UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3257

Harry E. Brown, Et AL.,

Plaintiffs-Appellants,

VERSUS

Maxxam, Inc., Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(90 CV-1468)

May 20, 1993

Before REAVLEY, SMITH, AND DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:[*]

I. FACTS AND PROCEDURAL HISTORY

This case arises under the Employee Retirement Income Security Act of 1974 (ERISA). For many years prior to 1988, Kaiser Aluminum & Chemical Corporation (Kaiser)[1] owned and operated plants in Chalmett and Gramercy, Louisiana, and Purvis, Mississippi, in which

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The collective name Kaiser includes the alleged parent corporations of Kaiser, Maxxam and Kaiser Tech Ltd.

it calcined coke for sale to aluminum smelters. The plaintiffs, former employees of Kaiser, were and are presently employed at those plants. At all relevant times, Kaiser has maintained the Kaiser Aluminum Pension Plan (the Kaiser Plan) and the Kaiser Aluminum-USWA Retired Employees Group Plan (Retiree Medical Plan), both of which are subject to ERISA.

All of the plaintiffs are presently eligible for a deferred vested pension from the Kaiser Plan, which provides them a full pension benefit beginning at age 62. The Kaiser Plan also provides several contingent benefits that include a 30-year pension, a Rule of 65 pension, and a Rule of 70/80 pension. Under the 30-year pension, an employee with 30 years of continuous service with Kaiser could retire with a full, unreduced pension prior to reaching age 62.[2] Under the Rule of 65 pension, an employee could receive a full, unreduced pension if: (1) he was under the age of 62, (2) he had 20 or more years of continuous service with Kaiser, (3) the sum of his age and years of continuous service equaled 65 or more, and (4) his service with Kaiser was interrupted due to a layoff lasting longer than 2 years or less if the company advised the employee that it would not offer him suitable long term employment.[3] Under the Rule of 70/80 pension, an employee could

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[2] The Kaiser Plan provides "[a]ny employee who shall have had 30 or more years of continuous service but has not attained age 62 may, upon receipt of proper application therefor, retire and be entitled to receive a full retirement pension."

[3] The Kaiser Plan provides an employee "who has completed 20 or more years of continuous service . . . and who shall have a combined age and continuous service equal to 65 or more and

(a) has been absent from work for two years by reason of layoff, sickness, or accident and the Company has failed to offer the Employee suitable long-term employment, or

(b) has been absent from work for less than two years by reason of layoff, sickness, or accident and the

receive a full, unreduced pension if: (1) he was under the age of 62, (2) he had 10 or more years of continuous service with Kaiser, (3) the sum of his age and years of continuous service equaled 70, if he was between the ages of 55 and 62, or the sum of his age and years of continuous service equaled 80, if he was under age 55, and (4) his service with Kaiser was interrupted due to a layoff lasting longer than two years or less if he was absent from work due to a permanent shutdown at the plant.[4]

On July 26, 1988 Kaiser sold several of its coke calcining plants to LaRoche Chemicals (LaRoche), including the plants in Chalmett, Gramercy, and Purvis. The sale was structured so that the plants did not stop operations and the employees did not lose any work time. Additionally, the employees' pension and medical benefits with LaRoche were identical to those that they had with

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Company has advised the Employee that suitable long-term employment will not be offered, or

(c) has been absent from work for less than two years due to a layoff resulting from an energy related shutdown of a plant, department or substantial portion thereof and the Company has failed to offer the Employee suitable long-term employment . . . ,

shall be eligible to retire on or after the effective date of this Agreement and receive a `Rule of 65' pension."

[4] The Kaiser Plan provides an employee who "shall have had at least 10 years of continuous service and has not attained age 62 and (a) shall have attained the age of 55 years and whose combined age and years of continuous service shall equal 70 or more, or (b) whose combined age and years of continuous service shall equal 80 or more, and

(1) who . . . has by reason of a layoff, sickness or accident . . . been absent from work for a period of two years, or

(2) who . . . has been absent from work for a period of less than two years by reason of

(i) a displacement resulting from a permanent shutdown of a plant, department, or substantial portion thereof, or

(ii) a sickness or accident or a layoff other than a layoff resulting from a permanent shutdown of a plant, department, or substantial portion thereof, and whose return to active employment is declared unlikely by the Company or whose return to active employment from a disability is unlikely to occur within 24 months, or

(3) who considers that it would be in the Employee's interest to retire and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions,

shall be eligible to retire . . . , and receive a `70/80 Retirement' pension."

