



Western States Pension Assistance Project
California Senior Legal Hotline
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January 30, 2010

Plan Administrator
Company Cash Account Pension Plan
Pension Plan for Employees of Company, Inc.
123 Main Street

Re: Overpayment of Benefits
Participant: Jan Smith

Claim for Waiver of Recoupment of Overpayment

Dear Plan Administrator:

The Western States Pension Assistance Project is a nonprofit law office that assists pension plan participants and beneficiaries. We are writing on behalf of Jan Smith, who was notified by letter dated March 30, 2009, of an alleged overpayment made to her by the Pension Plan for Employees of Company, Inc. (Pension Plan). (See Exhibit 1) We are requesting that the plan administrator waive efforts to recoup the alleged overpayment and immediately provide Ms. Smith access to her Company, Inc. Cash Account Pension Plan (Cash Account Plan).

Issue Presented

At issue is whether the plan administrator must cease efforts to recoup alleged overpayments made to Ms. Smith and provide her access to her Cash Account Plan. Courts presented with this issue have waived recoupment when the overpayment was due to plan error and recoupment would result in hardship to the participant. Additionally, plans may not attempt to recoup an overpayment made by one plan by denying a participant access to benefits provided by another plan. Such action is a breach of the plan administrator's fiduciary duty and amounts to an illegal alienation of the participant's benefits in violation of the Employee Retirement Income Security Act of 1974 (ERISA).

Factual Background

Jan Smith began working for Company (Company) in 1969. Ms. Smith worked for Company until 1993 when a serious injury forced her to stop working at age 54. At

this time, she was a vested participant in the Company, Inc. Pension Plan. This plan was later renamed the Pension Plan for Employees of Company, Inc.

Shortly thereafter, at age 55, Ms. Smith elected early retirement by requesting that her Pension Plan benefits commence immediately. Evidence that the plan administrator should have been aware of Ms. Smith's early retirement may be found in company phone records. A phone record dated April 22, 1993, indicates that Ms. Smith spoke to a representative about early retirement. (See Exhibit 3) In January 1994, Ms. Smith received her first monthly benefit from her Pension Plan in the amount of \$360.25.

By 1995, Ms. Smith had recovered from her injuries and went to work for Company, Inc. (Company), who had acquired Company. At this point, she began participating in the Cash Account Plan with Company. By March of 2009, Ms. Smith had accumulated a Cash Account lump sum benefit of \$19,828.21. (See Exhibit 1)

In 2009, Ms. Smith requested access to her Cash Account Plan. In a letter dated March 30, 2009, Company denied her request for access to this plan. (See Exhibit 1) The letter stated that her monthly Pension Plan benefit of \$360.25 was never reduced to reflect her early retirement. According to the letter, this resulted in an overpayment to Ms. Smith in the amount of \$32,972.80. The letter gave her two options for repaying the alleged overpayment. The first option was that she mail Company a check in the amount of the overpayment. In the alternative, Company gave her the option of using the balance in her Cash Account Plan to offset the overpayment to her Pension Plan and take a reduced monthly Pension Plan benefit. The letter further stated that if Ms. Smith did not respond by June 15, 2009, they would default to the second option. (See Exhibit 1)

Prior to receiving the March 30, 2009 letter from Company, Ms. Smith did not know her Pension Plan benefit was never reduced to reflect early retirement. Ms. Smith is a 70-year-old women living on a fixed income. All of her monthly fixed income is used to pay basic living expenses, such as housing, food, medical costs and transportation. The plan administrator's pursuit of recoupment of overpayments is causing Ms. Smith severe economic, physical and emotional distress. (See Exhibit 3)

Legal Argument

I. The Plan May Not Reduce or Eliminate Ms. Smith's Pension Plan Benefit to Recoup the Alleged Overpayments Because Equitable Considerations Weigh Heavily in Favor of Ms. Smith

If the plan administrator eliminates or reduces Ms. Smith's Pension Plan benefit to recoup any overpayments made to that account, they would be availing themselves of the common law remedy of restitution. Phillips v. Maritime Ass'n-I.L.A. Local Pension Fund, 194 F. Supp. 2d 549, 555 (E.D. Tex. 2001). However, pension plans do not have unrestrained discretion to avail themselves of the equitable remedy of restitution by reducing or eliminating payments to participants. Bobo v. 1950 Pension Plan, 548 F.Supp. 623 (W.D.N.Y. 1982); Phillips, 194 F. Supp. 2d 549. Therefore, the issue is whether the plan administrator is entitled to use the equitable remedy of restitution.

