

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,**

Plaintiffs,

vs.

**DUKE ENERGY RETIREMENT CASH
BALANCE PLAN and DUKE ENERGY
CORPORATION,**

Defendants.

Case No.: 8-06-00373-RBH

**MEMORANDUM OF DUKE
ENERGY RETIREMENT CASH
BALANCE PLAN AND DUKE
ENERGY CORPORATION IN
SUPPORT OF MOTION
FOR SUMMARY JUDGMENT ON
FIDUCIARY DUTY CLAIMS**

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NATURE OF THE CASE AND INTRODUCTION

Plaintiffs pursue individual claims under the Employee Retirement Income Security Act of 1974 (“ERISA”) alleging breaches of fiduciary duty in connection with the design and implementation of the Duke Energy Retirement Cash Balance Plan (the “Plan”) that became effective January 1, 1997. The claims are brought against Duke Energy Corporation (“Duke”), the sponsor of the Plan.¹ Plaintiffs allege that Duke (1) improperly created and adjusted opening cash balance account balances, and then (2) failed accurately to describe the new methodology for establishing those balances. (Am. Cmpl., ¶¶ 92-94). Some of the complained of conduct is not fiduciary but, rather, the acts of Duke as “settlor” of the Plan. As to the claims that properly identify fiduciary conduct, there is neither a breach of fiduciary duty as a matter of law nor can any plaintiff establish detrimental reliance. Finally, each of the fiduciary duty claims is barred by ERISA’s statute of limitations. Therefore, defendants are entitled to summary judgment on Count Six.

UNDISPUTED FACTS

A. The Cash Balance Plan.

Duke adopted the cash balance plan effective January 1, 1997. (Am. Cmpl., ¶ 41). Under the prior final average pay plan (the “Prior Plan”), participants received a lifetime annuity based on years of credited service (up to 30 years) and qualifying compensation. (*Id.*) Benefits grew slowly, and then spiked upon satisfaction of early retirement criteria (generally age 55). (Affidavit of Richard Jefferies (Fiduciary Claims), “Jefferies Aff.,” ¶ 7, Exh. 1) (attaching Prior Plan). In addition, the Prior Plan capped Creditable Service after 30 years of service. (*Id.*, ¶ 7, Exh. 1) (citing Prior Plan, § 3.2(d)). Once the early retirement requirements and service caps

¹ The Amended Complaint alleges that “defendants” have breached fiduciary duties, but no fiduciary claim can be pursued against the Plan itself.

were met, new benefit growth was substantially reduced. (*Id.*, ¶ 7). The Prior Plan design created a very strong incentive for employees to leave the company when they became early retirement eligible.

Duke wanted a plan design that, among other things, allowed for a more even growth of benefits and eliminated the Prior Plan's Creditable Service cap. (Jefferies Aff., ¶ 8). Duke also wanted to eliminate the strong incentive to retire early, because this was causing talented and productive employees to leave Duke. (*Id.*; *see also* Shaw Dep., pp. 9-10) (Group Exh. A). A cash balance design achieves both goals. Under it, benefits grow more evenly and do not spike at age 55 or cease to grow thereafter. (Jefferies Aff., ¶ 8). Duke designed the cash balance plan with an eye toward making early retirement less desirable and generating a larger age 65 normal retirement benefit. (*Id.*). Duke, at the same time, increased its support of the 401(k) plan. (*Id.*, ¶ 9). Thus, employees who fully availed themselves of the 401(k) benefits could increase their total benefits at age 65 and to offset some of the loss of the early retirement subsidies that had been provided by the Prior Plan. (*Id.*).

Duke established opening cash balances for all employees who had accrued benefits in the Prior Plan. Each opening balance was calculated so that the combination of the opening cash balance, plus projected pay and interest credits, would generate a benefit equal to the projected Prior Plan benefit at some point between a participant's 60th and 64th birthdays. (*Id.*, ¶ 10). This was referred to as the "crossover" point. (*Id.*). To calculate these projections, Duke needed to make assumptions about (1) future pay increases, and (2) future interest rates. (*Id.*, ¶ 11). With respect to the latter, Duke assumed a 7% interest crediting rate.² (*Id.*).

² At the time the Plan was designed, this was midpoint of the 5-year range for the 30-year Treasury bond and on the low end of the 10-year range. (Jefferies Aff., ¶ 11).

