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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JEANNE FOSTER,	*	
	*	4-00-CV-90286
Plaintiff,	*	
	*	
v.	*	
	*	
E.I. DUPONT de NEMOURS AND COMPANY and PIONEER HI-BRED INTERNATIONAL, INC.,	*	
	*	ORDER
Defendants.	*	
	*	

Before the Court is Defendant E.I. DuPont de Nemours and Company's ("DuPont") motion to dismiss Counts II, III, and IV of Plaintiff's Recast and Substituted Complaint ("Complaint"). DuPont's motion was filed August 18, 2000. Plaintiff filed her resistance on September 15, 2000. DuPont replied on October 6, 2000. The Court held oral argument on this motion on December 7, 2000 at the United States Courthouse in Des Moines, Iowa. The matter is submitted.

I. Background

This is an action brought under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, by Plaintiff Jeanne Foster, a former in-house attorney with Defendant Pioneer Hi-Bred International, Inc. ("Pioneer"). DuPont's liability, it is claimed, grows out of its conduct and statements surrounding its purchase and take-over of Pioneer on October 1, 1999. As this comes on DuPont's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court will state, and assume as true, the facts as substantially presented in Plaintiff's Complaint. *See Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1304 (8th Cir.

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1997).

At bottom, the Plaintiff in this case is seeking payment of severance benefits due her under the terms of a severance plan instituted by her former employer, Pioneer. In 1989, Pioneer adopted the Pioneer Hi-Bred International, Inc. Change in Control Severance Compensation Plan for Management Employees (hereinafter "Plan" or Change in Control Plan"). Pioneer instituted its Change in Control Plan, in part, to protect itself from the adverse effects of attempted takeovers. The Plan provided generous severance benefits for its management employees on the theory these workers would agree to work for Pioneer in an environment where takeover threats to the company were real.

The terms of the Plan are elaborate and the preconditions for payment of severance benefits involve several "triggering" events. First, a "change in control" must occur — meaning purchase by an outsider of 25% or more of Pioneer's common stock. Second, there must be "involuntary termination" of a plan participant based on a "Stated Good Reason." The "objective" triggering events for a "Stated Good Reason," which are detailed in the Plan, include: (a) reduction in the Participant's base salary; (b) failure to continue in effect any bonus plan; (c) failure to continue in effect any benefit or compensation plan; (d) assignment to the Participant any duties inconsistent with the Participant's duties, responsibilities, or status; (e) or a requirement the Participant change job locations. *See* Complaint at para. 15.

The Plan provides that participants such as Ms. Foster, upon involuntary termination of employment within three years of a change in control, receive a lump sum cash payment equal to three times the participant's annual compensation, payable no later than 10 days after the involuntary termination of employment. Participants also receive health, dental, and life insurance coverage for 12 months after the involuntary termination of employment.

In 1995, Pioneer approached Ms. Foster and invited her to join Pioneer's legal department. Ms. Foster expressed her concern that Pioneer had recently been the subject of a takeover overture by Monsanto and that as a single mother she needed assurances that she would not be terminated or be forced to leave Des Moines. Pioneer's then-general counsel made a clear and definite promise to Ms. Foster that if she accepted employment with Pioneer, she would be protected under the terms of the Plan. Specifically, she was promised that if a change in control occurred, then her "subjective" determination that she could no longer in good faith work for the surviving company was all that was required to entitle her to severance benefits. Based on this specific promise, Ms. Foster agreed to work for Pioneer. Since 1989, the Plan consistently has been interpreted to provide benefits based upon the subjective determination of Plan participants.

In January of 1999, Pioneer commenced discussions with DuPont regarding the latter's acquisition of Pioneer. During these discussions and well before the merger between the two companies closed on October 1, 1999, DuPont reviewed the Plan and became informed about its "objective" triggering provisions, as well as Pioneer's understanding of the "subjective" triggers.

Plaintiff claims that sometime after March 15, 1999, DuPont dictated that there would be "no easy exit due to 'Stated Good Reason'" for Ms. Foster and other participants under the Plan despite objection from Pioneer's management that this was an incorrect interpretation. Thus, Plaintiff claims, DuPont interpreted the subjective trigger out of the Plan.

