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

CHARLES STEPNOWSKI Plaintiff,	:	CIVIL ACTION
v.	:	
HERCULES, INC.; THE PENSION PLAN OF HERCULES INC.,; THE HERCULES INC. FINANCE COMMITTEE; and EDWARD V. CARRINGTON, HERCULES' VICE PRESIDENT HUMAN RESOURCES, Defendants.	:	NO. 04-2296

MEMORANDUM AND ORDER

Fullam, Sr. J. May 26, 2005

Until his retirement on January 1, 2003, plaintiff was an employee of defendant Hercules, Inc., and a participant in its pension plan, which is a tax-exempt, defined benefit plan. One notable feature of this plan is that, upon retirement, employees may elect to receive a lump sum payment representing the present value of 51% of their future pension payments.

Between 1985 and the end of 2001, the interest rate used to determine the present value of these future benefits was the published rate of the Pension Benefit Guaranty Corporation (PBGC), an entity created by ERISA to encourage the growth of pension plans. In 2002, not long before plaintiff's retirement, Hercules amended the plan to specify that the future payments would be calculated on the basis of a higher rate of return (the 30-year treasury rate), thus reducing the present value of future

payments. As a result of this change, plaintiff's lump sum payment was $28,000 less than it would have been under the PBGC rate calculation. Seeking to represent a class of similarly situated-retirees and potential retirees, plaintiff brought this action challenging the 2002 amendment to the plan.

Currently before the Court are defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6), plaintiff's motion for class certification, and defendants' motion to strike the class allegations. For the reasons that follow, the motion to dismiss will be granted in part and the motions to certify the class and strike the class allegations will be denied.

The complaint alleges that defendants' decision to amend the plan constitutes a breach of fiduciary duty, a breach of contract, and an improper cutback of benefits. Plaintiff alleges that defendants represented on the company's intranet site that the amendment was "required", and not simply permitted, by the Retirement Protection Act (RPA). The RPA mandates that the current value of any accrued benefit in a pension plan be greater than or equal to the current value determined using the 30-year Treasury rate. 26 U.S.C. § 417(e)(3)(2002).

Count one is an ERISA benefits claim. Plaintiff argues that the plan amendment never took effect; thus application of the PBGC rate is warranted under the unamended plan. Moreover, plaintiff asserts that even if the plan amendment was valid,

Hercules made a binding promise not to change the rate when it placed postings regarding changes in federal law and the possibility of a plan amendment on the company intranet site.

Defendants' position is that the validly amended plan does not provide plaintiff with the option of having the PBGC rate applied to his pension and that the intranet postings regarding proposed changes to the plan were merely informal communications, not binding promises.

In deciding the motion to dismiss I am not prepared to say that plaintiff cannot state a claim for ERISA benefits. While it seems clear that the plan amendment was valid and enforceable, Plaintiff alleges in his complaint that he did not receive the benefit of his bargained for pension plan. While the evidence may eventually show that the intranet postings were incapable of creating a binding promise, at this stage plaintiff has alleged sufficient facts to support this claim.

With respect to Count II, the claim for breach of fiduciary duty, plaintiff alleges that Hercules breached its fiduciary duty when it lied about the necessity of the rate change to its employees. Hercules claims that the absence of evidence of detrimental reliance in the complaint mandates dismissal.

A company has a duty to keep its employees informed about pension plans, and the information provided must be accurate. Hozier v. Midwest Fasteners,Inc., 908 F.2d 1155, 1170 (3d Cir.

1990). A plaintiff need not specifically rely on that information to state a claim for breach of fiduciary duty under ERISA. Ackerman v. Warnaco, 55 F.2d 177 (3d Cir. 1995). Plaintiff has alleged that he suffered a loss when he found his ability to challenge the plan amendment diminished, and as a result he has sufficiently pled a breach of fiduciary duty claim. Id.; see also Jordan v. Federal Exp. Corp., 116 F.3d 1005, 1012 (3d Cir. 1997) ("there is little doubt that ERISA provides plan participants an equitable cause of action for an administrator's breach of fiduciary duty.")

The third count of the complaint alleges that the plan amendment violated the anti-cutback provisions of ERISA. I am inclined to dismiss this count based on the recent ruling of the Unites States Tax Court, which held that the Commissioner did not err in his determination that the Hercules plan amendment did not violate the anti-cutback rule of 26 U.S.C. § 411(d)(6). Charles P. Stepnowski v. Commissioner of Internal Revenue and Hercules Incorporated, 124 T.C. No. 12 (U.S. Tax Ct. Apr. 26, 2005).

Turning to the issue of class certification, Plaintiff seeks certification of a class consisting of all Hercules Pension Plan participants who retired, or who will retire, on or after January 1, 2002. The parties agree that the first three elements of Fed. R. Civ P. 23(a), numerosity, commonality, and typicality, are met in this case. However, the parties do debate whether plaintiff

and his counsel are adequate class representatives under Rule 23(a)(4). I find that they are not, and as a result the motion for class certification will be denied.

Defendants contend that plaintiff's interests are adverse to those of the class because plaintiff pursued an action in the United States Tax Court seeking a declaratory judgment that the plan amendment had the effect of disqualifying the plan. Defendants argue that, had plaintiff succeeded in Tax Court, the effect would have been disqualification of the Hercules plan, resulting in adverse tax consequences for plan members and for the company itself.

While plaintiff argues that the cost to Hercules to execute a curative amendment to the plan, had the Tax Court disqualified it, pales in comparison to the cost of losing tax exempt status, there is no guarantee that defendant would have taken such action. Since there is a possibility that plaintiff's action in the Tax Court could have resulted in adverse consequences for all other potential class members, and because plaintiff still can pursue an appeal of the Tax Court's decision (26 U.S.C. § 7483 provides for a 90 day appellate window), neither plaintiff nor his counsel can adequately represent the proposed class.

Despite this deficiency, I will not strike the class allegations at this time. With the exception of the adequacy of representation requirement, all other elements of Rule 23(a) have

been met in this case. In addition, the proposed class meets the cohesiveness requirement of Rule 23(b)(2), because individual issues of reliance do not effect the outcome of this case. Hercules argues that the outcome of the case will depend upon the resolution of individual issues of reliance for each class member. However, if defendant did commit widespread misrepresentation with regard to the plan as plaintiff alleges, plan participants were all harmed equally through their diminished capacity to make informed choices about the plan, resulting in a class with cohesive interests.

An Order follows.

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ORDER

AND NOW, this 26th day of May, 2005, upon consideration of Defendants' Motion to Dismiss, Plaintiff's Motion to Certify the Class, Defendants' Motion to Strike the Class Allegations, and all responses thereto, IT is ORDERED:

1. Defendants' Motion to Dismiss is GRANTED in part. Count three of the complaint is dismissed. In all other respects, the motion is DENIED.
2. Plaintiff's Motion to Certify the Class is DENIED without prejudice.
3. Defendants' Motion to Strike the Class Allegations is DENIED.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.