Federal Courts evaluate equitable restitution claims according to traditional equitable considerations. Phillips, 194 F. Supp. 2d at 555. The court in Dandurand v. Unum Life Ins. Co. developed a four-part test to determine whether restitution was appropriate. 150 F. Supp. 2d 178 (D. ME 2001). In Dandurand, the plan overpaid the plaintiff participant for four years before it noticed its miscalculation. Upon becoming aware of the problem, the plan sought recoupment of the overpayments from the participant. The court held that recoupment was not appropriate after weighing: (A) the relative culpability of the parties; (B) whether the overpaid party had notice of the overpayment; (C) how the participant used the overpaid funds; and (D) the harm to the participant caused by recoupment. Id. at 186-87.

A. Culpability of the Parties

The first factor courts typically consider in equitable restitution cases is the relative fault of the parties, which includes the length of time it took the plan to discover its erroneous miscalculation. Dandurand, at 186. Similar to the participant in Dandurand, Ms. Smith was not at fault for the overpayment. She fulfilled her obligations to the plan by providing complete and accurate information to be used in calculating her benefits. According to the March 30, 2009 letter, the overpayment occurred because Ms. Smith's benefit was not reduced to reflect early retirement. (Exhibit 1) In other words, the overpayment was exclusively the fault of the plan administrators.

Additionally, the failure of the plan administrators to discover this overpayment for 15 years constitutes a breach of their fiduciary duty to exercise care, skill, prudence and diligence in administering the plan. 29 U.S.C § 1104(a)(1)(B). Ms. Smith relied on the plan administrators to distribute the plan's funds accurately. Their failure to discover a mistaken calculation for 15 years is a breach of their fiduciary duty to Ms. Smith, as well as to other participants of the plan.

Furthermore, both the Phillips Court and the Department of Labor, which is responsible for overseeing enforcement of ERISA, have held that where an overpayment is the result of neglect by a plan administrator and not error of the participant, the plan's recourse should be against the negligent administrator, not the participant. Phillips, 194 F. Supp. 2d 549; Dept of Labor ERISA Op. Letter No. 77-08. Presently, Company should be seeking repayment from the plan administrators, whose negligent conduct allowed the miscalculation to occur and neglected to discover it for 15 years.

B. Notice of the Overpayment

The second factor to be considered in equitable restitution cases is whether the overpaid party had notice that an overpayment was being made. Dandurand, 150 F. Supp. 2d at 187. Ms. Smith was completely unaware the Pension Plan benefit she was receiving for 15 years was incorrectly calculated. (See Exhibit 3) It is the plan administrators, not Ms. Smith who are responsible for calculating her monthly pension benefit. She relied upon the plan administrator's skill and expertise in calculating the correct amount of her monthly pension benefit. Furthermore, Ms. Smith received the same amount for over 15 years. There was never an increase or decrease in her monthly benefit, which may have given her notice that a miscalculation had occurred.

Just as it was “reasonable for the participant in Dandurand to believe [the plan administrator] conducted its accounting on a periodic basis and that it would correct payment errors within a reasonable time,” Ms. Smith had no reason to believe the plan administrators would incorrectly calculate her benefit and fail to discover this mistake for over 15 years. Id. at 187. Allowing this miscalculation to persist for 15 years is not a reasonable amount of time.

C. Use of the Overpaid Funds

The third factor to be considered in equitable recoupment cases is how any excess funds were used by the beneficiary. Dandurand, 150 F. Supp 2d at 187. Ms. Smith, like the participant in Dandurand, “did not put this money towards any extravagant purchases,” but used it to pay her monthly living expenses over the 15-year period. Id. All of her income is used to pay basic living expenses. (See Exhibit 3)

D. Harm to the Participant

The final factor to consider is the hardship that recoupment would cause to the plan beneficiary. Dandurand, at 187. Presently, a reduction in Ms. Smith’s monthly pension benefit would result in severe economic harm to her. For the past 15 years, she has relied on the \$360.25 monthly benefit in making her financial decisions. A reduction to this benefit will make it difficult or impossible for her to meet financial obligations undertaken with the belief that she would continue to receive the same amount from her Pension Plan. Additionally, Ms. Smith has not actually retained the sum of \$32,972.80 because she has paid taxes on the Pension Plan benefit since 1994. Seeking recoupment of the entire amount would unjustly enrich the Plan at the expense of Ms. Smith. Furthermore, Company’s illegal action denying her access to her Cash Account Plan has resulted in Ms. Smith currently being unable to meet her monthly financial obligations. (See Exhibit 3) Ms. Smith needs access to her Cash Account Plan in order to cover her basic monthly living expenses.

