

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1496  
Summary Calendar

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JAMES W. GREEN,

Plaintiff-Appellant,

versus

PRIMERICA DISABILITY INCOME  
PLAN, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
For the Northern District of Texas  
(CA3-91-2726-T)

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(June 28, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:\*

James W. Green appeals an adverse summary judgment, the substitution of defendants, and the transfer of his case to another district judge. We affirm in part and vacate and remand in part.

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

### Background

In August 1987 while employed by Gulf Insurance Co., Green suffered a retinal hemorrhage which left him blind in his right eye. This allegedly was caused by a work-related lifting accident. Shortly thereafter Gulf terminated Green, citing his poor performance. Green obtained alternative employment which lasted for approximately two years.<sup>1</sup> During that time Green communicated with Gulf regarding his eligibility for long-term disability benefits. After he lost his second job, Green made an application for long-term disability benefits under the Gulf plan. His application was denied on the grounds that his coverage under the plan had terminated when he was dismissed by Gulf.

In September 1989, Green filed an action against Gulf which, after several amended complaints, alleged discharge in violation of ERISA § 510 and asserting state tort and contract claims. That action was dismissed as time-barred.

Green, proceeding *pro se*, filed the instant action against Commercial Credit Company (as owner of its subsidiary Gulf), Commercial Credit Corporation (as owner, in turn, of Commercial Credit Company), and John Hsu, trustee of Gulf's employee benefits plan. The case was assigned to Judge Solis, but at the defendants' request was transferred to Judge Maloney who had presided in the prior litigation.

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<sup>1</sup> Green admits that he did not disclose to his new employer either his visual impairment or his pre-existing hearing impairment. He eventually was terminated for unsatisfactory work performance.

While working for Gulf, Green was covered by an employee benefits program entitled "Disability Income Program" (hereinafter "the Plan"), sponsored by Commercial Credit Company. Primerica Disability Income Plan is successor-in-interest to the Commercial Credit Company plan. Over Green's objection, Primerica sought and was granted leave to be substituted for the Commercial Credit defendants. The district court then granted summary judgment in favor of Primerica, finding Green's section 510 claims time-barred.

Green appeals the adverse summary judgment, the order substituting Primerica as defendant, and the order transferring the case to Judge Maloney; in addition, Green seeks attorney's fees on appeal.

### Analysis

#### The Section 510 Claim

ERISA section 510 provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this title . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this title . . . .<sup>2</sup>

The provisions of section 510 are enforceable under 11 U.S.C.

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<sup>2</sup> 29 U.S.C. § 1140.

§ 1132.<sup>3</sup>

1. The proper defendant.

Green contends that the district court erred in permitting Primerica to be substituted for the Commercial Credit defendants. Green brought his section 510 claim against the Commercial Credit defendants in their capacities as owner of his former employer, Gulf, not in their capacities as sponsors or administrators of the Plan. An ERISA plan is not a proper defendant for a section 510 claim.<sup>4</sup> Presumably Primerica succeeded only to the functions of Commercial Credit Company in its capacity as administrator of the Plan and substitution in that capacity was proper. The district court erred, however, in substituting Primerica as the defendant on the section 510 claim which was not brought against the Plan. Thus, Commercial Credit Company and Commercial Credit Corporation must be reinstated as party defendants to the section 510 claim.

2. The limitations period.

Having determined that the Commercial Credit defendants must be reinstated we find the section 510 claims against them time-barred. We review summary judgments *de novo*, applying the

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<sup>3</sup> **Id.**

<sup>4</sup> **Swanson v. U.A. Local 13 Pension Plan**, 779 S.Supp. 690 (W.D.N.Y.) (plan not subject to section 510 claim because not within ERISA definition of "person"), aff'd without op., 953 F.2d 636 (2d Cir. 1991); **Adams v. Koppers Co.**, 684 F.Supp. 399 (W.D.Pa. 1988) (same); see also **Rollo v. Maxicare of Louisiana, Inc.**, 698 F.Supp. 111 (E.D.La. 1988) (section 510 not intended to apply to non-employer).

same standards as the district court.<sup>5</sup> "We will affirm a grant of summary judgment if we find a basis, independent or not of the district court's reasoning, adequate to support the result. We may affirm even in situations in which the district court's ruling was incorrect, as long as the result was proper."<sup>6</sup> In this case, we find that the result -- summary judgment in favor of the defendants on the section 510 claim -- was proper.

We have held that, in Texas, an ERISA section 510 claim is subject to a two-year statute of limitations.<sup>7</sup> Green was notified of his termination from Gulf on September 2, 1987 and the termination was effective as of October 31, 1987. Green did not bring the instant ERISA suit until December 13, 1991, more than two years after his termination.

Green contends that we should apply a discovery rule in determining when his section 510 claim accrued. Green claims that he was not aware that he was terminated to avoid payment of ERISA benefits until more than two years after his termination, at which time he was informed that his application for benefits would be denied based upon that termination. He contends that throughout the limitations period Commercial Credit Company led him to believe

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<sup>5</sup> **Texas Refrigeration Supply, Inc. v. FDIC**, 953 F.2d 975 (5th Cir. 1992).

