UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GERALD R. TARDIF Plaintiff,	:	
V.	:	CASE NO. 3:98CV1374 (RNC)
GENERAL ELECTRIC CO., et al., Defendants.	:	

Ruling and Order on
Cross-Motions for Summary Judgment

Plaintiff brings this action under the civil enforcement provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. ("ERISA"), in connection with defendants' denial of his application for special early retirement benefits. Plaintiff, in essence, makes claims in the alternative: first, that defendants improperly denied him benefits to which he was entitled under the terms of the plan; and, second, that defendants breached their fiduciary duty to him by misrepresenting his eligibility for the benefits. Cross-motions for summary judgment have been filed. After careful consideration of the parties' submissions, I conclude that plaintiff's application for benefits was not improperly denied, and that he has not sufficiently alleged and supported his fiduciary duty claim. Accordingly, defendants' motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and the action is dismissed.

Background

The essential facts are not in dispute. Plaintiff is a long-time employee of defendant General Electric ("GE") at its "North Plant" in Plainville, Connecticut. The GE Pension Plan (the "Plan") contains a Special Early Retirement Option ("SERO") which provides pension benefits to qualifying employees who retire before age 65. One aspect of the SERO is known as the SERO Replacement Feature (the "SERO-RF"), under which qualifying employees can retire early if they are replaced by persons from particular categories. In July 1997, GE amended its pension plan to make the SERO-RF available to any employee who was fifty years old and had thirty years of service at GE, provided that the employee was replaced by a "fully qualified" present or former GE employee from one of the following four categories:

i) active employees with rights to the classification of the employee electing early retirement;

ii) individuals on layoff with recall rights as of a date on or after June 30, 1997, and on or before September 30 1997, to that job classification;

iii) individuals who were active candidates for preferential placement at a designated location seeking replacement workers possessing the necessary job qualifications for that classification; or

(iv) subject to the sole discretion of local Company management, individuals on layoff without recall rights.[1]

The 50/30 replacement feature was made available in August 1997. By August 1997, plaintiff was fifty years old and had at least thirty years of service with GE. He made a timely request to take advantage of the SERO-RF.

Plaintiff's claims center on the significance of the following representations allegedly made by defendants in connection with the offering of the SERO-RF. The content of the written representations is not in dispute, but the content of the oral representation is disputed to some extent.

Written Representations. The July 24, 1997, edition of the North Plant News stated:

> A SERO Replacement Feature will be offered in August 1997 to active hourly and non-exempt salaried employees who are 55 to 59 years of age, with at least 25 years of pension qualification service.
>
> The Replacement Feature also applies to employees age 50-54 with 30 years of pension qualification service.
>
> Under provisions of this feature, eligible employees may retire voluntarily provided they are replaced by fully qualified laid-off employees with recall rights.

[1]See Nagle Aff. Exhibit A (the "Plan"), p. 117, App. A, § II(B).

> Former employees with lost recall rights may also qualify as replacements for those electing this SERO feature.[2]

After the SERO-RF was adopted, defendants issued guidelines "intended to clarify certain aspects" of the SERO-RF (the "Guidelines"). The Guidelines, which defendants say are corporate human resources documents, include the following statements:

> No employee can retire under this Feature unless an employee comes off the recall list of employees on layoff as of June 30, 1997, is preferentially placed at a designated location, or, with local Company management approval, is hired from layoff without recall rights. . . .
> . . .
> The language in the Memorandum of Settlement provides that local management may decide in its "sole discretion" whether to utilize as replacements individuals on layoff who have no recall rights. The Company has committed to the union, however, that local management will use "best efforts" to identify, where necessary, individuals who have lost their recall rights and who are fully qualified to perform the work of employees wishing to retire under the [SERO-RF]. . . .[3]

Oral Representations. It is undisputed that during July 1997, after plaintiff had applied for the SERO-RF, he had a conversation with Sam Medina, a GE human resources manager, during which plaintiff offered his own efforts to find a suitable replacement. It is also undisputed that during this time, no one told plaintiff that the recently announced SERO-RF would not be available at North Plant or that former employees with lost

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[2]Pl.'s Mem. Ex. 3.

[3]Pl.'s Mem. Ex. 4, p. 1, 3

recall rights ("Category 4 Replacements") would not be considered by local management. The parties do dispute whether Medina either encouraged or directed plaintiff to locate a Category 4 Replacement. They agree that, sometime later in July 1997, plaintiff proposed Thomas Loosemore, a GE employee who had been laid off in 1988, as a replacement and that Loosemore had satisfactorily performed his job duties while employed by GE.