Duke used a multi-step calculation to establish the opening balance needed to attain the desired crossover point. The cash balance design was to become effective on January 1, 1997 and Duke wanted to use the most recent 1996 compensation data to calculate opening balances. (*Id.*, ¶ 12). Because Duke used 1996 year-end data, the schedule of opening account balances for all participants was finalized after January 1, 1997. (*Id.*, ¶ 12). During the interim, calculations were performed on an as-needed basis, for example, when a participant requested a distribution. (*Id.*). The opening balance schedule was an exhibit to the July 16, 1997 Plan amendment and restatement, which was made retroactively effective as of January 1, 1997. (*Id.*).³

ERISA requires that a plan administrator provide notice of any plan amendment that will cause a significant reduction in the future rate of benefit accrual commencing at normal retirement age. ERISA § 204(h); 29 U.S.C. § 1054(h) (“§ 204(h)”). In late 1996, just before the Plan’s effective date, the 30-year Treasury bond rate dipped below 7%. (Jefferies Aff., ¶ 13). As a prophylactic measure to assure that the amendment to the cash balance design would not require a § 204(h) notice, Duke recalculated the projected age-65 (normal retirement age) benefits under the Plan using the 6.63% interest crediting rate that was to be used for the first quarter of 1997. (*Id.*). Duke consulted Mercer Consulting, the Plan’s actuary, with respect to the calculations. (*Id.*). An amount was added to the opening account balance of any participant whose age-65 benefit did not equal his or her projected age-65 Prior Plan benefit, using this interest assumption. (*Id.*). Only 332 participants, out of a total of approximately 17,000, needed these increases. (*Id.*). An actuary that assisted Duke after the initial conversion, Hewitt

³ Copies of the January 1, 1997, July 16, 1997, and January 1, 1999 Plans are attached to the Affidavit of Richard Jefferies (Class Claims) filed with the Defendants’ Memorandum in Support of Motion for Summary Judgment on Class Claims.

Associates, subsequently referred to this calculation as “Step 5” in a memorandum. (Rule 30(b)(6) Deposition of Mercer Consulting, “Mercer Dep.”, Exh. 5) (Group Exh. B).

B. Communications Regarding The Conversion To A Cash Balance Plan.

Duke announced the changes to its benefits plans via newsletters and employee meetings. The newsletters, called On Track, were first issued in August, 1996. (Jefferies Aff., ¶¶ 14, 16, Exhs. 2 and 3). In the first On Track newsletter, Duke stated that the Prior Plan would be converted into a cash balance plan at the start of 1997. (Jefferies Aff., ¶ 16, Exh. 2). Duke told participants that the cash balance plan’s benefit accrual pattern would be different than that under the Prior Plan. (*Id.*, Exh. 2, pp. 3-4) (stating, among other things, “[u]nder the current plan, you earn benefits slowly until you reach age 55; then benefits increase significantly. Under the new plan, your benefits begin to build earlier and more gradually”). The purpose of the opening balance was described in the second On Track newsletter, issued in September of 1997:

Although the formula for calculating opening cash balances is complex, the basic goal is to provide you with an opening balance that would make your benefit from the new plan roughly equivalent to the benefit you would have received from the current plan if you retire in your early 60’s. (This assumes that interest credits are about 7% per year and that your salary increases over time.)

(*Id.*, ¶ 17, Exh. 3, p. 3). The assumption regarding future interest rates was reiterated in an October, 1996 personalized statement provided to each participant. (*Id.*, ¶ 18, Exh. 4). This document showed a projected cash balance benefit and warned that the “actual cash balance amount will vary based on the interest rates in effect at the time you receive your payout” and “[t]his may result in a different age at which your projected benefits under the Retirement Cash Balance Plan and current plan are equal.” (*Id.*, Exh. 4, pp. 1, 7).

The September 1996 On Track newsletter informed employees that the opening balances would not be established or disseminated until the year-end 1996 data became available.

“[Y]our actual opening cash balance will be calculated after January 1, 1997 with data as of December 31, 1996, and will be available to you in mid-1997.” (*Id.* ¶ 17, Exh. 3, p. 4). This disclosure was repeated in the October, 1996 personalized statement sent to each participant. (*Id.* ¶ 18, Exh. 4, pp. 1, 7).

As noted above, one of the intended effects of the adoption of the cash balance plan was to reduce the incentive to retire early. (*Id.*, ¶¶ 8, 17). Duke stated that early retirement, between 55 and 60, may be less “financially attractive under the Plan.” (*Id.*, ¶ 8, Exh. 2, p. 4). The September On Track described the reason for this change:

In our competitive environment, experienced employees are among our most important assets. Our current Retirement Plan, however, provides substantial early retirement benefits, while providing few additional benefits to employees who work more than 30 years. This gives our most experienced employees a strong incentive to leave Duke early – at a great cost to the company both in dollars and talent. While early retirement should remain an option, our new retirement plan should not encourage employees to leave Duke early, and it should provide better benefits to employees who choose to work more than 30 years.

(*Id.* ¶ 17, Exh. 3, pp. 1-2). To mitigate the Prior Plan’s encouragement of early retirement, the cash balance plan provided “a smaller retirement benefit” to participants who “decide[d] to retire early.” (*Id.*, Exh. 3, p. 10).

C. Plaintiffs’ Response To The Cash Balance Amendment.

Plaintiffs’ fiduciary duty claims assert, *inter alia*, that Duke’s communications overstated the benefits of the cash balance amendment and minimized less favorable aspects. (*See Am. Cmpl.*, ¶ 52). However, by late 1996 to mid-1997, the record shows that each plaintiff believed that the cash balance amendment diminished his future pension benefits.

