**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 93-5069**

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**KENNETH E. WILDBUR, SR., ET AL.,**

**Plaintiffs-Appellants,**

**VERSUS**

**ARCO CHEMICAL CO., ET AL.,**

**Defendants-Appellees.**

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**Appeal from the United States District Court**
**for the Western District of Louisiana**
**(6:88-CV-2404)**

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(August 26, 1994)

Before JOHNSON, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:[1]

At issue in this second appeal of this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA), is whether, under § 35 of Atlantic Richfield's (ARCO's) retirement plan, plaintiffs were terminated from employment, thereby entitling them to enhanced retirement benefits. On remand from the first appeal, the district court held once again that they were not terminated within the meaning of § 35, and therefore were ineligible for the benefits. We **AFFIRM**.

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

A detailed background for this litigation is provided in ***Wildbur v. ARCO Chem. Co.***, 974 F.2d 631 (5th Cir.), *modified on denial of rehearing and rehearing en banc*, 979 F.2d 1013 (5th Cir. 1992) (***"Wildbur II"***). Briefly stated, plaintiffs were employed by ARCO subsidiary ChemLink Petroleum, Inc., and participated in both ARCO's Retirement Plan, an ERISA defined benefit plan (ARRP), and its Special Termination Allowance Plan, an ERISA employee welfare benefit plan (severance benefits) (STAP). Under ARRP § 35, an employee who was, *inter alia*, "notified by the Company [within a specified time period] ... that he or she will be terminated from employment, due to the continuing consolidation of [ARCO]" would be eligible for certain "special enhanced retirement" benefits.[2]

In 1986, ARCO sold assets, including ChemLink, to PONY Industries, with PONY promising to "use reasonable efforts to utilize [ARCO employees] in the operation of the Purchased Assets". ***Wildbur II***, 974 F.2d at 634. Pursuant to this, plaintiffs began work immediately for PONY upon its purchase of ChemLink. ***Id.*** This notwithstanding, plaintiffs filed this action in September 1988, claiming that the sale of ChemLink effected a "termination" under § 35, making them eligible for the enhanced benefits. ***Wildbur v. Atlantic Richfield Retirement Plan***, 765 F. Supp. 891 (W.D. La. 1991) (***"Wildbur I"***), *vacated by* ***Wildbur II***, 974 F.2d 631.

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[2] Employees eligible for § 35 benefits could elect to receive either special enhanced retirement benefits under that section, along with a reduced severance payment under the STAP, or regular STAP severance payments, without § 35 enhanced payments.

The district court reviewed the actions of the ARRP Committee (plan administrator) *de novo*, ***Wildbur I***, 765 F. Supp. at 895; it noted, however, that it would have reached the same result had it reviewed under the more deferential "arbitrary and capricious" standard. ***Id.*** at 895 n.2. It held that the administrator had concluded correctly that plaintiffs were not "terminated" as contemplated by § 35. Under the administrator's interpretation, § 35 did not apply to employees who continued working for ARCO's successors as a result of ARCO's actions to secure their employment. As stated, plaintiffs fell into this category: they did not receive notice, under § 35, that they would be terminated from employment due to the company's continued consolidation; and, instead, pursuant to the agreement between ARCO and PONY, went to work immediately for PONY. ***Id.*** at 895-96. Accordingly, the district court granted summary judgment for ARCO in March 1991. ***Id.***

This court vacated and remanded, ***Wildbur II***, 974 F.2d 631, holding that the district court could consider evidence outside the administrative record, ***id.*** at 635-37, and that it was unclear whether the district court had done so in reaching its decision, ***id.*** at 643-45. Therefore, our court directed the district court to analyze the evidence more fully, ***id.*** at 644 & n.8; and in so doing, rather than reviewing the administrator's actions *de novo*, to

review only for abuse of discretion, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101, 109-15, 109 S. Ct. 948, 953-57 (1989).[3]