In summary, given the relative culpability of the plan administrators and the length of time it took them to discover the error, restitution is not appropriate. It simply would not be equitable for Ms. Smith to bear the weight of an error that the plan administrators could have prevented by executing fiduciary duties “with care, skill, prudence and diligence.” 29 U.S.C § 1104(a)(1)(B); Phillips, 194 F. Supp. 2d at 557.

II. **Denying Ms. Smith Access to her Cash Account Plan in Order to Recoup an Overpayment made to her Pension Plan is a Breach of the Plan Administrator’s Fiduciary Duties to her and an Illegal Alienation of Her Benefit Under the Cash Account Plan**

In order to recoup the alleged overpayment made to the Pension Plan, the plan administrator is denying Ms. Smith access to her benefits in the Cash Account Plan. The Pension Plan and the Cash Account Plan are separate plans, even if they are currently administered by the same plan administrator. The plan administrator’s actions amount to a clear violation of ERISA’s anti-alienation provision. ERISA's anti-alienation provision

provides that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” 29 U.S.C. § 1056(d)(1); ERISA §206(d). In Guidry v. Sheet Metal Workers National Pension Fund, the Supreme Court held that ERISA § 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners even if that decision prevents others from securing relief for the wrongs done them. 493 U.S. 365, 376. In other words, the plan administrator may not use Ms. Smith’s Cash Account Plan to repay the Pension Plan because such action illegally alienates her benefits under the Cash Account Plan.

Additionally, a fiduciary must discharge his/her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. 29 U.S.C.A. § 1104(a)(1). The Department of Labor has addressed this very situation in which a plan administrator attempts to use a participant’s benefits from one plan to remedy an overpayment made through another plan. The Department of Labor stated that “delaying or reducing benefits under a plan to remedy a participant’s or beneficiary’s failure to repay erroneous amounts received from another plan . . . would be primarily for the convenience of the fiduciary of such plan, rather than for the benefit of the participants and beneficiaries of the plan.” Dept of Labor ERISA Op. Letter No. 77-34.

By denying Ms. Smith access to her Cash Account Plan in order to recoup an overpayment made by the Pension Plan, the plan administrator is discharging his/her duties with respect to the Cash Account Plan for the benefit of a separate plan, the Pension Plan. Such action violates the fiduciary requirements of ERISA. Dept of Labor ERISA Op. Letter No. 77-34. Therefore, the plan administrator must immediately provide Ms. Smith access to her benefits under the Cash Account Plan.

III. Company’s March 30, 2009 Letter Informing Ms. Smith of an Overpayment and Denying her Access to the Cash Account Plan Did Not Comply with ERISA’s Statutory and Regulatory Notice Requirements

Courts have held that “inadequate notice, in and of itself, may constitute arbitrary and capricious denial of benefits.” Jader v. Principal Mutual Life Ins. Co., 723 F. Supp. 1338, 1341 (D.Minn. 1989). When making an adverse decision, plan administrators must inform the participant of their decision in writing, setting forth the specific reasons for the decision, and afford the participant a reasonable opportunity for a full and fair review. 29 U.S.C. §1133(1)-(2). The Department of Labor has interpreted this section of ERISA to require every benefit plan to set forth in writing: (1) the specific reason or reasons for denying benefits; (2) a reference to pertinent plan provisions on which the denial was based; (3) a reference to additional information necessary for the beneficiary to perfect a claim; and (4) a description of the steps necessary to appeal the adverse decision. 29 C.F.R. § 2560.503-1(g)

The March 30, 2009 letter denying Ms. Smith access to her benefits under the Cash Account Plan fails to meet these requirements. It merely states that Ms. Smith’s monthly benefit was not correctly reduced for early retirement, and that she has two repayment options. (See Exhibit 1) It fails to state any reason why the responsibility falls upon Ms. Smith to repay the benefits. Moreover, it does not reference a plan provision

upon which the determination was based that she must repay the overpayments, as required by 29 C.F.R. § 2560.503-1(f)(2). Without this citation, Ms. Smith “had no opportunity to comprehend fully the reason for the denial” of her claim for benefits to her Cash Account Plan. White v Jacobs Engineering Group Long Term Disability Benefit Plan, 896 F.2d 344, 350 (9th Cir. 1990) (quoting Brown v. Babcock & Wilcox Co., 589 F.Supp. 64, 71 (S.D.Ga. 1984)).