1. Mr. Miller

Mr. Miller understood that his opening account was calculated based on assumptions, “[a]nd one of them involved interest rates.” (Miller I Dep., p. 40) (Group Exh. C).⁴ By around January, 1997, he concluded that he was harmed by the cash balance conversion. (*Id.*, p. 54). He and his co-workers “started from that point on, trying to talk to everybody we could about the harm that it was doing. I talked with Bru Barron. He’s vice-president over Nuclear Production right now. I talked to him in the control room and tried to explain to him just how badly this had hurt the employees.” (*Id.*, pp. 54-55).

2. Mr. George

Mr. George was apprehensive about the cash balance amendment before he received his opening statement in July, 1997. (George I Dep., p. 98) (Group Exh. D). He had intended to retire between age 55 and 58, but determined he needed to delay retirement because of the cash balance amendment. (*Id.*, p. 18). He began to investigate cash balance plans in 1998 or 1999. “[T]here was a number of us that suspected that we were getting something a good bit less than what we thought in the early part of that disclosure.” (*Id.*, p. 34). He contacted an attorney in 1999 or 2000 regarding possible litigation against Duke regarding the cash balance plan. (*Id.*, pp. 170-71). By that time, he believed that Duke had failed to satisfy the notice requirement of § 204(h). (George II Dep., pp. 21-22) (Group Exh. E). In January, 2000, Mr. George wrote to the IRS to complain about Duke’s conversion to a cash balance plan, stating, *inter alia*, that Duke had improperly failed to provide participants with an ERISA § 204(h) notice. (George I Dep., p. 135 and Exh. 63).

⁴ Mr. Freeman was not deposed due to medical reasons. Each other plaintiff was deposed twice. References to the first deposition shall be in the form “[Deponent] I Dep., p. ___” and to the second deposition “[Deponent] II Dep., p. ___.” The cited deposition pages and exhibits to the depositions of each plaintiff are combined and attached hereto as group exhibits.

3. Mr. Bowen

Mr. Bowen viewed the amendment negatively by October, 1996, when sample personalized opening statements were distributed. (Bowen I Dep., pp. 46-47) (Group Exh. F). He felt he had been wronged at all times after the fall of 1996. (*Id.*, pp. 88-89; *see also id.* at 49 (testifying that the majority of the employees viewed the change to a cash balance plan unfavorably)). Mr. Bowen recalls Duke's disclosure that the Plan was intended to diminish the incentive to retire at age 55. (*Id.*, p. 38). Mr. Bowen deferred his retirement, originally planned for age 55, because of the amendment. (*Id.*, pp. 22-23).

4. Mr. Moyers

Mr. Moyers traces his displeasure with the cash balance amendment to the date he received his opening statement in July 1997. (Moyers I Dep., p. 106) (Group Exh. G). On December 10, 1998 he wrote to a journalist with the Wall Street Journal who had written about cash balance conversions. (*Id.*, Exh. 1). He raised a series of complaints about the Plan and his opening balance. (*Id.*). Mr. Moyers also wrote to the IRS and Department of Labor to complain about the cash balance conversion. (*Id.*, Exhs. 2, 16 and 18).

5. Mr. Matthews

Mr. Matthews suspected he was harmed by the cash balance amendment "from day one, and each day since, my suspicions were stronger." (Matthews I Dep., p. 30) (Group Exh. H). "Day one" was a meeting in "either late 1996 or early 1997" where he saw charts showing the differing accrual patterns of the cash balance plan and the Prior Plan. (*Id.*, pp. 30-31). Because of the cash balance amendment he deferred his plan to retire early, concluding he would need to work past age 55. (*Id.*, p. 43). By 1999, he had contacted an ERISA attorney about his concerns. (*Id.*, pp. 29-30). That same year he started a website – titled "Duke Energy Employee Advocate" – to promote litigation over the cash balance plan. (*Id.*, p. 52) (www.dukeemployees.com). He

posted a letter on that site that he and others had sent to the Department of Labor on December 6, 1999. (*Id.*, p. 115, Exh. 46). The letter complains about cash balance conversions and requests, *inter alia*, that the Department of Labor “consider the related issue of breaches of employer fiduciary duty.” (*Id.*, Exh. 46, p. 3). At the time of this letter – December 6, 1999 – Mr. Matthews believed that he had a claim for breach of fiduciary duty against Duke. (*Id.*, p. 124).

ARGUMENT

I. DUKE DID NOT BREACH FIDUCIARY DUTIES.

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986) (there must be “sufficient evidence favoring the non-moving party” to avoid summary judgment). Some of plaintiffs’ fiduciary duty claims survived earlier motion practice, with this Court determining that plaintiffs’ allegations were sufficient to survive a motion for judgment on the pleadings. Specifically, plaintiffs’ claims survived in two areas: (1) the allegation that Duke misled employees as to the purpose and effect of the cash balance amendment (Am. Cmpl., ¶ 92); and (2) the contention that Duke committed errors in “arbitrarily” calculating opening balances to circumvent ERISA § 204(h) and did not tell participants that a purported “fifth step” was used to calculate those balances. (*Id.*, ¶¶ 93-94; Order of March 31, 2009 (Doc. No. 239)).