Plaintiff's application for retirement under SERO-RF was denied by North Plant management, and he grieved the denial by letter on October 16, 1997.[4] Ed Stratton, a GE human resources manager, responded by letter on January 28, 1998, and informed plaintiff that his grievance had been denied because North Plant local management had exercised its sole discretion not to accept Category 4 Replacements.

Plaintiff, through counsel, appealed the denial of his grievance to the GE Pension Board on February 6, 1998. The GE Pension Board (sometimes hereinafter the "Pension Board" or the "Board") is a Named Fiduciary under the GE Pension Plan. Section XX(6) of the Plan provides:

6. Pension Board Decisions

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[4]This and the remaining facts in this Background section are taken from defendants' Local Rule 9(c)(1) Statement. Because plaintiff did not file a Local Rule 9(c)(2) Statement, the facts in defendants' 9(c)(1) Statement are deemed admitted. See D. Conn. L. Civ. R. 9(c)(1). The facts deemed admitted are almost all either alleged by plaintiff himself or recitations of the contents of documents whose authenticity has not been challenged.

> Any determination, decision or action of any Named Fiduciary or other entity having powers, duties, obligations and responsibilities with respect to the Plan concerning or with respect to any question arising out of or in connection with the construction, interpretation, administration and application of the Plan and its rules and regulations, shall lie within the absolute discretion of such Named Fiduciary or other entity and shall be final, conclusive and binding upon all participating Employees . . . .[5]

In a letter dated March 13, 1998, the Pension Board notified plaintiff's counsel that the GE Pension Staff Committee had considered the arguments of both plaintiff and GE management and had denied plaintiff's appeal. Plaintiff appealed the determination of the Staff Committee to the Pension Board itself in a letter dated May 6, 1998. On May 15, the Board requested from plaintiff any additional information that he wanted considered in his appeal; plaintiff did not provide any additional information.

In a letter dated June 17, 1998, the Pension Board denied plaintiff's appeal and upheld the decision of the Staff Committee, finding that plaintiff was not eligible for the SERO-RF because local management had exercised its discretion under the plan to decline Category 4 Replacements. The Board considered and rejected plaintiff's arguments that local management had decided to accept Category 4 Replacements.

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[5]Nagle Aff. Ex. A., p. 80.

During the appeal process, plaintiff never raised a claim to the Pension Board that there were any replacements available from categories 1, 2, or 3 of the SERO-RF.

Plaintiff's claims are brought under ERISA Section 502(a)(1)(B), 29 U.S.C § 1132(a)(1)(B), to recover Plan benefits, to enforce his rights under the terms of the Plan, and to clarify his right to future benefits under the Plan; and under Section 502(a)(3), 29 U.S.C. § 1132(a)(3), to enjoin defendants from violating the terms of the Plan as applied to him and to obtain appropriate equitable relief to enforce the terms of the plan and redress defendants' alleged violation of the plan.

The dispute centers on local management's discretion under the Plan to accept or reject Category 4 Replacements at North Plant. As his claims are presented in the complaint and fleshed out in his moving papers, plaintiff appears to be making arguments in the alternative, each based on a different interpretation of defendants' alleged written and oral representations about the SERO-RF. First, Plaintiff argues that the representations either constitute or reflect local management's exercise of its discretion to accept Category 4 Replacements. As a result of that acceptance, plaintiff argues, he was eligible for the SERO-RF and the Pension Board's denial of his benefits was improper.

The alternative argument is that defendants breached their fiduciary duty to plaintiff by making misrepresentations to him regarding his eligibility for the SERO-RF. Under this argument, defendants' publications and their agent's alleged oral statements represented to plaintiff that local management had accepted Category 4 Replacements, when in fact it had not. To argue that defendants misrepresented to plaintiff that he was eligible, however, implicitly concedes that plaintiff was in fact not eligible and that local management had not accepted Category 4 Replacements.[6]

Plaintiff seeks an injunction requiring defendants to grant him the early retirement benefit, as well as an award for present and future damages (for monetary loss and emotional distress), punitive damages, interest, costs and attorney's fees.

Discussion

I. Standard for Summary Judgment

The standard for summary judgment is well settled; the burden is on the moving party to demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); see generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986);

[6]Defendants dispute whether plaintiff would have been eligible for the SERO-RF even if local management had accepted Category 4 Replacements. For purposes of this ruling, I assume that plaintiff would have been eligible.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The nonmovant cannot rest on the mere allegations of its pleadings, but rather must set forth specific facts demonstrating the existence of a triable issue. See Fed. R. Civ. P. 56(e). Further, Rule 56(c) mandates summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 322-23.

