

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANTHONY MILLER.	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 00-4938
RITE AID CORPORATION	:	
	:	
Defendant.	:	
	:	

FINDINGS OF FACT & CONCLUSIONS OF LAW

YOHN, J. May _____, 2002

On April 30 and May 1, 2002, the court conducted a bench trial in the above captioned case. Anthony Miller (“Miller”) brought this action against his former employer, Rite Aid Corporation (“Rite Aid”), to recover the severance payments that he alleges were wrongfully withheld from him.¹

The issue in this case is whether Miller can demonstrate that he is entitled to recover unpaid severance benefits from Rite Aid because of a breach of fiduciary duty under the Employment Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001. Miller contends

¹ Miller’s claim in the current action is solely for the 39 weeks of compensation to which he maintains that he is entitled under the Rite Aid severance package. Miller has withdrawn his claim for a severance bonus for the Rite Aid fiscal year 2001, which ran from March 1, 2000 through February 28, 2001. Miller resigned in August of 2000, and therefore he was not working for Rite Aid at the end of the fiscal year or at the time when the bonuses were distributed thereafter. It is Rite Aid’s policy that only those employees employed on the date that bonus checks are distributed are entitled to receive a bonus. Miller has also withdrawn his claim for the unrealized profits on the sale of his home in Harrisburg and any other miscellaneous claims.

that Mark White (“White”), his immediate supervisor at Rite Aid, was an ERISA fiduciary and that by failing to lay-off Miller once Miller’s severance had been approved by senior Rite Aid management, White breached his fiduciary duty under ERISA to administer the severance plan solely in the interest of Miller. In response, Rite Aid argues that the severance plan provided White with discretion to determine when, and if, Miller would be laid off and that in deciding not to immediately lay-off Miller once he had been given upper management’s approval, Miller was acting as an employer and not an ERISA fiduciary. Rite Aid contends that White’s decision not to terminate Miller’s employment until the under-staffing of his department was remedied was an employer “business decision” immune from the duties imposed on ERISA fiduciaries under 29 U.S.C. § 1104.²

Having considered all of the testimony and exhibits offered at trial, pursuant to Fed. R. Civ. P. 52(a), I make the following findings of fact and conclusions of law.

C. FINDINGS OF FACT

1. On June 7, 1999, Rite Aid hired Miller as its Director of Construction - Western Division in Rite Aid’s Store Development Department. Plaintiff/Defendant Proposed Undisputed Findings of Fact (“Agreed Findings”) ¶ 1.
2. Miller accepted the June 7, 1999 job offer and relocated to Rite Aid’s corporate headquarters in Camp Hill, Pennsylvania. Agreed Findings ¶ 2. Miller started working for Rite Aid on June 28, 1999. Testimony of Anthony Miller (“Miller Test.”).

² In his complaint, Miller also sought to recover under a breach of contract theory. However, prior to trial, the court granted summary judgment to Rite Aid on the breach of contract claim due to ERISA preemption.

3. Rite Aid hired Miller at an annual salary of \$115,000. Agreed Findings ¶ 3.
4. In September 1999, Rite Aid laid off employees at its corporate headquarters. Miller Test.
5. As a result of the lay-offs, Miller's position at Rite Aid changed. Miller Test; White Test. Miller became the Corporate Director of Store Planning and he reported directly to Mark White, Rite Aid's Vice-President of Store Development. Agreed Findings ¶ 4.
6. Also in the fall of 1999, Rite Aid's Chairman, Martin L. Grass, resigned. Miller Test.; Testimony of Mark White ("White Test."). As a result, in December 1999, Rite Aid hired a new senior management team. Miller Test; White Test.
7. In an effort to cut costs, the new management team decided to restructure Rite Aid's real estate development and construction departments. White Test.
8. Because White was concerned that Rite Aid would lose its best employees to other companies, White drafted a "Guaranteed Severance Program," which was to serve as an incentive for Rite Aid's employees to stay. White Test.; Exh. P-3. Rite Aid's new senior management rejected this plan. White Test.
9. Subsequently, in March 2000, White submitted a proposed employee restructuring arrangement plan to the senior management. White Test. This plan called for the reorganization of Rite Aid's corporate headquarters by adding and eliminating certain positions. Id. Those whose positions were to be eliminated were eligible to receive a severance package. Id.
10. Miller's name was not included on the initial proposed list of employees to be severed from Rite Aid. Id.