For that remand proceeding, our court stated that "[a]pplication of the abuse of discretion standard may involve a two-step process", ***Wildbur II***, 974 F.2d at 637 (*citing* ***Jordan v. Cameron Iron Works, Inc.***, 900 F.2d 53, 56 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 344 (1990)). This court first used that test in ***Dennard v. Richards Group, Inc.***, 681 F.2d 306, 314 (5th Cir. 1982); *see also* ***Duhon v. Texaco, Inc.***, 15 F.3d 1302, 1307 & n.3 (5th Cir. 1994) (discussing this circuit's application of ***Dennard*** test, and citing ***Wildbur II***). Under ***Dennard***, the district court first determines whether the administrator's interpretation of the plan was legally correct; if it was not, then the court determines whether that legally incorrect decision constituted an abuse of discretion.[4] ***Duhon***, 15 F.3d at 1307 n.8 (discussing test,

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[3] As stated, the district court had noted that, had it applied an "arbitrary and capricious" standard, it would have still granted summary judgment for defendants. ***Wildbur I***, 765 F. Supp. at 895 n.2. The "arbitrary and capricious" standard is equivalent to the ***Bruch*** abuse-of-discretion standard. *E.g.*, ***Wildbur II***, 974 F.2d at 635 n.7 ("semantic, not a substantive, difference"); ***Salley v. E.I. DuPont de Nemours & Co.***, 966 F.2d 1011, 1014 (5th Cir. 1992) ("In applying the abuse of discretion standard, we analyze whether the plan administrator acted arbitrarily and capriciously.") (citing cases).

[4] Further, each step of the test has been analyzed according to three component factors. For the first step (correct legal interpretation), cases from this circuit have considered "(1) `uniformity of construction [*i.e.*, previous interpretations of the same provisions]; (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs'" to the plan under a particular interpretation. ***Batchelor v. Int'l Bhd. of Elec. Workers Local 861 Pension & Retirement Fund***, 877 F.2d 441, 444 (5th Cir. 1989) (quoting ***Dennard***, 681 F.2d at 314). If the second step (abuse of discretion) is called into play, the three factors to

and citing cases); ***Haubold v. Intermedics, Inc.***, 11 F.3d 1333, 1336-37 (5th Cir. 1994) (same).

On remand, the parties again moved for summary judgment. But, after consultation with the court, it was agreed that the case should be decided on the merits, and that no additional evidence need be submitted.

In rendering judgment, the district court modified its ***Wildbur I*** findings of fact, mainly to conform its analytical structure to that suggested by this court. But, those findings remained "largely unchanged". In re-evaluating the evidence, it used the two-part test for the abuse-of-discretion standard of review. And, as directed by our court, it considered evidence outside the administrative record: the cost that would result to the ARRP if the benefits request were granted;[5] a letter from ARCO's Benefit Plans Compliance Manager to ChemLink's president;[6] and certain

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consider are: (1) the internal consistency of the plan under the administrator's interpretation; (2) relevant regulations, *e.g.* by the IRS or Department of Labor; and (3) the factual background of the administrator's decision, including any inferences of lack of good faith. ***Id.*** at 445 (quoting ***Dennard***, 681 F.2d at 314).

[5] The court found that, if plaintiffs received § 35 enhanced benefits, the *unanticipated* cost to the plan would be "significant", approximately $2 million, even though this amount represented a negligible percentage of the total ARRP assets (estimated to be between $1.2 and 2 billion).

[6] The ChemLink division, sold to PONY in 1986, was sold again in 1990, merging with Baker Hughes, Inc. (not a party to this action). According to the letter, ARCO considered former ChemLink employees to have been terminated when that merger took place, even though they had not been considered terminated when ARCO earlier sold ChemLink to PONY:

> As you know, under the [ARRP] an individual is not terminated from employment for purposes of

practices by defendants that plaintiffs contend amount to bad faith.[7]

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> beginning to receive retirement allowances when he continues working for an entity which purchases the operation, if the purchaser [PONY] and ARCO agreed that the purchaser would retain the individual in employment. However, if that purchaser later sells the operations [*i.e.*, ChemLink] to another corporation unrelated to it [Baker Hughes], then under the [ARRP] a termination of employment occurs for purposes of applying for retirement benefits, regardless whether the individual continues working for the "second" purchaser.