On the basis of facts as to which there is no dispute, and making all inferences in favor of plaintiff, defendants are entitled to summary judgment on both the denial of benefits claim under Section 502(a)(1)(B) and the fiduciary duty claim under Section 502(a)(3). The claims are addressed in that order.

II. Section 502(a)(1)(B): Denial of the Early Retirement Benefit

Plaintiff's complaint and moving papers can be construed as making three arguments under Section 502(a)(1)(B) to the effect that he is entitled to the early retirement benefits: (1) the Pension Board's denial of the benefits was improper because local management had accepted Category 4 Replacements; (2) defendants, by their conduct, promised plaintiff the benefits and they are now estopped from denying the benefits; and (3) plaintiff is entitled to the benefits because Loosemore was a Category 3

replacement. Plaintiff cannot succeed with any of these arguments.

A. Improper Denial of Benefits

Defendants' contend that the Pension Board's denial of plaintiff's benefits must be reviewed under an arbitrary and capricious standard, and that the Board's decision must be upheld because it was reasonable. See Defs.' Mem. Supp. Mot. Summ. J., pp. 9-14. Plaintiff's memorandum in support of his motion does not address the standard to be applied or the reasonableness of the Pension Board's determination; its argument proceeds as if the Court were reviewing the Pension Board's decision de novo. See Pl.'s Mem. Supp. Mot. Summ. J., pp. 8-15. Plaintiff's opposition to defendants' motion does not object to defendants' arguments regarding the denial of benefits; it focuses exclusively on establishing a disputed issue of fact with regard to the breach of fiduciary duty claim. See Pl.'s Mem. Opp. Defs.' Mot. Summ. J. I agree with defendants on this claim.

When an ERISA plan confers discretion upon the administrator to determine eligibility for plan benefits, the administrator's decisions denying benefits are reviewed under an arbitrary and capricious standard. See Jiras v. Pension Plan of Make-Up Artist & Hairstylists Local 798, 170 F.3d 162, 166 (2d Cir. 1999) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)); Pagan v. NYNEX Pension Plan, 52 F.3d 438, 441 (2d Cir.

1995). The GE Pension Plan vests "control and management of the operation and administration of the Plan" in the Pension Board.[7] The Pension Board is a Named Fiduciary of the Plan[8] and is empowered, in part, to "decide such questions as may arise in connection with the Plan."[9] The Plan explicitly confers absolute discretion on the Pension Board with respect to any question arising out of or in connection with the construction, interpretation, administration and application of the Plan.[10]

Thus, the Plan confers discretion on the Pension Board to determine plaintiff's eligibility for the SERO-RF benefit and this Court applies the arbitrary and capricious standard to plaintiff's claim for benefits. The Pension Board's denial can be overturned only if it was "without reason, unsupported by substantial evidence or erroneous as a matter of law." Pagan, 52 F.3d at 442.[11] The Court is "not free to substitute [its] own judgment for that of the [plan administrator] as if [it] were

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[7]See Plan, supra, pp. 78-79, Section XX(2).

[8]See Plan, supra, p. 104, Section XXVI.

[9]Plan, supra, p. 79, Section XX(5)(c).

[10]See Plan, supra, p. 80, Section XX(6).

[11]"Substantial evidence" is "such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the [decisionmaker and] . . . requires more than a scintilla but less than a preponderance." Miller v. United Welfare Fund, 72 F.3d 1066, 1072 (2d Cir. 1995) (quoting Sandoval v. Aetna Life & Casualty Ins. Co., 967 F.2d 377, 382 (10th Cir. 1992)) (alteration in original).

considering the issue of eligibility anew." Id. Rather, the Court must defer to the plan administrator's determination so long as it is reasonable. See Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst., 46 F.3d 1264, 1271 (2d Cir. 1995). I find that the Pension Board's denial of plaintiff's claim was not arbitrary and capricious.

This Court's review of the Pension Board's determination under the arbitrary and capricious standard is limited to the administrative record that was before the Board. See Miller v. United Welfare Fund, 72 F.3d 1066, 1071 (2d Cir. 1995). To survive defendants' motion for summary judgment, plaintiff must establish a genuine issue of material fact as to whether the Pension Board's rejection of his claims was arbitrary and capricious. See Jiras, 170 F.3d at 166 (2d Cir. 1999).