11. However, later in March 2000, Miller discussed with White the possibility of adding Miller's name to the list of those employees to be severed.³ Miller Test; White Test. Because Miller was a personal friend of White and had expressed a desire to be added to the severance list, White amended his proposed department restructuring plan to include Miller as an employee whose position was to be eliminated. White Test; Exh. P-11.
12. In order for the lay-off of Miller to be practicable, it was necessary to add two positions to the corporate department: director of construction and director of store planning. White Test. Thus, at the same time that White added Miller to the severance list, he slated Bob Blickley ("Blickley") to fill a new director of construction position and he added a new, yet unnamed, director of store planning to the corporate department. White Test.; Exh. P-11.
13. Miller's enthusiasm for being added to the severance list stemmed from the fact that at this time he had been exploring another job opportunity at US GlobalNet ("USGN"), an internet start-up company that was in the process of developing an internet based construction management software system. Miller Test. Douglas Sperr ("Sperr") was the President of USGN with whom Miller had established contact.⁴ Id.

³ Miller and White disagree as to who approached whom with regard to the addition of Miller's name to the severance list. However, this disputed fact is not relevant to the court's conclusions of law as set forth below.

⁴ At trial, the defendant presented evidence to establish that Miller had acted improperly by making business contacts for Sperr and USGN while he was employed at Rite Aid. With this evidence, the defendant wished to show that Miller had "unclean hands" that prevented him from recovering under ERISA, even if the court found that Rite Aid acted wrongfully in not providing him with severance benefits. Given the court's conclusions of law, as set forth below, the issue of unclean hands is irrelevant here, and therefore, the court will not make specific findings of fact regarding the actions Miller took on behalf of USGN while he was still employed at Rite Aid.

14. The approval of John Standley (“Standley”), Rite Aid’s chief financial officer, was necessary before any lay-offs could occur. Testimony of John Standley (“Standley Test.”). On April 19, 2000, Standley gave his approval to the amended list of positions to be severed. Exh. P-12.
15. The approval of Mary Sammons (“Sammons”), Rite Aid’s president, was necessary before any positions could be added. Standley Test. On May 11, 2000, Sammons gave her approval to the amended list of positions to be added. Exh. P-12. Thus, as of this date, the amendment to the restructuring plan was approved in its entirety.
16. On May 9, 2000, Miller and White had a conversation in the hallway, in which Miller asked White whether he could change his mind and stay at Rite Aid, rather than being placed on the severance list. Miller Test.; White Test. White responded that because the restructuring agenda was up for final approval, it was too late for the severance list to be changed. Id.
17. Thereafter, sometime in late May, Standley gave final approval to the proposed employee restructuring plan, which included the amended severance list with Miller’s name.⁵ Standley Test.; White Test. Under the plan, White had discretion as to the timing and order of the lay-offs of each individual whose severance was approved by senior Rite Aid management. Id.
18. At this time, Gary Stein, the head of Rite Aid’s real estate department, and White were

⁵ Because of the short term of Miller’s employment at Rite Aid, Standley determined that Miller should not receive a full year of severance compensation. Standley Test. As a result, before giving final approval to the list of employees to be severed, Standley changed Miller’s severance compensation from a full year of compensation, or \$115,000, to 39 weeks of compensation, or \$86,250. Standley Test.; Exh. P-15.

given the authority to implement the restructuring plan.⁶ Testimony of Steve Chesney (“Chesney Test.”); Standley Test; Exh. P-15.