As in the district court, plaintiffs assert that this letter evinces an inconsistent interpretation of the ARRP, because individuals who continued working for ChemLink following the PONY sale were not considered terminated, whereas they were considered terminated after the Baker Hughes sale several years later. The district court concluded, however, that there was no inconsistency. It considered the letter to refer to eligibility for *any* retirement benefits under the ARRP, rather than the more narrowly-defined eligibility under § 35 and found that it was

> not inconsistent for ARCO to have had a broader definition of "termination" in the context of retirement benefit *eligibility*, than the interpretation given the term for purposes of receiving [§ 35] *enhanced* benefits. It is logical that ARCO may have wished its employees to receive regular, *earned* retirement benefits under a lesser standard than the standard necessary to secure *enhanced* benefits.

(Emphasis in original.)

[7] The district court considered the alleged bad faith in discussing the second step of the ***Dennard*** test (whether the administrator's decision, if legally incorrect, was an abuse of discretion). As it made clear, however, this discussion was dicta, to "take[] effect only upon determination by the appellate court that the ARRP administrator did not reach the legally correct decision". *See* ***Duhon***, 15 F.3d at 1306-08 & n.3 (if administrator's interpretation is legally correct, reviewing court need not proceed to second step of ***Dennard*** test); ***Jordan***, 900 F.2d at 56 (same; citing ***Batchelor***, 877 F.2d at 444). Because we agree that the administrator's decision was legally correct, we do not reach this second step.

Also, *inter alia*, the district court considered again the treatment of transferred employees under other, analogous plan provisions after previous similar asset sales; the administrator's definition of "termination" under other sections of the ARRP and for purposes of eligibility for other benefits; and the purpose and intent of § 35. The district court concluded again -- as had the administrator -- that § 35 "was never meant to be applied to employees transferred pursuant to a sale of assets." Accordingly, it entered judgment for defendants in June 1993.

II.

Although plaintiffs contend that they suffered a § 35 termination of employment, and contest the denial of attorney's fees, the district court's findings of fact are essentially undisputed.[8] In any event, we review them only for clear error. Fed. R. Civ. P. 52(a); *e.g.*, ***Anderson v. City of Bessemer City***, 470 U.S. 564, 573, (1985); ***Brock v. El Paso Natural Gas Co.***, 826 F.2d 369, 372 (5th Cir. 1987). Of course, we review legal conclusions freely, *e.g.*, ***Salve Regina College v. Russell***, 499 U.S. 225, ___, 111 S. Ct. 1217, 1221 (1991); but, in reviewing the district court's application of the abuse-of-discretion standard, we are mindful that the administrator's interpretation of § 35 was reviewed by the district court only for abuse of discretion. ***Wildbur II***, 974 F.2d 631, 637; *see also* ***Duhon***, 15 F.3d at 1305-07 & n.3.

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[8] Plaintiffs state that they "agree, for the most part, with the" findings; that "the issues they raise ... are legal".

A.

The challenge to the conclusion that the administrator made a legally correct interpretation of the ARRP when it denied the § 35 benefits turns on the contention that the court applied the ***Dennard*** test incorrectly. Plaintiffs assert that "the overarching issue is whether the [***Dennard*** test] should be applied as written, or, can a trial court accept reasons not to apply" it. But, "the reviewing court is not rigidly confined to [***Dennard***'s] two-step analysis in every case." ***Duhon***, 15 F.3d at 1307 n.3 (citing ***Wildbur II***, 974 F.2d at 637: "`[a]pplication of the abuse of discretion standard *may* involve [the] two-step process'" (brackets and emphasis in ***Duhon***)). And, as stated in ***Wildbur II***,

> [w]e do not accept plaintiffs' argument that the district court's failure to expressly list or refer to each factual and legal argument raised by plaintiffs means that the court did not consider these facts and arguments. Nor are we intimating that all six of the elements that may affect a district court's abuse-of-discretion analysis are present in every case, or that if all of them are potentially relevant in a particular case, that a district court must refer to them in deciding a case. We are mindful that in many cases the parties may not raise all of these elements, and that elements that are raised may not be supported....

