

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1576
Conference Calendar

EDWINA VONKEISLER, Individually and
as Sole Heir to the Estate of
Karl Vonkeisler, Deceased,

Plaintiff-Counter-Defendant-Appellant,

versus

UNIGATE RESTAURANTS, INC.,

Defendant-Counter-Plaintiff-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:91-CV-1502-D
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(March 25, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

To recover under 29 U.S.C. § 1140, a beneficiary must prove that the employer possessed the specific discriminatory intent to violate ERISA as an essential element of the claim. Unida v. Levi Strauss & Co., 986 F.2d 970, 979-80 (5th Cir. 1993); McGann v. H & H Music Co., 946 F.2d 401, 404 (5th Cir. 1991), cert. denied, 113 S.Ct. 482 (1992). The district court found the evidence "clear that Unigate's decisions were not made with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

specific discriminatory intent." The company's former employee benefits manager testified that Unigate decided to find one company to handle its various insurance needs because of its substantial growth. Under § 510 of ERISA, the asserted discrimination is illegal only if it is motivated by a desire to retaliate against an employee or to deprive an employee of an existing right to which he may become entitled. McGann, 946 F.2d at 408. Nothing in the record suggests that Unigate's motivation was other than as it asserted. See id. at 404. The district court did not clearly err in finding that Unigate did not possess the specific discriminatory intent to violate ERISA.

Section 409 of ERISA provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach" 29 U.S.C. § 1109(a). Section 409 does not permit an individual beneficiary to recover for breach of fiduciary duties.

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144-48, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). Actions for breach of fiduciary duty may be brought only in a representative capacity on behalf of the plan as a whole. Id. at 141 n.9, 144; see also Simmons v. Southern Bell Tel. & Tel. Co., 940 F.2d 614, 617 (11th Cir. 1991). Because VonKeisler is seeking to recover benefits in her individual capacity under § 409, the district court correctly granted summary judgment in favor of Unigate on her breach-of-fiduciary-duty claim.

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AFFIRMED.