In addition, during earlier briefing, plaintiffs contended that Duke did not adequately administer the Plan between January 1, 1997 and July 16, 1997, when the schedule of opening balances was finalized. This Court noted that these allegations were not included to assert a “separate claim” for breach of fiduciary duty but, rather, “as relevant evidence to provide context to [plaintiffs’] breach of fiduciary duty/opening balance claim.” (Order of March 31, 2009, p. 4,

n.2). Defendants are entitled to summary judgment on both of the remaining fiduciary duty claims.

A. The Undisputed Facts Defeat Plaintiffs' Claim That Duke Breached Fiduciary Duties by Misrepresenting The Cash Balance Amendment.

To establish a breach of fiduciary duty based upon the allegations that Duke misrepresented the purpose and effect of the cash balance amendment, plaintiffs must prove: “(1) the defendant’s status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of the misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation.” *Wiseman v. First Citizens Bank & Trust Co.*, 215 F.R.D. 507, 510 (W.D.N.C. 2003) (citation omitted); (Order of September 4, 2009, p. 22) (Doc. No. 251). Plaintiffs cannot establish any of the requisite elements.

1. There was no misrepresentation.

Plaintiffs allege the claimed misrepresentations only in the most general terms, stating that Duke’s “‘On Track’ newsletters . . . misinformed its employees as to the effect that the Plan conversion would have on them.” (Am. Cmplt., ¶ 40). Plaintiffs further allege misrepresentations – not attributed to any source – “that the new Plan would not impair employee expectations, would not greatly change the old plan, and that employees should not be concerned.” (*Id.*, ¶ 39). Finally, they contend that unspecified representations misled “employees about the effects of the conversion to the Cash Balance Plan and the purpose behind certain amendments to the Plan concerning the calculation of interest credits.” (*Id.*, ¶ 92).⁵ Collectively, the allegations seek to paint a picture of Duke overstating the benefits of the cash balance plan in comparison to the Prior Plan. However, the undisputed record shows that no

⁵ The interest credit provisions were amended effective July 16, 1997 and January 1, 1999. Plaintiffs could not have been misled because, in neither case, was there any communication to plaintiffs regarding “the purpose behind” the amendment.

representation overstated the cash balance plan. Indeed, no plaintiff overvalued the cash balance plan based on Duke's representations, which is further proof that no such misrepresentation occurred.

Plaintiffs have not specified a single untrue statement regarding the cash balance amendment. Contrary to plaintiffs' assertion that Duke represented "that the new Plan . . . would not greatly change the old plan," the On Track newsletters told plaintiffs that early retirement subsidies would decline, stating that "retirement prior to age 60 may not be as financially attractive under the Retirement Cash Balance Plan." (Jefferies Aff., Exh. 2, p. 4). The Prior Plan was simply too generous in its early retirement subsidies, a fact about which Duke did not mince its words: "Our current Retirement Plan, however, provides substantial early retirement benefits, while providing few additional benefits to employees who work more than 30 years. This gives our most experienced employees a strong incentive to leave Duke early – at a great cost to the company both in dollars and valued talent." (*Id.*, Exh. 3, pp. 1-2; *see also*, Bowen I Dep., p. 38 (Group Exh. F)). Nor did any plaintiffs believe they "should not be concerned," as a result of the conversion. (*Cf.* Am. Cmplt., ¶ 39). Each was, in fact, very concerned. Mr. Bowen felt he had been wronged at all times after the fall of 1996. (Bowen I Dep., p. 88) (Group Exh. F). Mr. Miller tried "to talk to everybody [he] could about the harm" from the amendment. (Miller I Dep., p. 54) (Group Exh. C). Mr. George embarked on an investigation of cash balance plans. (George I Dep., p. 34) (Group Exh. D). Mr. Moyers wrote to the Wall Street Journal (Moyers I Dep., Exh. 1) (Group Exh. G) and Mr. Matthews started a website to protest the cash balance plan. (Matthews I Dep., p. 52) (Group Exh. H).

The On Track newsletters also discussed the positives, from the employees' point of view, of the change. (*See* Jefferies Aff., Exh. 2, pp. 3-4). Duke stated that the cash balance plan

provides a steady build-up of benefits, allows for a lump sum distribution and eliminates the 30-year Creditable Service cap. (*Id.*). Each of these statements is true and plaintiffs do not claim otherwise. (*See, e.g.,* Matthews I Dep., pp. 68-73, 102) (Group Exh. H).

In earlier briefing, plaintiffs sought to supplement the conclusory allegations of the Amended Complaint by arguing that Duke's On Track newsletters and the October 1996 Personalized Statement falsely made a "mandatory" promise that benefits under the cash balance plan would equal those under the Prior Plan at each participant's specified crossover point. (Plfs.' Opp. to Mot. to Dismiss, p. 15) (Doc. No. 222-38). The language of the documents and plaintiffs' own testimony defeat this assertion.