19. On June 1, 2000, Miller and Sperr orally agreed to employment terms whereby Miller was targeted to begin working for USGN on June 5, 2000.⁷ Miller Test; Exh. P-22. A written employment agreement was signed on June 20, 2000. Id.
20. On June 6, 2000, White told Miller he had been approved to receive 39 weeks of severance. Miller Test. However, White did not provide Miller with a date certain for his release. Id.
21. Immediately thereafter, White began to implement the restructuring plan. Miller Test.; White Test.
22. White had conversations with Blickley about relocating to Rite Aid’s corporate headquarters. Miller Test.; White Test. Blickley arrived at headquarters to fill the director of construction position in June 2000. Id.
23. Some, but not all, of those employees listed on the severance list were laid off at the end of the first week in June. Miller Test; Standley Test.; White Test.
24. On June 7, 2000, the Director of Retail Facilities, Larry Haller, who reported directly to Miller, tendered his written resignation effective June 23, 2000. Agreed Findings ¶ 8.
25. Recruitment began to fill the positions at Rite Aid that would be responsible for Miller’s

⁶ The exact role of Stein in the implementation of the plan was not testified to at trial.

⁷ At the May 23-27, 2000 ICSC convention, White and Sperr had a conversation about the fact that Miller was leaving Rite Aid to work for USGN. White Test. However, White and Sperr did not discuss a definite date for when Miller would be officially severed from Rite Aid and able to begin working at USGN. White Test.; Deposition of Douglas Sperr, p. 118 - 19.

- work once he departed. Advertisements for the director of store planning and the director of retail facilities were posted on the internet. Miller Test.; White Test.; Exh. P-16.
26. Although White and Miller had expected Haller's resignation, it occurred sooner than had been anticipated. Miller Test; White Test. As a result, White had to delay any plans to layoff Miller and Miller agreed to stay for awhile to help in the Rite Aid facilities department during the restructuring of the corporate headquarters. Id. Miller changed his targeted start date at USGN to July 31, 2000. Miller Test; Exh. P-22.
27. A staff meeting was held on June 9, 2000, in which it was announced that Miller would be leaving Rite Aid and joining USGN, but that he would stay around "for a while" to help retail facilities. Exh. P-24. Because of this indefinite time frame, I find that as of this date, there was no agreement upon the date on which Miller was to be laid off from his employment at Rite Aid.
28. From June 9, 2000 through July 2, 2000, Miller and White exchanged e-mails regarding Miller's entitlement to a severance package. Exh. P-26. On June 14, 2000, White told Miller that he would get his package when he was laid off but that because of staffing shortages, White could not afford to lay him off at that time nor could White commit to a date as to when he would be able to let Miller go. Id. According to White, Miller's release date depended on when he could hire and train the personnel necessary to appropriately staff his department. White Test.; Exh. P-26. On June 26, 2000, Miller e-mailed White that he would stay at Rite Aid until July 28, and that his 9 months severance needed to start from that date. Exh. P-26. White responded on July 2, 2000 that he could not guarantee Miller a specific severance date and that he would not agree to a

severance date simply because Miller had accepted a job with USGN. Id. White indicated that Miller's lay-off was at the discretion of the company and that he would only be laid off, if at all, when his employment at Rite Aid was no longer necessary. Id.

29. On August 9, 2000, White wrote Miller an interoffice memo in which he reiterated the policy of Rite Aid to give severance packages to employees only when they were laid off. Exh. P-28. White further reiterated that Rite Aid only laid off employees when there was a business necessity to do so, and that in Miller's case it was not only not necessary to lay him off, it was "virtually impossible," given the staffing shortages in Rite Aid's corporate department. Id.
30. Accordingly, I find that in using his discretion to determine that Miller's lay-off was impractical at that time, White was acting as an employer in accordance with his discretionary power under the severance plan, properly considering Rite Aid's best business interests.
31. On August 18, 2000, Miller voluntarily resigned from Rite Aid, effective immediately. Agreed Findings ¶ 10.
32. At the time Miller resigned, he was aware that his severance benefits would not vest until his employment at Rite Aid was severed. This fact is evidenced by the correspondence between Miller and White in which White indicated that Miller would not receive his severance package until he was laid off and that if Miller left before he was laid off, it would be without severance. Exh. P-26.
33. Rite Aid never severed Miller's employment. Agreed Findings ¶ 11.
34. There are employees listed on the severance list approved in May 2000 that continue to