***Wildbur II***, 974 F.2d at 644.

We find no error in either the district court's application of the ***Dennard*** abuse-of-discretion test, or its resulting conclusion. For the reasons stated in the district court's extremely thorough opinion, we affirm its holding that the administrator's interpretation of the plan was legally correct. Therefore, we hold

likewise that plaintiffs are not entitled to receive the claimed benefits.[9]

B.

Plaintiffs challenge also the denial of attorneys' fees. We review that denial only for abuse of discretion. ERISA § 502, 29 U.S.C. § 1132(g)(1) (providing that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"); ***Salley v. E.I. DuPont de Nemours & Co.***, 966 F.2d at 1017 (denial of ERISA attorney's fees reviewed for abuse of discretion). In this circuit, claims for attorney's fees in ERISA cases are evaluated according to:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying [ERISA] section 502(g) [29 U.S.C. § 1132(g)].

***Iron Workers Local No. 272 v. Bowen***, 624 F.2d 1255, 1266 (5th Cir. 1980), *quoted in* ***Harms v. Cavenham Forest Indus., Inc.***, 984 F.2d 686, 694 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 382

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[9] The issue addressed by the dissent, concerning three of the approximately 80 plaintiffs, was not presented properly here. Alternatively, based on our review of the record and pursuant to the applicable standard of review, they were not entitled to § 35 benefits.

(1993). The district court expressly considered these factors, concluding:

> Neither party acted in bad faith; they merely advanced conflicting interpretations of the plan. Furthermore, it is not clear that an award of fees in this case would deter other persons acting under similar circumstances. Plaintiffs were not seeking to benefit all participants and beneficiaries of an ERISA plan, merely those employees transferred to [PONY]. The question here was a close one. Attorney's fees, on behalf of either party, are denied.

(Footnote omitted.) We do not find an abuse of discretion.[10]

III.

For the foregoing reasons, the judgment is

**AFFIRMED.**

JOHNSON, J., Concurring in part and dissenting in part.

This writer agrees with the majority that the ARRP administrators construed the Retirement Plan properly here. The contract terms between ARCO and PONY expressly provided a list of ChemLink employees whom PONY would retain. The contract referred to those employees as transferees and clearly implied that these employees would not receive any severance benefits.

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[10] Plaintiffs contend that they also are entitled to the fees as "make whole" damages, asserting only that the same argument was made in ***Duhon***. *But see* ***Duhon***, 15 F.3d 1302 (Plaintiffs' brief was filed in September 1993, before the ***Duhon*** decision; the decision makes no reference to attorneys' fees, under any theory of recovery.) In any event, this theory was not raised in the district court. Accordingly, we decline to consider it. *E.g.*, ***Randolph v. Resolution Trust Co.***, 995 F.2d 611, 620 n.9 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1294 (1994) (court ordinarily will not consider issues raised for first time on appeal).

Additionally, the same contract specifically provided that ARCO would pay the *non*transferees——those whom PONY *failed* to designate——severance pay and other applicable benefits. These contractual provisions explain why several ChemLink executives and attorneys received the enhanced benefits package and why the vast majority of the plaintiffs did not: The executives and attorneys were not designated by PONY as transferees. My departure from majority comes from the fact that the record reflects that PONY failed to designate three of the seventy-nine plaintiffs as transferees. These three plaintiffs and the nontransferee executives and attorneys were in an identical situation. All were hired by PONY; none missed a day of work; and none was designated as a transferee pursuant to the ARCO/PONY contract. Nevertheless, ARCO failed to provide these three plaintiffs with the enhanced benefits. *See* Rec. Vol. 1. at 130 n.2.

Although the record amply supports the administrators' decisions to deny most of the plaintiffs' claims, neither the record nor the defendants' explanations justify the administrators' decisions to deny benefits to Plaintiffs Hill, Natowsky, and Chambers. Hence, those three employees should each have received the severance pay and benefits just as the nontransferee executives and attorneys did. Any other decision would be inconsistent with the terms of the contract and inconsistent with the administrators' construction of the ARRP.

For the reasons heretofore stated, this writer would reverse and remand as to Plaintiffs Hill, Natowsky, and Chambers on the grounds that the administrators' failure to grant them the same

benefits granted the other nontransferees constituted an abuse of discretion.

Accordingly, this dissent is respectfully tendered.