<sup>6</sup> **Id.** at 980 (citing **Degan v. Ford Motor Company**, 869 F.2d 889, 892 (5th Cir. 1989)).

<sup>7</sup> **McClure v. Zoecon, Inc.**, 936 F.2d 777 (5th Cir. 1991).

that his benefits claim still could be considered on the merits, thereby preventing his discovery of the improper cause for his termination. Although at first blush the argument appears compelling, a close look at the record proves it to be without merit. As early as September 15, 1987, in a letter to Gulf's vice president, O.L. Ayers, Green claimed a wrongful discharge. In this letter, he states:

The chronology of the events which led to my discharge might be the most lucid way of treating the problem, because a pattern of conduct is thus more apparent, which will permit a jury to find (no matter Gulf's protests) that I was discharged at least in part for insisting upon my rights to certain benefits. (I note parenthetically that the employees handbook grants that "no one, including your employer or any other person, may terminate you or otherwise discriminate against you in any way to prevent you from exercising your rights under ERISA["]) [emphasis in original].

Accordingly, the district court properly found the section 510 claim time-barred. We therefore render judgment on that claim in favor of the reinstated Commercial Credit defendants.<sup>8</sup>

#### The Section 502 Claim

Green also claims that he raised a claim under ERISA section 502(a)(1)(B) to recover benefits under the Plan,<sup>9</sup> and that the

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<sup>8</sup> Green also contends that the Commercial Credit defendants are estopped from asserting the limitations defense in this lawsuit because they controlled Gulf's defense in the prior lawsuit but failed to assert that defense on their own behalf. This argument is wholly without merit.

<sup>9</sup> "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the Plan, or to clarify his rights to future benefits under the terms of the plan."

district court either ignored this claim or erroneously applied the two-year limitations period. The defendants, on the other hand, contend that Green failed to raise this claim in the district court because the initial paragraph of his complaint states: "The action arises under Section 510 of the Employees Retirement Income Security Act, 29 U.S.C. §§ 1132 and 1140."

A *pro se* litigant's pleadings are to be liberally construed.<sup>10</sup> So construed, we find the district court erred in failing to recognize Green's claim for benefits. First, in his initial complaint, Green asserts that "[t]he failure and refusal of John Hsu, Trustee, to extend disability benefits to Plaintiff was wrongful, and Plaintiff has standing to sue for the benefits so denied pursuant to 29 U.S.C. § 1132." In response to the defendants' motion for summary judgment, Green again pointed out that he was making a claim for benefits from the plan.<sup>11</sup>

A cause of action under section 502(a)(1)(B) accrues when the application for benefits is denied.<sup>12</sup> In Texas such claims are

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29 U.S.C. § 1132(a)(1)(B).

<sup>10</sup> **Haines v. Kerner**, 404 U.S. 519 (1972).

<sup>11</sup> In that response, Green incorrectly cites section 502(a)(1)(A), but quotes the language of section 502(a)(1)(B). In addition he notes that contractual benefits are "the only benefit Plaintiff seeks from the Plan."

<sup>12</sup> **Hogan v. Kraft Foods**, 969 F.2d 142 (5th Cir. 1992); **Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.**, 637 F.2d 357 (5th Cir.), cert. denied, 454 U.S. 836 (1981).

governed by the four-year limitations period for contract actions.<sup>13</sup> Green's application for benefits was denied on July 15, 1990; thus his claim for benefits was not time-barred. We must vacate the summary judgment as to the section 502(a)(1)(B) claim and remand for its consideration.<sup>14</sup>

#### Transfer to Judge Maloney

Green contends that the court erred in transferring his case from Judge Solis to Judge Maloney. Cases may be transferred from one judge to another for the expeditious administration of justice.<sup>15</sup> Chief Judge Sanders transferred the case to Judge Maloney, who was familiar with the issues presented because he had presided over Green's prior suit. We find neither error nor abuse of discretion in that administrative action.<sup>16</sup>

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<sup>13</sup> **Hogan.**

<sup>14</sup> As to this claim, Primerica is a properly substituted defendant for Commercial Credit Company in its capacity as plan administrator.

<sup>15</sup> **United States v. Stone**, 411 F.2d 597 (5th Cir. 1969); 28 U.S.C. § 137.

<sup>16</sup> He also contends that Judge Sanders granted the defendants' request to transfer the case to Judge Maloney without providing him with an opportunity to respond as required by the local rules. This argument is not supported by the record -- before the transfer was made, Green submitted his written objection thereto.



### Attorney's Fees

Green requests that, as a sanction against the defendants, we award him attorney's fees. ERISA permits a court, in its discretion, to award attorney's fees to a prevailing party on appeal. This does not extend to non-attorney *pro se* litigants.<sup>17</sup>

For the foregoing reasons we VACATE IN PART the district court's order substituting Primerica Disability Income Plan as the sole defendant in this matter and REINSTATE Commercial Credit Company and Commercial Credit Corporation as defendants with respect to Green's section 510 claim; we RENDER summary judgment in favor of the Commercial Credit defendants on the section 510 claim; we VACATE and REMAND for consideration of Green's claims under section 502(a)(1)(B); and AFFIRM the district court in all other respects.

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<sup>17</sup> See **McLean v. International Harvester Co.**, 902 F.2d 372 (5th Cir. 1990).