Pioneer merged with DuPont on October 1, 1999. On October 15, 1999, Plaintiff filed a written claim for benefits. She cited both objective and subjective reasons as to why she could no longer reasonably and in good faith perform the duties for which she was hired. Pioneer responded one month later stating Plaintiff needed to quit first before she could file a claim for severance benefits. Plaintiff contends this quit-first requirement is arbitrary because at least two

other Pioneer employees were not required to quit first prior to making a claim for benefits.

On December 1, 1999, Plaintiff submitted her resignation and gave a detailed notice of claim for benefits, again citing both objective and objective reasons. The DuPont-controlled severance and authorization committees (which were established to hear and decide severance claims) denied Plaintiff's claim for benefits. Plaintiff avers that in denying her claim, these committees acted arbitrarily in failing to interview key witnesses and review documents which supported her claim.

The instant lawsuit, which is in six counts, followed: Count I seeks change in control benefits against Pioneer; Count II seeks the same against DuPont; Count III is an action for breach of fiduciary duty against both Pioneer and DuPont; Count IV is an interference claim against DuPont; Count V is a promissory estoppel claim against Pioneer; and Count VI is a request for attorneys fees and costs against Pioneer. Given the parties' agreement that Count II is no longer in dispute,[1] DuPont seeks dismissal of III and IV to the extent Plaintiff seeks recovery against DuPont.

II. Standard for Motion to Dismiss

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (emphasis added); *see also Morton v. Becker*, 793 F.2d 185, 187 (8th Cir.

[1] In its agreement to merge with Pioneer, DuPont guaranteed Pioneer's obligations under the Change in Control Plan. Thus, Count II is really a claim on DuPont's promise to pay benefits under the Plan in the event Pioneer is adjudicated liable for benefits and either cannot or refuses to pay. In its motion papers and again at oral argument, DuPont renewed its promise to guarantee Pioneer's obligations to pay benefits under the Plan. Likewise, Pioneer accepted DuPont's promise in its resistance and at oral argument. Count II is no longer in dispute. Therefore, DuPont's motion as to Count II is granted without further discussion.

1986). In addition, the allegations of the Complaint must be taken as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). The Complaint must be liberally construed in the light most favorable to the Plaintiff. *Fusco*, 676 F.2d at 334. A dismissal under Rule 12(b)(6) should be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.* (citing *Jackson Sawmill Co., Inc. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978)) (emphasis added). The Court will examine DuPont's motion with these standards in mind.

III. Discussion

Count III

In Count III, the Plaintiff alleges DuPont breached its fiduciary duty in violation of 29 U.S.C. § 1132(a)(2), for which Plaintiff seeks damages. DuPont argues that this count fails as a matter of law because it is a "repackaged benefit claim,"meaning the Plaintiff seeks no different relief than that provided under a claim for benefits. Plaintiff denies that Count III is a repackaged benefit claim and believes that she has plead a valid § 1132(a)(2) claim.

Under 29 U.S.C. § 1132(a)(2), "[a] civil action may be brought" by a plan "participant" for "appropriate relief under section 1109 of this title." The cross-referenced section, 29 U.S.C. § 1109, is titled "Liability for breach of fiduciary duty" and provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligation, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a). By its own terms, § 1132(a)(2) authorizes a participant (Ms. Foster) to bring an action against a fiduciary (assertedly DuPont) who has violated § 1109.

In addition to this general rule of standing that a participant can sue her fiduciary, two other rules apply. First, the Supreme Court has made clear that "recovery for a violation of [§ 1109], inures to the benefit of the plan as a whole" and not to the individual claimant. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-44 (1985) ("Congress did not intend [§ 1109] to authorize any relief except for the plan itself."). And second, the Eighth Circuit has held, based on a suggestion by the Supreme Court, that where a plaintiff "is provided adequate relief by her right to bring a claim for benefits under . . . 29 U.S.C. § 1132(a)(1)(B), as she did in Count I, and she seeks no different relief in [another count] of her complaint," then the plaintiff is barred as a matter of law from bringing a claim under that other count. *Wald v. Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th cir. 1996) (relying on *Varity Corp. v. Howe*, 516 U.S. 489 (1996)); *see also Graham v. Rosemount, Inc.*, 40 F. Supp. 2d 1093, 1102 (D. Minn. 1999) (citing *Wald*, Court held "plaintiff's breach of fiduciary duty claim is not appropriate and must be dismissed" because it requests the same relief as her § 1132(a)(1) claim for benefits), *aff'd*, 221 F.3d 1342 (8th Cir. 2000) (unpublished per curiam). In short, *Russell* requires that § 1132(a)(2) relief accrue to the Plan and not to the individual participant; and *Wald* requires that the relief requested be something different than a payment of benefits.