Plaintiff's claim for early retirement benefits was denied first by local management at North Plant, then on appeal by the Pension Board Staff Committee, and finally on further appeal by the Pension Board itself. The basis for the denial at each stage was the lack of a qualifying replacement under the terms of the SERO-RF. Plaintiff's eligibility under the terms of the Plan turned on whether local management had exercised its "sole discretion" to accept as replacements former employees with lost recall rights (the so-called Category 4 Replacements). The Pension Board concluded that local management had not exercised

its discretion to accept Category 4 Replacements.[12] In making that decision, the Pension Board had before it local management's denial of plaintiff's claim, which came in a January 28, 1998, letter from Edward Stratton, Human Resources Manager at North Plant, to plaintiff's counsel.[13] Stratton's letter noted that there had not been significant lay-offs at North Plant in at least seven years and that local management "felt it would be a poor business decision to replace current employees with ones who'd been gone for many years."[14] Accordingly, local management declined to accept any Category 4 Replacements.

Plaintiff, through counsel, put before the Pension Board at least two, and possibly three, arguments that local management had in fact exercised its discretion to accept Category 4 Replacements.[15] Plaintiff's primary argument was that the underlined portion of the following statement in the North Plant News either constituted or announced local management's exercise of its Category-4 discretion: "Under provisions of [SERO-RF], eligible employees may retire voluntarily, provided they are replaced by fully qualified laid-off employees with recall

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[12]See Nagle Aff. Ex. J.

[13]See Nagle Aff. Exhibit H, p. D0097.

[14]Id.

[15]See Nagle Aff. Exhibit H, p. D0101-02 ("Plaintiff's Appeal Letter.")

rights. Former employees with lost recall rights may also qualify as replacements for those electing the SERO feature."[16]

Second, plaintiff alleged that local management had encouraged him to find a Category 4 Replacement and argued that this encouragement constituted or reflected local management's decision to accept Category 4 Replacements.[17] (Plaintiff has elsewhere identified Sam Medina, a GE human resources manager, as at least one of the persons who allegedly encouraged him to find a Category 4 Replacement.[18]) Third, plaintiff's letter could be viewed as arguing that local management was obliged to accept Category 4 Replacements because GE had pledged to its unions that "local management will use 'best efforts' to identify, where necessary, individuals who have lost their recall rights and who are fully qualified . . . ."[19]

I find that the Pension Board's rejection of each of plaintiff's arguments was reasonable. Plaintiff's primary argument requires reading the underlined sentence as meaning that former employees with lost recall rights would automatically

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[16] See Plaintiff's Appeal Letter, supra; Nagle Aff. Exhibit H, p.D0091 & D0113 ("North Plant News").

[17] See Plaintiff's Appeal Letter, supra. Defendants dispute whether plaintiff was encouraged to find a replacement.

[18] See Pl.'s Aff. ¶ 20; Pl.'s Mem. in Opp. to Defs.' Mot. for Summ. J., p. 9.

[19] See Plaintiff's Appeal Letter, supra; Nagle Aff. Exhibit H, pp. D0092-D0095 ("SERO-RF Guidelines"), at p.D0094.

qualify as replacements, on a par with laid-off employees with recall rights. The Pension Board interpreted the "may also qualify" language as indicating it was possible, but not automatic, that former employees with lost recall rights would qualify. The Pension Board's interpretation is reasonable, especially in light of the context of the disputed language[20] and the fact that the North Plant News notice was a general description of the SERO-RF published shortly after the feature was announced.

The Pension Board's rejection of the second and third arguments was also reasonable. Even if Medina had encouraged plaintiff's efforts to identify or find a former employee without recall rights, it was not arbitrary or capricious for the Pension Board to determine that such encouragement did not constitute local management's exercise of its "sole discretion" to accept and re-hire any employee plaintiff located. Finally, to the extent plaintiff made the third argument, it was not unreasonable for the Pension Board to find that the corporate human resources Guidelines, reflecting a promise to GE's unions to use "best efforts" to find Category 4 Replacements, was not an exercise of local management's discretion regarding acceptance of the category. In fact, the sentence immediately preceding the "best

[20]The previous sentence in the North Plant News uses no qualifying language to identify the category of automatic replacements--laid-off employees with recall rights.

efforts" sentence reiterates that local management has "sole discretion" whether to utilize Category 4 Replacements, as does the third bullet point on the first page of the Guidelines.