First, it was not possible to predict results decades in the future with certainty, and Duke's statements were not guarantees. The August 1996 On Track told participants that Duke was making assumptions about future interest rates and stated that, using those assumptions, opening balances "will be set to generate benefits that are *roughly equivalent* to benefits you would earn under the current plan between the ages of 60 and 64." (Jefferies Aff., Exh. 2, p. 4; *see also id.*, Exh. 4, October 1996 Personalized Statement, p. 6 (the "actual cash balance amount will vary based on the interest rates in effect at the time you receive your payout" and "[t]his may result in a *different age at which your projected benefits under the Retirement Cash Balance Plan and current plan are equal*")) (emphasis added). Predictions of "rough equivalence" in the future are obviously not *mandatory* promises. *See In re Marine Energy Sys. Corp.*, 362 B.R. 247, 261 (Bkrcty. D.S.C. 2006); *Hart v. Equitable Life Assurance Soc'y*, 2002 WL 31682383 at *5-6 (S.D.N.Y. Nov. 26, 2002), *aff'd*, 75 Fed. Appx. 1 (2d Cir. 2003) (no claim of breach of fiduciary duty or misrepresentation under ERISA estoppel theories for inaccurate benefit

projections because, among other things, the company stated benefit projections were estimates and subject to change) (unpublished opinions attached at Group Exh. I).

The clarity of Duke's disclosures is evidenced by plaintiffs' testimony, as they conceded they understood the interest rate assumption used. For example, Mr. Bowen testified:

Q. Okay. So again, to project out what someone would make in the future under the Cash Balance Plan, you had to make assumptions about what their income would be and what the 30-year Treasury bill rate would be at dates in the future, correct?

A. Correct.

Q. And were you informed that as to the Treasury bill rate, they were assuming that that would be seven percent annually?

A. Yes, sir.

(Bowen I Dep., p. 42) (Group Exh. F); *see also* Matthews I Dep., p. 75 (Group Exh. H); George I Dep., p. 69 (Group Exh. D); Miller I Dep., pp. 39-40) (Group Exh. C)).⁶

Duke made no promise that any cash balance benefit would be as large as the Prior Plan benefit at the projected crossover age. In fact, Duke told plaintiffs that their cash balance benefit might not exceed even the value of the accrued Prior Plan benefit that was frozen as of January 1, 1997. (*See* Jefferies Aff., Exh. 5, 1997 Opening Account Balance Statement, p. 3). (participants electing a distribution receive the "larger of" their Prior Plan frozen benefit or their cash balance benefit). The opening balance calculations were based upon fully disclosed assumptions regarding projected future interest rates, estimated salary increases and other matters. Plaintiffs do not claim that, calculated under the disclosed assumptions, there was any inaccuracy.

⁶ Mr. Moyers did not recall the disclosures in the On Track newsletter or the October 1996 Personalized Statement. (Moyers I Dep., pp. 57, 73) (Group Exh. G). He did, however, recall a 7% interest rate assumption. (*Id.*, p. 75).

2. There was no detrimental reliance.

In addition, plaintiffs did not rely to their detriment on any of the so-called representations that the cash balance plan would provide greater benefits than the Prior Plan. To the contrary, plaintiffs almost immediately believed that the amendment diminished their benefits. This defeats the detrimental reliance element of their misrepresentation claim.

Martino-Catt v. E.I. duPont Nemours and Co., 317 F. Supp. 2d 914, 926-27 (D. Iowa 2004)

(plaintiff who was “generally suspicious” of defendants cannot establish detrimental reliance).

That plaintiffs did not “overvalue” the Plan is underscored by the Amended Complaint.

Plaintiffs allege:

Duke’s conversion to a Cash Balance Plan during the late 1990’s, which was intended to and did cut benefits, prejudiced many of its workers because these employees had put in years of working for the company based on Duke’s promises that they were going to get a retirement pension at one amount, and suddenly the amount was greatly cut. Cash balance conversions left certain workers stranded, too old to start their careers over again, and having to defer plans for early retirement, because their expected lump sum benefit had been slashed. (Am. Cmpl., ¶ 50).

Thus, there was no reliance on a misrepresentation that the cash balance plan would be more generous than its predecessor. To the contrary, plaintiffs purportedly deferred plans for early retirement and were “stranded” because they believed the Plan “slashed” their benefits. (*Id.*). Plaintiffs’ conduct upon the conversion, and their universal dislike of the cash balance plan “from day one,” are undisputed facts and defeat any claim that plaintiffs relied to their detriment on any alleged “overly optimistic” statement about the Plan.

B. Plaintiffs’ Opening Balance Claims Do Not Establish A Fiduciary Breach.

Plaintiffs’ claims regarding the calculation of the opening account balance solely revolve around “step 5.” As noted above, opening accounts were calculated under a multi-step process designed to produce a cash balance benefit that would equal the projected benefit under the Prior

Plan at a crossover point between ages 60 and 64. These projections were based on pay and interest rate assumptions, including the assumption that the 30-year Treasury bond rate would average 7%. When Treasury bond rates dropped below 7% at the end of 1996, Duke performed the crossover calculation projections to age 65 with the 6.63% rate, the rate applicable for the first quarter of the Plan. (Jefferies Aff., ¶ 13). As a result, an aggregate of about \$430,000 was added to the opening balances of 332 participants. (*Id.*). Plaintiffs advance a host of supposed fiduciary breach claims in connection with the “step 5” calculation. None are valid.