It's easy to view the whole of this lawsuit as nothing more than a straight claim for severance benefits, enforceable through an action pursuant to 29 U.S.C. § 1132(a)(1), which is what is properly plead in Count I. The theme of the Complaint and Plaintiff's resistance brief is that she was wrongfully denied benefits and now seeks payment.

At this stage of the litigation, however, the Court's role is not to divine themes but simply to test the sufficiency of the pleadings. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984) (issue is not whether a

claimant will ultimately prevail or whether recovery is remote or unlikely but whether the claimant is entitled to offer evidence to support the claims). Fidelity to the standards of Rule 12(b)(6), therefore, counsels against granting DuPont's motion to dismiss Count III at this stage of the litigation. As to liability, Plaintiff has plead enough facts in Count III to sustain a finding that DuPont violated § 1132(a)(2), as cross-referenced in § 1109(a). *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994) (citing *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (setting forth elements for proving breach of fiduciary duty)).

The problem here is not with liability, but with the remedy requested. Although the Complaint is not the most artfully plead in terms of the relief requested, the Court finds, after taking the allegations in a light most favorable to Ms. Foster, that Plaintiff has sufficiently requested relief for her § 1132(a)(2) claim that satisfies the requirements of *Russell* and *Wald*. Count III recites how the conduct of DuPont committee members was arbitrary and capricious. It also states that DuPont and Pioneer failed to fund a Rabbi Trust as required by the Plan. In her Prayer for Relief, in addition to requesting an award of damages, costs, and attorney fees, the Plaintiff broadly requests "such further relief as is appropriate in the interest of justice." Compl. at 18. At oral argument, Plaintiff suggested that imposition of the Rabbi Trust as well as a determination that DuPont committee members are not proper fiduciaries for the Plan would constitute appropriate remedies under Count III. The Court agrees. Consistent with *Russell*, this type of requested relief is appropriate for § 1132(a)(2) fiduciary claims because the relief would inure *not* to the Plaintiff but to the Plan. And consistent with *Wald*, imposition of the Rabbi Trust as well as a declaration about the fitness of DuPont fiduciaries constitute "such other equitable or remedial relief" authorized by § 1109(a) which is "different" than that available on a straight claim for benefits. *See Hall v. Lhaco, Inc.*, 140 F.3d 1190, 1197 (8th Cir. 1998)

("different" relief included injunctive relief and an accounting; therefore claim not barred under *Wald*). For these reasons, the Court denies DuPont's motion to dismiss Count III of the Complaint.

Count IV

In Count IV of her Complaint, Plaintiff alleges that DuPont intentionally and improperly interfered with her rights under the Change in Control Plan contrary to 29 U.S.C. § 1140. In relevant part, that section makes it unlawful for "any person to . . . interfer[e] with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter." *See Adams v. LTV Steel Min. Co.*, 936 F.2d 368, 370 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992) (setting forth the prima facie case for an interference claim) (citation omitted). With respect to Count IV, the Plaintiff seeks relief that is no different than that claimed in Count I (severance benefits) and Count III (declaration that DuPont officials are not proper fiduciaries and imposition of the Rabbi Trust). Because *Wald* bars redundant ERISA claims as a matter of law, Count IV is dismissed. DuPont's motion to dismiss Count IV is granted.

IV. Conclusion

For the foregoing reasons, the Court enters the following Order:

(1) With respect to Count II (claim for Change in Control benefits against DuPont), DuPont's motion is **GRANTED**;

(2) With respect to Count III (breach of fiduciary duty as against DuPont only), DuPont's motion is **DENIED**;

(3) With respect to Count IV (interference with protected rights as against DuPont), DuPont's motion is **GRANTED**.

IT IS SO ORDERED.

Dated this 3rd day of January, 2001.

ROBERT W. PRATT
U.S. DISTRICT JUDGE