Kaiser. On November 1, 1988 LaRoche sold the plants to Calciner Industries (Calciner). The LaRoche-Calciner sale was as non-disruptive as the Kaiser-LaRoche sale had been. Calciner's pension plan was modeled after Kaiser's and LaRoche's plans and provided substantially identical, if not better benefits. The employees did not lose any work time as a result of the sale and retained their same positions at the plant with the same or better pay. The plaintiffs are presently employed with Calciner.

The United Steel Workers' union (the union) was the collective bargaining representative for the employees of Kaiser. Prior to the sale from Kaiser to LaRoche, Kaiser notified the union of its intent to sell the plant to LaRoche. Thereafter, the union and Kaiser negotiated a letter agreement, which provided that (1) the sale would not be deemed a permanent shutdown or a closing or cessation of operations for any purposes, and (2) the sale would be a termination of employment for all purposes except that employees with 28 to 30 years of service with Kaiser who were hired by LaRoche would be permitted to continue accruing service credit for up to two years for the purpose of qualifying for a 30-year pension from the Kaiser plan ("the two year creep").

The plaintiffs presented their claims for early retirement benefits to the plan administrators[5] of the Kaiser Plan and the Retiree Medical Plan, which denied them. The Plaintiffs then sued Kaiser, the Kaiser Plan, Kaiser's insurers, Kaiser's plan trustee,

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[5] The Kaiser Plan and the Retiree Medical Plan are administered by committees.

ABB Trading U.S. (ABBTUS),[6] LaRoche, Calciner, and the union. At the United States District Court, the plaintiffs alleged that the defendants had violated ERISA, the National Labor Relations Act (NLRA), and several state laws. The court dismissed the state law claims as preempted by ERISA and dismissed the labor law claims as time barred. The district court then granted summary judgment to the defendants on the ERISA claims. The plaintiffs appeal contending that they are presently entitled to Rule of 65 and Rule of 70/80 pensions from the Kaiser Plan and benefits under the Retiree Medical Plan.[7] Additionally, the plaintiffs contend that they are entitled to continuing service credit under the Kaiser Plan for their time of employment with LaRoche and Calciner.

II. DISCUSSION

1. **Standard of Review**

The district court found that the proper standard for its review of the plan administrator's benefits determination was the arbitrary and capricious standard. The plaintiffs contend that the district court erred in applying an arbitrary and capricious standard, and instead assert that the district court should have applied a de novo standard of review. In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989), the Supreme Court held that a denial of benefits by a plan administrator is to be reviewed under a de novo standard unless the plan expressly gives the plan

[6] ABBTUS owned unprocessed coke which was calcined at the plant pursuant to a conversion agreement.

[7] Because the plaintiffs' right to benefits under the Retiree Medical Plan depends on their "retired" status and does not apply to plan participants that are eligible only for a deferred vested pension, in the interest of brevity we will not discuss it further in the opinion.

administrator discretion to determine benefit eligibility or to construe the terms of the plan. The plaintiffs contend that the Kaiser Plan did not vest the plan administrator with discretionary authority during the relevant time, and therefore the district court should have been applied a de novo standard of review. While the Kaiser Plan now purports to give the plan administrator discretionary authority to interpret the plan, when the Kaiser-LaRoche sale occurred such discretionary language was not in the plan. It was later added, before the plaintiffs filed their claim for benefits with the Kaiser Plan, but after the sale from Kaiser to LaRoche. Therefore, although the Kaiser Plan now gives the plan administrator discretionary authority to determine benefit eligibility, in our view, the discretionary language should not retroactively apply so that the Kaiser Plan administrator's decision is reviewed under a more lenient standard than was provided for in the Kaiser Plan when the Kaiser-LaRoche sale occurred. Even without the discretionary language, however, the Kaiser Plan administrator's factual determinations are reviewed under an abuse of discretion standard. Pierre v. Conn. Gen. Life Ins. Co., 932 F.2d 1552 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 453, 116 L.Ed.2d 470 (1991). Consequently, we will review the plan administrator's interpretation of the plan de novo and its factual determinations for an abuse of discretion.