Accordingly, I affirm the Pension Board's denial of benefits under the terms of the Plan.[21]

B. Promissory Estoppel

Although he has not pleaded promissory or equitable estoppel, plaintiff's claim for benefits "under the Plan as it applied to him pursuant to GE's agents' representations" could be construed as an estoppel claim.[22] To the extent plaintiff makes such a claim, defendants are entitled to summary judgment.

In ERISA cases, the Second Circuit permits promissory estoppel claims for benefits under Section 502(a)(1)(B) only when a plaintiff can demonstrate "extraordinary circumstances." See

[21]Plaintiff phrases his claim as one for benefits due "under the Plan as it applied to him pursuant to GE's agents' representations as contained in the GE publications described above, and in Messrs. Lama and Medina's representations." Compl. ¶ 31 (emphasis added). To the extent plaintiff claims that the alleged representations altered the terms of the Plan as it applied to him, the claim is rejected. See Miller v. Coastal Corporation, 978 F.2d 622, 624 (10th Cir. 1992) ("An employee benefit plan cannot be modified, however, by informal communications regardless of whether those communications are oral or written." (citation omitted)); cf. Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) ("[A]n ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries.") To the extent Plaintiff suggests a promissory estoppel claim, it is addressed in the next section.

[22]See Compl. ¶31.

Devlin v. Transportation Communications Int'l Union, 173 F.3d 94, 101-02 (2d Cir. 1999). The requirement of extraordinary circumstances is in addition to the standard elements of promissory estoppel: (1) a promise; (2) reliance on the promise; (3) injury caused by the reliance; and (4) an injustice if the promise is not enforced. See Bonovich v. Knights of Columbus, 146 F.3d 57, 62 (2d Cir. 1998); Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 79 (2d Cir. 1996).

Even if defendants' oral and written representations to plaintiff constituted a promise that Category 4 Replacements would be accepted by local management and/or that plaintiff was eligible for the SERO-RF,[23] plaintiff cannot succeed on an estoppel claim because failure to enforce the promise does not result in an injustice and, separately, because extraordinary circumstances are not present.

Affirming the Pension Board's denial of benefits does not result in an injustice. The only actions plaintiff alleges to have taken in reliance on the alleged promises are his efforts to apply for the SERO-RF and to locate Thomas Loosemore, his proposed Category 4 Replacement. As a matter of law, this does not constitute injury that would result in an injustice if the

[23]Second Circuit law requires plaintiff to show a promise that defendants reasonably should have expected to induce action or forbearance on his part. See Schonholz, 87 F.3d at 79. Whether defendants' alleged representations are such promises is in dispute, but dismissing any estoppel claim presented by plaintiff does not require resolving that dispute.

promise were not enforced. Cf. Schonholz, 87 F.3d at 80 (noting that the injustice element is an equitable consideration for the court and not the jury). Plaintiff's application was a hand-written, half-page note of approximately 30 words,[24] and plaintiff himself argues that it "proved no trouble" for him to locate Mr. Loosemore.[25] Plaintiff did not actually retire early in reliance on representations that he was eligible for special benefits, only later to be denied the benefits. Compare Schonholz, 87 F.3d at 80 (holding that if plaintiff could prove she resigned in reliance on promised severance benefits that were subsequently denied, she could then contend that failure to enforce the promise would result in an injustice). Plaintiff remains an employee of defendant GE to this day, and he remains eligible for all benefits he is due under the terms of the plan.

Also, plaintiff cannot demonstrate extraordinary circumstances. Plaintiff's alleged reliance does not by itself constitute "extraordinary circumstances" permitting an estoppel claim in an ERISA action. See Devlin, 173 F.3d. at 102 (noting "reliance is one of the four basic elements of promissory estoppel, and would not by itself render the case extraordinary"). A finding of extraordinary circumstances requires a "remarkable consideration" such as the employer's use

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[24]See Pl.'s Ex. 5

[25]See Pl.'s Mem. Supp. Mot. Summ. J., p.4

of a promise of benefits to induce certain behavior on the employee's part. See Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140, 152 (2d Cir. 1999) (discussing the extraordinary circumstances standard and citing Devlin.) As in Aramony, plaintiff points to nothing suggesting that defendants made a promise to him in order to induce him to take action for defendants' benefit only later to renege on the promise. See id.; see also Devlin, 173 F.3d at 102 (finding that reneging on an alleged promise to employees to provide medical benefits free for life after retirement did not constitute extraordinary circumstances where there was no evidence of an intent to induce retirement).