Furthermore, the letter does not adequately specify the type of information Ms. Smith needed to submit in order to perfect a claim, as required by 29 C.F.R. § 2560.503-1(f)(3). In fact, the letter is completely void of these requirements. The letter implies that the overpayment is Ms. Smith’s fault, when it is not, and that it is her responsibility to replenish the Pension Plan trust, when it is not. Such conclusory letters do not satisfy the statutory and regulatory notice requirements of ERISA. Richardson v. Central States, S.E. & S.W. Areas Pension Fund, 645 F.2d 660, (8th Cir. 1981).

Finally, the letter does not provide Ms. Smith with a description of the Plan’s review procedures and the time limits applicable to such procedures. 29 C.F.R. § 2560.503-1(g). By not including this important information, the letter does not satisfy the requirement that the notice “specify with some detail what type of information would help to resolve [the questions regarding eligibility for benefits], and how the applicant should present such information.” White, 896 F.2d at 350 (quoting Wolfe v. J.C. Penny Co., 710 F.2d 388, 392 (7 Cir. 1983)). Therefore, the Company Plan Administrator has breached his/her fiduciary duty to Ms. Smith by making adverse benefit determinations without complying with the notice requirements set forth in ERISA and by the Department of Labor.

Conclusion

For the reasons stated herein, we respectfully request that the plan administrator cease efforts to recoup any overpayment made to Ms. Smith, and that Company provide her access to her benefits under the Cash Account Plan.

Please direct your written response to us at: Western States Pension Assistance Project, California Senior Legal Hotline, 444 North 3rd Street, Suite 312, Sacramento, CA 95811. Thank you for your attention to this matter.

Sincerely,

Justin Freeborn
Staff Attorney

Encls: (Exhibits 1-3)
cc: Jan Smith

[REDACTED]

March 30, 2009

[REDACTED]

Dear Ms. [REDACTED]

You are currently due [REDACTED] Cash Account lump sum of \$19,828.81 for your service with [REDACTED] from 1995 through 2001. However, in 1994 you started receiving a Single Life Annuity of \$360.25 for your service from 1969 through 1993. You began this benefit prior to reaching normal retirement age. The \$360.25 was not correctly reduced for starting the benefit early. The benefit you should have correctly been receiving since 1994 is \$181.05 per month. This totals an overpayment of \$32,972.80.

We are willing to offer two means of repayment. Please put an 'X' next to the option that you choose. The options include the following:

_____ You mail us a check made payable to [REDACTED] in the amount of the overpayment, \$32,972.80. Once this overpayment has been corrected, we will send you pension election forms for the \$19,828.81 you are still owed.

_____ You receive a reduced monthly Single Life Annuity benefit of \$70.05 to offset the overpayment. You would continue to receive this benefit for the rest of your lifetime. The \$19,828.21 is being used to offset your overpayment in this option; therefore, the \$70.05 per month is the only benefit you would receive per month.

If we do not receive this letter back with your selected option by June 15, 2009, we will default to the second option of receiving \$70.05. We apologize for any inconvenience. Please sign and date in the space below and send the form back in the enclosed return envelope. If you have any questions, please contact me directly at [REDACTED]

Signature

Date

Sincerely,
[REDACTED]

February 9, 2010

Justin Freeborn
Western States Pension Assistance Project
444 North 3rd Street, #312
Sacramento, CA 95811

Re: [REDACTED] Claim for Waiver of Recoupment of Overpayment

Dear Mr. Freeborn:

I have reviewed your letter dated November 5, 2009 in which you request [REDACTED] as plan administrator for the [REDACTED] Cash Account Pension Plan, waive efforts to recoup alleged overpayments made to Ms. [REDACTED]

The overpayment arose from the administrator's failure to apply to appropriate early retirement reduction factors when Ms. [REDACTED] pension benefit under the [REDACTED] pension plan commenced in 1994. As a result, she was paid \$360.25 per month rather than \$181.04. Subsequently, Ms. [REDACTED] rehired with [REDACTED] and accrued an additional benefit under the Cash Account Pension Plan.

After reviewing your correspondence and the citations provided, I agree that it is inappropriate for the company to demand repayment of the excess amounts paid to Ms. [REDACTED]

As we discussed on the telephone, I will instruct the plan administrators to do the following:

1. Withdraw any request for overpayment of the amounts attributable to Ms. [REDACTED] Broadway pension;
2. Reduce her monthly pension amount related to Ms. [REDACTED] pension, on a prospective basis only, to the appropriate amount of \$181.04.
3. Permit Ms. [REDACTED] to withdraw the full value of her Cash Account Pension Plan benefit, accrued after her rehire, in whatever form she chooses (and is permitted under the terms of the plan).

I trust this resolution is satisfactory to you and that you will share this information with Ms. [REDACTED]. Please let me know if you have any questions.

Sincerely,