1. Establishing opening account balances was not a fiduciary act.

Plaintiffs allege that the adjustments were “arbitrary,” and hence, a breach of fiduciary duty. (Am. Cmplt., ¶ 93). But the establishment of the opening account is a settlor function, not a fiduciary act: a plan sponsor “does not . . . act as a fiduciary simply by . . . establishing a plan and designing its benefits.” *Sunoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 373 (4th Cir. 2003) (internal quotation marks omitted). As the calculations were not performed in a fiduciary capacity, they cannot support a fiduciary duty claim. *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (“threshold question” is whether defendant was “acting as a fiduciary [that is, was performing a fiduciary function] when taking the actions subject to the complaint.”).

Plaintiffs also allege that Duke made the adjustments “to circumvent the notice requirements of ERISA § 204(h).” (Am. Cmplt., ¶ 93). This, again, fails to identify fiduciary conduct. ERISA § 204(h) is a statutory condition to the exercise of settlor conduct: a plan cannot be amended so as to significantly reduce the rate of future benefit accruals without advance notice. 29 U.S.C. § 1504(h). Fiduciary duties exist to guide discretionary conduct. 29 U.S.C. § 1002(21)(A). “[T]he primary function of the fiduciary duty [in ERISA] is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime.” *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996).

There is nothing discretionary about § 204(h): it is a duty imposed by “the legal regime.” The establishment of the opening balances was a settlor act and cannot support a fiduciary duty claim.

2. The adjustments were neither “arbitrary” nor an attempt to circumvent § 204(h).

Even if plaintiffs had identified fiduciary conduct, the adjustments were not “arbitrary” or an attempt to circumvent § 204(h).⁷ In consultation with a national actuarial consulting firm, Mercer Consulting, Duke used the 1997 first quarter interest crediting rate to project benefits to normal retirement age to assure that the projected age-65 benefit from the Prior Plan did not diminish if rates remained at that level. (Jefferies Aff., ¶ 13; Mercer Dep. pp. 73-74 (Group Exh. B); Beideman Dep., Exh. 17 (Exh. J)). It ran the same calculation for every participant. (Jefferies Aff., ¶ 13). And it added amounts to opening balances where such additions were called for by the calculation. (Jefferies Aff., ¶ 13). There was nothing “arbitrary” about these adjustments.

Nor did Duke attempt “to circumvent the notice requirements of ERISA § 204(h).” On the contrary, certain opening account balances were increased to assure compliance with § 204(h). (Jefferies Aff., ¶ 13; Mercer Dep. pp. 73-74 (Group Exh. B); Beideman Dep., Exh. 17 (Exh. J)). Where the projected normal retirement age benefit is not significantly reduced, no § 204(h) notice is required. *See, e.g., Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 465-66 (2d Cir. 2009). An employer does not “circumvent” § 204(h) by providing equal or greater benefits through a plan amendment.

⁷ This Court denied plaintiffs’ request for leave to add an ERISA § 204(h) claim to their complaint.

3. There was no duty to disclose “step 5.”

Plaintiffs complain that they were not informed of the “step 5” recalculation of opening accounts using the 6.63% interest rate assumption. (Am. Cmplt. ¶ 93). Where there is fiduciary conduct, an ERISA fiduciary has an affirmative duty to disclose “when the trustee knows that silence might be harmful.” *Griggs v. E.I. duPont De Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001) (citation omitted). Even assuming there was fiduciary conduct, the silence here was not harmful to plaintiffs. Plaintiffs concede that this calculation could have prejudiced or harmed them only if it caused a decrease in their opening accounts. (Bowen II Dep., pp. 16-17 (Group Exh. K); Moyers II Dep., pp. 34-35 (Group Exh. L); Miller II Dep., p. 35 (Exh. M); Matthews II Dep., p. 24 (Exh. N); *see also* Mercer Dep. p. 53 (Group Exh. B)). This was not the case for any plaintiff, as none had any adjustment made to his opening balance by virtue of this calculation.

In addition, plaintiffs did not rely to their detriment on the description of a four-step calculation. Plaintiffs do not even suggest some contrary action they would have taken had they been told that an additional “step 5” calculation, as applied to their opening account, resulted in no change to their opening balance.

4. Duke did not improperly administer the Plan.

Plaintiffs claim that the administration of the Plan prior to July 16, 1997, before the Plan was amended to include a schedule of the opening balances, supports their fiduciary breach claim. Not only do plaintiffs fail to support the notion that this allegation gives rise to any claim, the only act of “administration” complained of is the manual calculation of benefits for participants who made a benefit election during the period from January 1 to July 16, 1997. However, no plaintiff took a distribution during that period, and, as such, none can establish detrimental reliance or any injury, as required. *Wiseman*, 215 F.R.D. at 510. Moreover, there is

no requirement under the law that the amount of each participant's accrued benefit, in whole or in part, be stated under the Plan.