2. **Did a Layoff or Shutdown Occur?**

The plaintiffs contend that the district court erred in determining that neither a "layoff" nor a "permanent shutdown"

occurred for purposes of the Kaiser Plan paying Rule of 65 or Rule of 70/80 benefits to the plaintiffs. Under the Kaiser Plan, eligible employees are entitled to benefits, if there is a permanent shutdown or they are laid off. Essentially, the plaintiffs contend that their termination from Kaiser automatically triggered the layoff and shutdown provisions in the Kaiser Plan, and therefore, entitled them to payment of Rule of 65 and Rule of 70/80 benefits. However, the plain meaning of the terms in the Kaiser Plan does not support the plaintiffs' contention.

A layoff is defined as "to halt or suspend operation of. . . [or] . . . to cease to employ, usually temporarily because of slack in production and without prejudice to the worker." Webster's Third New International Dictionary (1971). Shutdown is defined as "the cessation or suspension of an activity or function, . . . usually a temporary stoppage of work." Id. In Rowe v. Allied Chemical Hourly Employees' Pension Plan, 915 F.2d 266 (6th Cir. 1990), the plaintiff employees sued their former employer and its pension plan for benefits after their former employer sold the plant in which they worked. Although the plaintiffs were immediately employed by the purchaser of the plant, the plaintiffs contended that the sale constituted a "layoff," and therefore they were entitled to benefits under their former employer's plan. Id. at 268. In rejecting that claim, the court held under de novo review that "separation from one employer followed by immediate employment with a successor employer does not constitute a layoff." Rowe at 269.

In the present case, it is undisputed that there was no interruption of operations and no suspension of work between the Kaiser ownership and the LaRoche ownership or between the LaRoche ownership and the Calciner ownership. Additionally, the plaintiffs' wages and benefits with LaRoche and Calciner were and are the same or better than those they had with Kaiser. Moreover, Kaiser and the union reached an agreement, which was approved by the union membership, that the plant sale was not a "layoff" or a "permanent shutdown" of plant operations so as to trigger payment of Rule of 65 or Rule of 70/80 pension benefits. Therefore, the district court was correct to hold that the Kaiser Plan was not obligated to pay "layoff" or "shutdown" benefits.

3. **Should the Single Employer and Alter Ego Doctrines be Applied for Purposes of the Plaintiffs' Obtaining Continuing Service Credit?**

The plaintiffs contend that the district court erred in not applying the alter ego or single employer doctrines to Kaiser, LaRoche, and Calciner so as to find that they should be treated as one entity for purposes of the Kaiser Plan. If the defendants are treated as one entity, then, according to the plaintiffs, they would be given continuous service credit for their time of employment with LaRoche and Calciner for purposes of obtaining Rule of 65, Rule of 70/80, and 30-year pension benefits.

To support their contention, the plaintiffs rely on the case of Carpenters' Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983). In Pratt-Farnsworth, a union sued two companies alleging that the companies

were one entity for purposes of collective bargaining and ERISA. Id. at 497-98. The union alleged that a double-breasted operation existed wherein a union company was being used to funnel work to a non-union company. Id. This court held that if the employees could prove that the non-union company was a sham used by the union company to escape its obligation under the collective bargaining agreement and ERISA, they could succeed in their claims against the non-union company under the alter ego or single employer doctrines. Id. at 526.

The factors to consider in determining whether a corporation should be treated as one entity under the alter ego or single employer doctrines are substantially similar and consist of whether "the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership." Pratt-Farnsworth, at 507; See also A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 518 (9th Cir. 1989). Applying those factors to the facts of the present case, it is apparent that the plaintiffs' contention is without merit in that none of the factors that would support a finding of one entity under the alter ego or single employer doctrines exist. None of the corporations have ceased to exist or ceased to do business, and each of the corporations has a separate business purpose, ownership, management, operations, equipment, customers, and supervision from the other corporations. There is no common

stock ownership, no common officers,[8] and no common employees between any of the corporations, and each corporation is adequately capitalized and observes all corporate formalities. In conclusion, Kaiser, LaRoche, and Calciner should not be treated as one entity for purposes of the Kaiser Plan, and the plaintiffs should not be given continuing service credit for their employment with LaRoche and Calciner.

