UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20121
Summary Calendar

STEVEN C. MUTH,

Plaintiff-Appellant,

VERSUS

LYONDELL PETROCHEMICAL COMPANY and TEXAS EMPLOYMENT COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas (CA-H-93-2166)

(May 17, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Steven Muth, *pro se*, challenges a summary judgment that he was not denied improperly benefits under a severance pay plan maintained by Lyondell Petrochemical Company and governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA). We **AFFIRM**.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Muth filed suit in Texas state court against his former employer, Lyondell, and the Texas Employment Commission (TEC), seeking review of an adverse decision by the TEC. Muth alleged that after he was terminated from his employment with Lyondell, the company refused to pay him severance pay as required by its Special Termination Plan. Because Muth's claim arose under ERISA, Lyondell removed the case to federal court.[2]

The Plan has eight requirements that must be met in order to be eligible for benefits. One requirement provides that the employee "is not being terminated `for cause.' (Termination for failure to meet minimum work requirements, as well as for unsatisfactory work conduct, is considered to be `for cause'.)".

Lyondell moved for summary judgment, contending that Muth was ineligible for severance benefits because he was terminated for cause. On the day of the scheduled hearing on the motion, Muth filed his response, contending that he had been informed that his termination was due to a departmental reorganization, not for cause. In a bench ruling following the hearing, the district court held for Lyondell, concluding that the Plan provided that employees who were terminated for cause were to receive "no special severance", and that it was "undisputed that [Muth] was fired for cause".

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[2] The district court dismissed the TEC. Muth does not challenge this.

II.

It goes without saying both that we review a summary judgment *de novo*, and that such judgment is appropriate only if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". FED. R. CIV. P. 56(c). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. ***Topalian v. Ehrman***, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992). "If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." ***Little v. Liquid Air Corp.***, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

A reviewing court subjects an eligibility determination by an ERISA-plan administrator to either a *de novo* or an abuse of discretion review. The proper standard of review is based on the authority that the plan gives the administrator. *See* ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989). Muth acknowledges that the proper review of the administrator's decision is for an abuse of discretion.[3]

The focus of Muth's appeal is his contention that he was not terminated for cause.[4] There is no dispute over the

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[3] The Plan provides that "[t]he Vice-President, Human Resources, Lyondell Petrochemical Company, has the sole authority to interpret this plan".

[4] Muth also contends that the Plan's administrator has applied inconsistently the provisions of the Plan. Specifically, he maintains that Lyondell has a history of providing severance

administrator's interpretation of the plan; if Muth was terminated for cause, he does not meet the prerequisites to receive a severance. Rather, the challenge is to the administrator's determination that Muth was, in fact, terminated for cause.

In his affidavit, Muth stated that when he was first informed that he was being terminated, one of his supervisors stated that it was due to reorganization; it was only when Muth inquired into severance benefits, that he was told his termination was due to performance. Lyondell maintains the termination was for no other reason but deficient performance. In support, Lyondell presented the affidavit of John Hollinshead, Muth's immediate supervisor, who stated not only that Muth was terminated for failing to meet minimum work requirements and for poor performance, but also that he had advised Muth on numerous occasions of his inadequate performance. These conflicting affidavits create a disputed factual issue; but we must keep in mind that, in order to preclude summary judgment, disputed issues must be material. Moreover, we must be mindful of the reviewing standard applied to an administrator's decision.

"[F]or factual determinations under ERISA plans, the abuse of discretion standard of review is the appropriate standard; that is, federal courts owe due deference to an administrator's factual conclusions that reflect a reasonable and impartial judgment."

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benefits to employees with performance problems. The only support for this is Muth's affidavit. Needless to say, unsubstantiated assertions are not competent summary judgment evidence. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986).

Pierre v. Connecticut General Life Ins. Co., 932 F.2d 1552, 1562 (5th Cir.), *cert. denied*, 502 U.S. 973 (1991). Given Hollinshead's affidavit, as well as Muth's acknowledgment that he was informed prior to leaving Lyondell that he was being terminated for cause, the decision of the administrator regarding Muth's eligibility cannot be said to be an abuse of discretion. Accordingly, a material fact issue does not exist.

III.

For the foregoing reasons, the judgment is

AFFIRMED.