In addition, that a schedule of opening accounts was not included with the initial January 1, 1997 Plan amendment was fully disclosed to plaintiffs. Plaintiffs were informed on two occasions in 1996 that opening balances "will be calculated based on data as of December 31, 1996" and that the balances would not be available until "mid-1997." (Jefferies Aff., Exh. 3, p. 4; Exh. 4, p. 7). The Plan was at all times available for inspection by plaintiffs. *See* ERISA § 104(b); 29 U.S.C. § 1024. The absence of a schedule of opening balances at the outset was fully disclosed and readily apparent.

Plaintiffs have also argued that the Plan failed to meet the "definitely determinable" requirement of § 401(a) of the Internal Revenue Code (the "Code") before the opening balance schedules were attached. (Am. Cmplt., ¶ 94). The IRS, however, took no action against Duke by virtue of the absence of a schedule of opening accounts from January 1 to July 16, 1997. In addition, this contention fails because this provision of the Code is a requirement that must be satisfied to retain a plan's tax-qualified status and is not capable of enforcement under ERISA. *See Brengettsy v. LTV Steel (Republic) Hourly Pension Plan*, 241 F.3d 609, 612 (7th Cir. 2001) (further noting that even if plaintiff's argument were to succeed, the effect "would not be to benefit him but to hurt the company, the trust, and maybe other participants and beneficiaries by killing the plans' tax exemption").⁸ Finally, inasmuch as no plaintiff took a distribution during that period, none has any claim for damages.

⁸ The "United States Tax Court has jurisdiction to determine whether a retirement plan is qualified for tax-deferred treatment." *Crawford v. Roane*, 53 F.3d 750, 756 (6th Cir. 1995). Section 7476 of the Code "provides that only an employer, plan administrator, certain employees, and the Pension Benefit Guaranty Corporation may file pleadings in the Tax Court concerning the tax-deferred status of a plan." *Id.*

II. THE FIDUCIARY DUTY CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A breach of fiduciary duty claim must be brought after the earlier of:

- (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation; or
- (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA § 413; 29 U.S.C. § 1113.

The statute of limitations has two components, and the limitations period ends on the *earliest* of the two. The six-year provision of Section 413(1) creates a statute of repose. *Ranke v. Sanoti-Synthelabo, Inc.*, 436 F.3d 197, 205 (3d Cir. 2006); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994). The three-year provision in Section 413(2) can shorten the limitations period from that governed by the repose provisions where a plaintiff knows “the essential facts of the transaction or conduct constituting the violation.” *Browning v. Tiger’s Eye Benefits Consulting*, 313 Fed. Appx. 656, 661 (4th Cir. 2009) (unpublished opinion).

A. The Claims Are Barred By the Six-Year Repose Provision.

Plaintiffs’ fiduciary duty claims involve pre-1997 Plan amendment notices, the calculation and description of opening account balances and the administration of the Plan before the July 16, 1997 amendment. These events were complete, at the latest, by July 1997, when opening balance statements were distributed and the schedule of opening balances was added via an amendment to the Plan. The six-year repose period expired on the last of these claims in July 2003. This action was not filed until February 6, 2006, over two and a half years beyond the latest possible date. The fiduciary duty claims are thus barred under Section 413(1)(A). *See also*

Ranke, 436 F.3d. at 202-03 (six-year repose period commenced when alleged misrepresentations were made); *Finocchiaro v. Squire Corrugated Container Corp.*, 2007 WL 608462, at *6 (D.N.J. Feb. 23, 2007) (same).

Section 413(1)(B), which provides that claims for omissions do not accrue until the latest date “on which the fiduciary could have cured the breach or violation,” does not apply in this case. Plaintiffs’ allegations that Duke incorrectly calculated opening account balances as a result of “step 5” and improperly administered the Plan from January 1 to July 16, 1997 concern acts, not omissions. Similarly, plaintiffs’ contention that they were misled as to the purpose and effect of the cash balance amendment, (Am. Cmplt. ¶ 92), and that Duke incorrectly described the process used to calculate the opening balance as containing four steps (*id.* ¶ 93) are, on the face of the complaint, affirmative acts of Duke governed by § 413(1)(A). *Cf. Ellis v. Rycenga Homes, Inc.*, 484 F. Supp. 2d 694, 714 (W.D. Mich. 2007) (noting that “many plaintiffs attempt to strategically recharacterize their claim from one of affirmative act to one of omission. The courts generally resist such efforts.”).

B. The Claims Are Also Barred By The Three-Year Provision.

Plaintiffs’ claims are also untimely under the three-year “actual knowledge” provision of subsection (2). An action must be brought “three years after the earliest date on which the plaintiff had actual knowledge of the breach.” ERISA § 413(2); 29 U.S.C. § 1113(2). ERISA’s three-year limitations period begins to run when plaintiffs have knowledge of “the essential facts of the transaction or conduct constituting the violation.” *Browning*, 313 Fed. Appx. at 661 (quoting *Edes v. Verizon Commc’n., Inc.*, 417 F.3d 133, 142 (1st Cir. 2005)). It is uncontroverted that plaintiffs had such knowledge as early as 1996 and 1997, when plaintiffs became aware of the cash balance plan conversion and subjectively believed that the plan amendment was harmful and reduced their benefits. *See Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 520 (6th Cir. 2008)

(three-year period begins with knowledge of facts or transactions that constituted alleged violations); *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1254 (1st Cir. 1996); *Martin v. Consultants & Adm'rs., Inc.*, 966 F.2d 1078, 1093-96 (7th Cir. 1992); *Schaefer v. Arkansas Med. Soc'y*, 853 F.2d 1487, 1491-92 (8th Cir. 1988).