C. Plaintiff's Category 3 Argument

There remains under Section 502(a)(1)(B) plaintiff's contention that he is entitled to the SERO-RF benefit because Loosemore is or was a Category 3 Replacement (i.e., a laid-off employee with recall rights).[26] As noted above, this Court's review of defendants' denial of benefits is limited to the record that was before the Pension Board. Because the parties' papers and the record demonstrate that plaintiff did not present his

[26]See Pl.'s Aff. ¶35;, Pl's Mem. Supp. Mot. Summ. J., p. 5.

Category 3 argument to the Pension Board, I decline to consider it here.[27]

III. Breach of Fiduciary Duty

The complaint alleges generally that defendants' conduct with regard to plaintiff's claim constitutes a breach of defendants' fiduciary duty under ERISA. Plaintiff clarifies the nature of his fiduciary duty claim in his opposition to defendants' motion for summary judgment. Plaintiff there contends that alleged misrepresentations by defendants and their

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[27]Plaintiff's failure to file a Local Rule 9(c)(2) Statement results in the Court deeming as admitted defendants' statement that plaintiff never raised a claim to the Pension Board that there were any replacements available from categories 1, 2, or 3. See Defs.' 9(c)(1) Statement ¶ 7; D. Conn. L. Civ. R. 9(c)(1). Moreover, the record demonstrates that Plaintiff did not present a Category 3 argument to the Pension Board. See, for example, the absence of any such argument in Plaintiff's Appeal Letter, Nagle Aff. Ex. F, and the fact that Plaintiff declined the Pension Board's invitation to submit additional information for the Board to consider, Nagle Aff. Ex. G; Defs.' 9(c)(1) Statement ¶ 12.

I recognize that in his October 17, 1997, grievance to local management, Plaintiff characterizes Loosemore as a "former employee [with] a right to be restored to his formerly held classification," and also as an "active employee with restoration rights." Nagel Aff., Exhibit H, p. D0096. A copy of this grievance was included in the materials before the Pension Board, but I decline to find that those characterizations present a Category 3 argument to the Board. First, they do not expressly invoke Category 3 and were made in the context of plaintiff's argument regarding Category 4. Second, "a right to be restored to his formerly held classification" is not sufficiently similar to "recall rights" to put the Board on notice as to a category 3 argument. Third, it is not credible to characterize a former employee who had been laid off for almost ten years as an "active employee." Finally, even if the October 1997 Grievance made a Category 3 argument, it is apparent that plaintiff abandoned that argument in his subsequent appeals within the administrative process.

agent Sam Medina regarding his eligibility for the SERO-RF constitute a breach of fiduciary duty, and that genuine disputes as to the alleged misrepresentations preclude summary judgment.[28]

Defendants deny that Medina made the representations plaintiff attributes to him, deny that any of the alleged representations are misrepresentations, and contend that even if they or their agent made misrepresentations, plaintiff cannot recover because he cannot prove they caused cognizable damages. I agree with defendants on their last point, and thus summary judgment is granted on the fiduciary duty claim. Although they have not so argued, defendants are also entitled to summary

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[28]Plaintiff's opposition repeatedly states that the allegations of his complaint sufficiently establish disputes as to the extent and impact of the misrepresentations as to preclude summary judgment against him. By rule, a party opposing summary judgment cannot rest on the allegations of its pleadings, but rather must set forth specific facts showing a genuine issue for trial. See Fed. R. Civ. P. 56(e). Because plaintiff in his affidavit repeats the complaint's allegations as to defendants' representations, I treat plaintiff's opposition as referring to his affidavit rather than his complaint.

The content of alleged statements attributable to defendants, as well as whether the statements were affirmative misrepresentations, are questions for the trier of fact. See Mullins, 23 F.3d at 669. Whether an affirmative misrepresentation is "material" is a mixed question of law and fact, based on whether there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. See id. Here, however, the disputes over the content, accuracy, and materiality of the alleged representations do not preclude summary judgment because plaintiff has not made a showing sufficient to establish the existence of cognizable damages caused by any such breach, and because plaintiff's claim under Section 502(a)(3) is precluded.

judgment on this claim because plaintiff is precluded from proceeding under Section 502(a)(3).