4. **Discrimination Claim under § 1140**

The Plaintiffs contend that Kaiser discriminated against them in violation of 29 U.S.C. § 1140 by allowing employees with 30 years of service with Kaiser to retire prior to the sale to LaRoche, yet retain senior status in their continued employment at the plant with LaRoche and Calciner. Section 1140 provides that it "shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the Plan . . . ." The plaintiffs contend Kaiser granted certain employees preferential status to obtain the union's consent that the sale would not be considered a "layoff" or "shutdown" so as to trigger payment of Rule of 65 or Rule of 70/80 benefits. While the plaintiffs concede that employees with 30 years of service could

[8] With the exception that ABBTUS had the right, which has now expired, to appoint two of Calciner's directors for a period two years.

retire, the plaintiffs contend that they could not retire and retain senior status in their employment with LaRoche and Calciner.

Section 1140 is primarily intended to prevent unscrupulous employers from "discharging or harassing their employees in order to keep them from obtaining vested pension rights." Varhola v. Doe, 820 F.2d 809, 816 (6th Cir. 1987)(quoting West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980)). Because the plaintiffs' complaint is that some employees were able to retain their senior status with LaRoche and Calciner, which is not a right under the Kaiser Plan--much less a vested one--, the district court was correct to deny their claim.

5. **The Plan did not Terminate**

The plaintiffs contend that Rule of 65, Rule of 70/80, and 30-year pension benefits, while not vested benefits protected under ERISA, are nevertheless contingent benefits under the Kaiser Plan. Under the Kaiser Plan, the plaintiffs contend that Kaiser should have paid them for "credits earned" toward achieving Rule of 65, Rule of 70/80, and 30-year pension benefits when their employment with Kaiser ceased. In an attempt to support their position, the plaintiffs rely on Tilley v. Mead Corp., 927 F.2d 756 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992), which involved a terminated plan. In Tilley, the court held that under the provisions of a terminated plan, participants who had met the years of service requirement, but not the age requirement for early pensions when the plan terminated, were required to be paid such early pensions before the employer could

recoup surplus plan assets. Conversely, the Kaiser Plan has not been terminated, and therefore the plaintiffs are not entitled to "credit earned" toward achieving contingent benefits.

6. There was no Violation of a Fiduciary Duty under § 1104

Title 29 U.S.C. § 1104 provides "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." Plaintiffs contend that Kaiser and the union breached a fiduciary duty under 29 U.S.C. § 1104 by misleading them regarding the effect the sale of the plant and the adoption of the new LaRoche contract would have on their benefits under the Kaiser plan. According to the plaintiffs, Kaiser did not communicate to them its alleged intent to deprive them of Rule of 65, Rule of 70/80, and 30-year pension benefits. Additionally, the plaintiffs contend that Kaiser delegated its duty to disclose the effects of the Kaiser-LaRoche sale to the union and that the union failed to inform them what treatment their benefits under the Kaiser Plan would receive as a result of the sale.

In an attempt to support its claim against the union, the plaintiffs rely on Landry v. Airline Pilots Ass'n, 901 F.2d 404 (5th Cir.), cert. denied, 489 U.S. 895 (1990), in which the court held that there existed a fact issue whether a union and a union officer were fiduciaries under ERISA and whether they had failed to disclose information about the plan. The plan in Landry expressly gave the union fiduciary duties, which included "the sole authority and control to remove and appoint the Trustee, the Plan Administrator, and the Investment Manager." Id. at 420 n.48. In

the present case, there is no evidence that the union has assumed any fiduciary duty regarding disclosure of information about the Kaiser Plan. More importantly, a fiduciary duty was not implicated in the first instance as to Kaiser or the union because the only benefits affected by the sale were contingent and non-vested future retirement benefits. The fiduciary provision of "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued." Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987). Therefore, the district court was correct to hold that there was no fiduciary violation, because the benefits sought by the plaintiffs were contingent and Kaiser and the union had no fiduciary duty to disclose the effect of the sale on the plaintiffs' eligibility for contingent benefits.

III. CONCLUSION

In conclusion, we emphasize that the plaintiffs' complaints are focused on contingent and non-vested retirement benefits. For the foregoing reasons, the judgment of the district court is AFFIRMED.