Mr. Matthews, who believed he was harmed “from day one,” on December 6, 1999 co-authored a letter to the Department of Labor accusing employers who converted to cash balance plans of a breach of fiduciary duty. (Matthews I Dep., p. 30, Exh. 46) (Group Exh. H). By this point, Mr. Matthews believed he had a claim for breach of fiduciary duty against Duke and had contacted an ERISA attorney. (*Id.*, pp. 29-30, 124). In addition, commencing in 1999, Mr. Matthews’ website, “Duke Energy Employee Advocate,” presented a running diatribe against the wrongs supposedly inflicted by the cash balance conversion. (*See id.*, Exh. 46) (November 10, 1999 annotations to a Department of Labor ERISA Advisory Council Report discussing cash balance conversions stating, “hiding facts, giving out misleading information and NOT involving the employees allows greedy corporations to take even more of the employees’ retirement money”). In February 2000, Mr. Matthews annotated an article titled “The Modern-Day Johnny Appleseeds: Lawsuits Are The Fruit Of Their Labor” from The McGinn Forum. (*Id.*, Exh. 47). The article discussed litigation against cash balance plans. Mr. Matthews’ italicized comments stated, *inter alia*,

If a Duke employee embezzled \$200,000 from the company, do you think Duke would pursue legal action? You can take that to the bank! It is the very same principal. If Duke takes \$200,000 out of your benefits without your consent, in a very deceptive manner, and makes attempts to hide the fact, do you not think it is time for you to take some action?

(*Id.*, Exh. 47, p. 7).

Mr. George has an equally clear paper trail. On January 17, 2000, he wrote to the IRS to complain, *inter alia*, that “[a] lot of false reasons and concerns were presented to justify” the cash balance conversion and that the amendment was not preceded by “a disclosure ERISA form 204(h).” (George I Dep., Exh. 63) (Group Exh. D).

Mr. Moyers took his case against Duke to a reporter for the Wall Street Journal. In his December 10, 1998 letter to Ellen Schultz he wrote, “Like Mr. Bruggeman who was featured in one of your articles, I have spent a great deal of time over the past two years studying our Company’s conversion and have, like He, concluded that I have been royally screwed over.” (Moyers I Dep., Exh. 1) (Group Exh. G). He went on to complain about his opening account calculations. (*Id.*)

In 1997, Mr. Miller complained to the Vice-President of the Nuclear division about he believed the conversion had hurt the employees. (Miller I Dep., pp. 54-55) (Group Exh. C). Mr. Bowen was convinced he had been harmed by October, 1996. (Bowen I Dep., pp. 46-47) (Group Exh. F).

Early knowledge of the claims – no later than 1997 or 1998 – is in fact a precondition to the allegation that plaintiffs had “to defer plans for early retirement” because “the amount [of their pension] was greatly cut.” (Am. Cmplt., ¶ 50). This requires that plaintiffs be aware of the claimed benefit reduction, and not be acting under the mistaken belief that the cash balance amendment was beneficial. Nobody “defer[s] plans for early retirement” because they were misled to believe they had greater benefits than was the case. Plaintiffs had actual knowledge

sufficient to trigger the three-year limitations period well before February 6, 2003. The fiduciary claims are thus untimely.⁹

CONCLUSION

For the reasons stated herein, defendants Duke Energy Retirement Cash Balance Plan and Duke Energy Corporation move this Court for an order granting summary judgment in their favor and against plaintiffs on Count Six of the Amended Complaint.

Respectfully submitted,

/s/ Robert O. King _____

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⁹ The exception for “fraud or concealment,” which was not pled in the Amended Complaint, is not available to toll the limitations period. This provision requires affirmative conduct designed to hide the existence of the cause of action. *Browning*, 313 Fed. Appx. at 663; *Larson*, 21 F.3d at 1172-73; *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990) (“The phrase ‘fraud or concealment’ in § 1113 ‘incorporates the fraudulent concealment doctrine.’”) Plaintiffs do not and cannot claim there was any conduct by a plan fiduciary that satisfies this requirement. As shown above, each plaintiff clearly believed he had been wronged by the adoption of the cash balance amendment from the outset.

CERTIFICATE OF SERVICE

Robert O. King, an attorney, hereby certifies that he caused copies of the foregoing **MEMORANDUM OF DUKE ENERGY RETIREMENT CASH BALANCE PLAN AND DUKE ENERGY CORPORATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON FIDUCIARY DUTY CLAIMS** to be served on all counsel through the Court's ECF system on this 1st day of April 2010.

/s/ Robert O. King_____