A. Failure to Establish Causation

ERISA Section 404(a)(1) requires, in part, that plan fiduciaries act "solely in the interest of participants." 29 U.S.C. §1104(a)(1).[29] That section codifies the traditional fiduciary duty of loyalty. See Varity Corp v. Howe, 516 U.S. 489, 506 (1996). Because the statute does not elaborate in any detail on the duties owed by a fiduciary, courts have been called on to define the scope of a fiduciary's responsibilities. See Becker v. Eastman Kodak Co., 120 F.3d 5, 8 (2d Cir. 1997). The Second Circuit has held that a plan or an administrator breaches its fiduciary duty when it makes affirmative material misrepresentations about changes to an employee pension benefits plan. See id. (citing Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994); see also Varity, 516 U.S. at 506 (holding that an

[29]Plaintiff does not identify the section of ERISA that establishes the fiduciary duty he claims defendants violated, and Section 404 is only one of several sections that contain fiduciary duties. It is apparent, however, that Section 404(a)(1) is the provision plaintiff has in mind: the language of the complaint in part tracks the language of Section 404(a)(1) regarding a fiduciary's obligation to act "solely in the interest" of participants, compare Compl. ¶ 28 with 29 U.S.C. § 1104(a)(1); the ERISA duty of loyalty, stated in the complaint, is associated with Section 404(a)(1), see, e.g., Varity Corp v. Howe, 516 U.S. 489, 506 (1996); and the duty of a fiduciary to avoid affirmative material misrepresentations, also stated in the complaint, is established by Section 404(a)(1), see id.

intentional mispresentation about plan benefits by a fiduciary violates the duty of loyalty).

That causation of cognizable damages is an essential element of a fiduciary duty claim under Section 502(a)(3) is not as readily apparent as defendants suggest. As noted, plaintiff brings his claim in part under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes suits for individual equitable relief for breach of the fiduciary duties established in Section 404(a)(1). See Varity Corp v. Howe, 516 U.S. 489, 507-515 (1996). Most fiduciary duty cases that expressly require loss causation interpret Section 409, 29 U.S.C. § 1109, which makes a fiduciary liable for losses "resulting from" his or her breach.[30] The primary case defendants cite in support of the causation requirement, Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 279 (2d Cir. 1992), is such a case, although that fact is not apparent on the face of Diduck. Rather, the cases Diduck cites to support the causation requirement are themselves interpreting Section 409.

Despite the fact that neither Section 404(a)(1) nor Section 502(a)(3) contains express language of causation, a plaintiff seeking to enforce the former via the latter must demonstrate

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[30]Section 409 is enforced through Section 502(a)(2), 29 U.S.C. § 1132(a)(2); plaintiff is not claiming under Section 409, and for good reason: Section 409 does not permit individualized relief. See Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985).

that the alleged breach caused damages recoverable under Section 502(a)(3). In Estate of Becker v. Eastman Kodak, 120 F.3d 5 (2d Cir. 1997), the plaintiff sought individualized relief for a breach of the duty not to misrepresent. The Estate of Becker court concluded that the employer had committed a breach, but refused to direct the entry of judgment for the plaintiff "because there remains the question of causation." Id. at 10; see also Hein v. FDIC, 88 F.3d 210, 223-24 (3d Cir. 1996) (dismissing fiduciary duty claim under Section 502(a)(3) where there was no causal link between the alleged breach and the damages sought); cf. Diduck, 974 F.2d at 289 (Newman, J., concurring) ("It is fundamental that proof of damages is part of a plaintiff's burden, including the burden to prove that the damages claimed to have been suffered were caused by the wrong claimed to have been committed."); Restatement (Second) of Trusts, § 212, cmt. e (noting that a trustee is not liable for a loss resulting from a breach of trust if the same loss would have been incurred if the trustee had committed no breach of trust).

Here, plaintiff has not put forth sufficient evidence to permit a trier of fact to find that any alleged breach by defendants has caused him damages cognizable under Section 502(a)(3). Plaintiff claims that defendants' breach of fiduciary duty prevented him from receiving ERISA benefits.[31] Plaintiff

[31]Pl.'s Mem. Opp. Defs.' Mot. Summ. J, pp. 2-3.

claims generally that defendants' conduct (presumably including the alleged breach) caused him unspecified monetary damages and emotional distress damages. He also claims punitive damages, attorney's fees, and costs. Compensatory and punitive damages, however, are not "equitable relief" within the meaning of Section 502(a)(3) and thus are not recoverable under that section. See Varity, 516 U.S. at 509-510 (citing Mertens v. Hewitt Associates, 508 U.S. 248, 255, 256-58, and n. 8 (1993)). Emotional distress damages are a component of compensatory damages, which are prohibited. See Sandberg v. KPMG Peat Marwick, 111 F.3d 331, 335 (2d Cir. 1997). Attorney's fees and costs are not cognizable under Section 502(a)(3); they may be awarded in the Court's discretion under Section 502(g).[32] Thus, plaintiff's causation argument hinges on whether any alleged breach caused him to lose benefits.