be employed by Rite Aid. Standley Test.

35. Rite Aid employees who resign before Rite Aid severs their employment do not receive any severance benefits. Chesney Test.
36. Steven Chesney, Rite Aid's director of Corporate Human Relations, is responsible for administering lay-offs at Rite Aid. Chesney Test. Only when Chesney was told of an employee's release date, did Chesney prepare a severance and release agreement for that employee. *Id.* Because Miller was never given a date certain for his release, Chesney did not prepare a severance package for Miller. Chesney Test.; Exh. D-11 & D-12. As a result, Miller never received any amount under a Rite Aid severance plan.

C. CONCLUSIONS OF LAW

Standing to Bring ERISA claim

1. The severance plan is an employee welfare benefit plan subject to ERISA.⁸ 29 U.S.C. § 1002(1). Plaintiff/Defendant Proposed Undisputed Conclusions of Law (“Agreed Conclusions of Law”) ¶ 3.
2. In order to state a claim under ERISA, a person must be a “participant” in the severance plan. 29 U.S.C. § 1132(a).
3. ERISA defines participant as “any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer.” 29 U.S.C. § 1002(7).

⁸ Because no written document containing the contents of the plan was presented at trial, I must infer those contents from the testimony presented at trial.

4. Because Rite Aid only provides severance benefits to those who are laid off and Miller voluntarily resigned, Miller is not an employee entitled to benefits nor is he able to establish that he may become eligible for benefits under the severance plan. *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652, 655 (3d Cir. 1993) (To establish that one may become eligible for benefits, a claimant must prove that (1) he will prevail in a suit for benefits, or (2) eligibility requirements will be fulfilled in the future.). Thus, Miller is not a qualified ERISA participant.
5. Because Miller voluntarily resigned knowing that his severance benefits did not vest until he was laid off, Miller lacks standing to bring an ERISA action for unpaid benefits under the severance plan. *Sallee v. REXNORD Corp.*, 985 F.2d 927, 929 (7th Cir. 1993).
6. However, even if Miller did have standing to bring this action, Miller cannot establish an entitlement to severance benefits under ERISA.

Breach of ERISA Fiduciary Duties

7. A person that has the discretion to adopt, modify or terminate an ERISA plan does not qualify as an ERISA fiduciary. *Lockheed v. Spink*, 517 U.S. 882, 890 (1996). A person is an ERISA fiduciary to the extent he exercises discretion with respect to the management or administration of an ERISA plan. 29 U.S.C. § 1002(21)(A). However, “to the degree that the plan gives an employer discretion, the employer is not a fiduciary when it makes determinations according to the plan’s terms that affect the employees’ eligibility for benefits.” *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153, 158 (3d. Cir. 1999).
8. I conclude that White does not qualify as an ERISA fiduciary. An employer does not act

as a fiduciary when making business decisions allowed for by a plan.⁹ *Id.* As I have found, although Miller's lay-off and corresponding eligibility for severance had been approved by Rite Aid's senior management, the management did not approve a definite date for Miller's release. Although the plan as adopted approved the list of employees to

⁹ Plaintiff concedes that a person responsible for designing, amending or terminating an ERISA plan is not acting as an ERISA fiduciary. However, plaintiff contends that Standley and the senior Rite Aid management team were the individuals responsible for designing the plan at issue here, and that White was only responsible for implementing the plan as designed by Standley. Because White had discretion to implement the plan, plaintiff maintains that White was an ERISA fiduciary and that he breached his fiduciary duties to Miller by not considering Miller's best interests when it came to the timing of his severance from Rite Aid. He contends that once this plan was approved White was required to lay him off and Rite Aid was required to pay him severance benefits. To support this argument, in his Supplemental Trial Memorandum, plaintiff cites cases that draw a distinction between an employer who is responsible for the design of an ERISA plan and one who has discretion to administer such a plan, the later of which is a fiduciary, the former of which is not. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443 (1999).

