remedies concerning their claim of improper interest rate credits, this court concludes in its discretion that exhaustion would have been futile in this case.

Dkt.195: Order, p. 39.

When administrative exhaustion is excused, the Trial Court must determine the claimant's entitlement to benefits in the first instance. *See Licensed Div. Dist. No. 1 MEBA/NMU, AFL-CIO*

v. Defries, 943 F.2d 474, 478-80 (4th Cir. 1991). In addition, in this case, there is no administrative analysis of Plaintiffs claims and, thus, no administrative conclusions relating to the interest crediting rate claims. Consequently, there is no administrative record to which this Court could even consider according deference. [3]

4. *The Plain Language of the Duke Plan Controls.*

The plain language of the various iterations of the Duke Plan are not in dispute, nor can they be. Counting back days, weeks or months on a calendar is not subject to interpretation and a Plan Administrator is never free "to alter the terms of the plan or to construe unambiguous terms other than as written." *Colucci v. AGFA Severance Pay Plan*, 431 F.3d 170, 176 (4th Cir. 2005); *Adams v. Louisiana-Pacific Corp.*, 177 Fed. Appx. 335, 339 (4th Cir. 2006). The terms of an ERISA plan are to be interpreted "under the ordinary principles of contract law, enforcing the plan's plain language in its ordinary sense." *Wheeler v. Dynamic Engineering, Inc.*, 62 F.2d 634, 638 (4th Cir. 1915); *see also, Johnson v. Michelin N. Am.* 658 F.Supp. 732, 742 (D.S.C. 2009). This Court has previously concluded:

> "The plain language of an ERISA plan must be enforced in accordance with its literal and natural meaning." *Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563, 568 (4th Cir. 2004) (internal quotations marks omitted). "The award of benefits under any ERISA plan is governed . . . by the language of the plan itself." *Lockhart v. United Mine Workers of Am. 1974 Pension Trust*, 5 F.3d 74, 78 (4th Cir. 1993) (internal quotation marks and citations omitted).

Carden v. Aetna Life Ins. Co., 2007 U.S.Dist. LEXIS 81678 (D.S.C. Nov. 2, 2007). Ex. A of unpublished cases.

Further, "ERISA plan coverage is intended to be liberally construed in order to protect the

[3] If this Court determines that the abuse of discretion standard applies to Plaintiffs' Count Four, the analysis contained in Plaintiffs' Memorandum in Support of Motion for Summary Judgment as to Count Three, pp. 37-44, is equally applicable and incorporated herein.

interests of beneficiaries." *Murch v. Prudential Welfare Benefit Plan*, 2006 U.S. Dist. LEXIS 32613, *10 (W.D. Wash. May 23, 2006) ("coverage [is intended to] . . . be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs"). ERISA is a "remedial statute" that must be broadly construed to favor Plan participants. *See, e.g.*, *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 123 (4th Cir. 1991); *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981).

The question which is determinative of this claim is whether the SPD controls over the plain language of the Plan document. This is purely a question of law. *Dawkins v. Owens Corning Hourly Employees Ret. Plan*, 2007 U.S. Dist. LEXIS 73409 (D.S.C. Sept. 30, 2007), *citing Johannssen v. District No. 1-Pacific Coast Disp., MEBA,* 292 F.3rd 159, 169 (4th Cir. 2002). This Court has already concluded that:

> In this case, Duke cannot rely on the terms of SPD to immunize itself from its own practically admitted violations of the Plan documents. Duke does not dispute that it miscalculated interest rate credits during the 1997 and 1998 years. Rather, its sole arguments for dismissal of this count are that the SPD controls over the Plan documents and that Plaintiffs have failed to exhaust their administrative remedies. However, because Duke represented to its employees that the Plan document controls if a conflict arises between the Plan document and the SPD, Duke cannot repudiate this representation and rely on the terms of the SPD. Duke's Reply argument misses the boat and misconstrues the "general rule" concerning conflicts between SPD terms and Plan terms. The "general rule" concerning conflicts between SPD terms and Plan terms was meant to protect employees who rely on SPD terms, not employers.

Dkt. 195: Order, pp. 35-36 (citations omittted). This Court's June 2, 2008 ruling is the law of the case.[4] Duke cannot rely on the terms of the SPD when to do so decreased the benefit accruals that

[4] "The doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. This doctrine is based on the sound policy that when an issue is once litigated and decided, that should be the end of the matter. Accordingly, the doctrine promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Carter v. Monsanto Co.*, 635 F. Supp. 2d 479, 485 (S.D. W. Va. 2009) (internal quote marks omitted). The law of the case

otherwise would have resulted under the terms of the Plan.[5] Accordingly, Plaintiffs respectfully submit that this Court should enter judgment in favor of Plaintiffs and the interest rate class that, as a matter of law Duke must pay the increased benefit accruals called for by the interest crediting rates mandated by the Cash Balance Plan for the first, third and fourth quarters of 1997 and the first, second, third and fourth quarters of 1998.

IV. CONCLUSION

In conclusion, Summary Judgment in favor of Plaintiffs and the class should be entered as to Count Four, pursuant to 29 U.S.C. § 1132(a)(1), ERISA § 502(a)(1).

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doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). *See also United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999); *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 68-69 (4th Cir. 1988) (citing cases).

[5] Should the Court for any reason find that the law of the case doctrine does not apply, then Plaintiffs reiterate their argument as pages 39-40 of their brief filed at Dkt. 96 and refers the Court to cases cited therein including *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 542-43 (4th Cir. 1992) (holding that the employer cannot rely on terms of SPD which are less generous than the formal plan document when the employer has included in a statement in the SPD that the plan controls over the SPD); Ex. 3: 1997 SPD p. DE-000401 ("If any conflict arises between this summary and the official plan documents, the official plan documents will always govern.")

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