Plaintiff's fiduciary duty claim is based on the allegation that defendants misrepresented to him his eligibility for the SERO-RF. In arguing that the North Plant News, the Guidelines, and Medina misrepresented to him that he was entitled to the benefits, however, plaintiff must concede that he in fact was not entitled to the benefits under the terms of the plan. This concession defeats his claim, for it proves that, even in the absence of the alleged misrepresentation, he would not have

[32]In light of the disposition of these motions, plaintiff's request for attorney's fees and costs is denied.

received the benefits. Thus, the breach itself could not have caused the "loss" of benefits. See Hein, 88 F.3d at 224 (dismissing plaintiff's fiduciary duty claim because, where plaintiff "was not entitled to the benefits in the first place, there is no causal link between the alleged breach of fiduciary duty by [defendants] and the denial of benefits to [plaintiff]").[33]

The cases plaintiff cites in his Opposition do not support his claim. In two of those cases, the plaintiffs actually retired in reliance on alleged misrepresentations that enhanced retirement or severance benefits would not be offered in the near future. Those plaintiffs lost the opportunity to qualify for the enhanced benefits because they retired before the benefits became available, and thus they were able to directly link the alleged misrepresentations to their loss. See generally Ballone v. Eastman Kodak Co, 109 F.3d 117 (2d Cir. 1997); Mullins v. Pfizer, 899 F. Supp. 69 (D. Conn. 1995). In the third case, Estate of Becker, 120 F.3d 5 (2d Cir. 1997), the plaintiff's decedent elected long-term disability benefits instead of retirement benefits after allegedly misleading statements from the employer regarding future availability of the retirement benefits. When the decedent died before receiving the retirement benefits, her widower received much less valuable survivor's benefits. Thus,

[33]At most the breach could have suggested to plaintiff that he was entitled to benefits when he in fact was not.

plaintiff there could make a direct argument that the misrepresentations caused the loss of the retirement benefits. Here, plaintiff presents no argument or evidence as to the cognizable loss he allegedly sustained as a result of the misrepresentation, and thus summary judgment is granted to defendants on the fiduciary duty claim.

B. Plaintiff's Section 502(a)(3) Claim is Precluded

Independent of plaintiff's failure to establish causation, he cannot pursue "appropriate" equitable relief for his fiduciary duty claim under Section 502(a)(3) because he can seek to recover benefits under Section 502(a)(1)(B). In Varity Corp. v. Howe, the Supreme Court stated:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

516 U.S. at 515 (citations omitted). The Varity Court permitted plaintiffs there to proceed under Section 502(a)(3) because they could not proceed under any of the other civil enforcement provisions in Section 502. The Court particularly noted that, because they were no longer members of the plan, the plaintiffs

could not maintain an action to recover benefits under Section 502(a)(1)(B). When, as here, plaintiff can and has brought an action under Section 502(a)(1)(B), courts have relied on the above-quoted passage of Varity and found a Section 502(a)(3) claim precluded when it seeks the same relief as the recovery of benefits claim.[34] See Katz v. Comprehensive Plan of Group Ins., Alltel, 197 F.3d 1084, 1088-89 (11th Cir. 1999); Wald v. Southwestern Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1006 (8th Cir. 1996) (finding that plaintiff had an adequate remedy at law under Section 502(a)(1)(B) even though her claim under that section was unsuccessful); cf. Strom v. Goldman, Sachs & Co., 202 F.3d 138, 148-149 (2d Cir. 1999) (permitting plaintiff to proceed under Section 502(a)(3) only because she could not under Sections 502(a)(1)(B)or (a)(2)). For this independent reason, defendants' motion for summary judgment on the Section 502(a)(3) claim is granted.

Conclusion

In accordance with the foregoing, defendants' motion for summary judgment is granted, plaintiff's motion for summary

[34]Plaintiff does seek compensatory and punitive damages in his complaint, but, as noted above, those damages are not recoverable under Section 502(a)(3). Thus, plaintiff seeks essentially the same relief under each section: under Section 502(a)(10(B) he seeks recovery of the benefits, and under Section 502(a)(3) he seeks an injunction ordering that the benefits be granted to him.

judgment as to liability is denied, and the case is dismissed. The Clerk may close the file.

So ordered.

Dated at Hartford, Connecticut this 30th day of Septmeber 2000.

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Robert N. Chatigny

United States District Judge