However, the mere fact that White had discretion to implement the plan in the manner he saw fit does not mean that he was a plan administrator, and therefore an ERISA fiduciary. Whether White was a fiduciary here depends not on whether White had discretion but on whether White had discretion only to administer a plan as designed by Standley or had discretion over the timing and order of lay-offs as an employer making a business decision allowed as part of the plan. The Third Circuit has explicitly found that when a plan provides an employer with discretion to make a business decision that affects an employee's eligibility to receive benefits, the employer does not act as a fiduciary when making such a decision. *Noorily*, 188 F.3d at 158. I conclude that White, in using his discretion to determine whether lay-offs were in the best interests of Rite Aid, was acting as an employer, immune from the fiduciary standards of ERISA.

The severance plan authorized by Standley did not set a definite release date for the employees whose severance from Rite Aid was approved. Instead, the approved plan gave White the discretion to determine the order and timing for the lay-offs of each individual listed to be severed. In using his discretion not to lay-off Miller immediately once the severance plan was approved by Standley, White was exercising his discretion under the plan to consider the business interests of Rite Aid, finding that Rite Aid could not afford to lay-off Miller until the Rite Aid corporate headquarters was adequately staffed. White's use of discretion in this manner was clearly as an employer making a business decision and not as an ERISA fiduciary. As such, White's focus on Rite Aid's business interests in deciding not to lay-off Miller until the understaffing at Rite Aid's corporate headquarters was remedied was not a breach of a fiduciary duty.

be laid off and to be paid a severance benefit, it did not require immediate action in this regard. Under the plan, White had discretion to determine the timing and order of the employee lay-offs whose severance had been approved by senior management. *See supra* A-17. This is corroborated by the fact that the lay-offs of the people on the approved severance list occurred over a period of time, and that some of those people continue today to be employed by Rite Aid. *See supra* A-24, A-34. It is further corroborated by the continued negotiations between Miller and White regarding Miller's lay-off date. *See supra* A-28. Accordingly, White's decision not to lay-off Miller until the conceded under-staffing of the Rite Aid's corporate department was remedied, was a proper use of discretion, granted as part of the severance plan and immune from the fiduciary standards imposed by ERISA. *Noorily*, 188 F.3d at 158.

9. Because White was acting as an employer and not a fiduciary when he decided to delay Miller's release from Rite Aid, there was no breach of fiduciary duty under ERISA.¹⁰ Accordingly, I conclude that Rite Aid is not liable to Miller for any amount of severance that Miller would have received had he been laid off from his employment with Rite Aid.

C. CONCLUSION

For the reasons stated above, I conclude that the plaintiff, Anthony Miller, is not entitled to recover any withheld severance benefits from the defendant, Rite Aid. I will therefore enter

¹⁰ Under ERISA, a fiduciary is obligated to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1).

judgment in favor of Rite Aid.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANTHONY MILLER.	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 00-4938
RITE AID CORPORATION	:	
	:	
Defendant.	:	
	:	

ORDER

And now this _____ day of May, 2002, upon consideration of the plaintiff's complaint, the defendant's answer, and after trial, and in accordance with the aforesaid findings of fact and conclusions of law, it is hereby ORDERED that judgment in entered in favor of the defendant, Rite Aid Corporation, and against the plaintiff, Anthony Miller.

William H. Yohn., Jr., J.