Nos. 16-56529 & 16-56532

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

SCOTT BRAIN,
Defendant-Appellant,
and
MELISSA W. COOK, and
MELISSA W. COOK & ASSOCIATES, PC
Defendants-Appellants

On Appeal from the United States District Court
for the Central District of California
No. 2:14-CV-03911-JAK-AGR
Hon. John A. Kronstadt

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the district court's final judgment. ER 6.

STATUTORY AUTHORITIES

Relevant statutory authorities appear in the Addendum.

ISSUES PRESENTED

This brief responds to the consolidated appeals of Defendant Scott Brain and Defendants Melissa Cook and Melissa W. Cook & Associates, PC ("Cook Defendants") challenging the district court's determination that each committed violations of the Employee Retirement Income Security Act of 1974 ("ERISA").

As restated by the Secretary,[1] Brain's issues presented are:

I. Whether the district court erred in determining that Brain violated ERISA section 510, 29 U.S.C. § 1140, by retaliating against Cheryle Robbins.

II. Whether the district court erred in determining that Brain breached his fiduciary duties under ERISA section 404, 29 U.S.C. § 1104.

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[1] On April 27, 2017, R. Alexander Acosta became Secretary of Labor. He is substituted for Acting Secretary Edward C. Hugler. Fed. R. App. P. 43(c)(2).

III. Whether the district court erred in permanently enjoining Brain from serving as a fiduciary to the Cement Masons Southern California Trust Funds.

As restated by the Secretary, the Cook Defendants' issues presented are:

IV. Whether the district court erred in determining that the Cook Defendants violated ERISA section 510.

V. Whether the district court erred in determining that Robbins and Cory Rice engaged in protected activity under ERISA section 510.

VI. Whether the district court erred in determining that the Cook Defendants violated ERISA section 510 by causing Zenith not to hire Robbins.

VII. Whether the district court erred in determining that the Cook Defendants violated ERISA section 510 by causing Zenith to terminate Rice.

VIII. Whether the district court erred in determining that the Cook Defendants do not have attorney immunity because their actions went beyond providing legal advice.

STATEMENT OF THE CASE[2]

This case is about retaliatory actions by Brain, a trustee for the Southern California Cement Masons Trust Funds ("Trust Funds"), and by Cook, counsel to

[2] Statements herein are based on the district court's findings and conclusions in its July 25, 2016 decision. ER 7-77.

the Trust Funds, who were in a secret romantic relationship. ER 7-8, 49. Upon learning that two individuals, Cheryle Robbins and Cory Rice, had complained that Brain was not acting in the best interests of the Trust Funds' participants and beneficiaries, and that Robbins had spoken to Department of Labor ("DOL") investigators about Brain, Brain and Cook executed a plan to retaliate against Robbins and Rice for their protected conduct, eventually causing their terminations. ER 63, 67.

I. Background

The Trust Funds are five employee benefit trust funds established by the Cement Masons Local Unions 500 and 600 and four contractor associations. ER 9. Each trust fund is an employee benefit plan under ERISA, and each has a Board of Trustees. ER 9. The trustees for the five trusts funds formed a Joint Board of Trustees ("Joint Board") to coordinate administration of the Trust Funds. ER 9.

Brain was the business manager for the Cement Masons Local 600, a trustee of each of the Trust Funds, and a Joint Board member. ER 9. Cook and her law firm, Melissa W. Cook & Associates, PC, served as counsel for the Trust Funds. ER 9.

The Trust Funds had an internal Audit and Collections department ("A&C department") responsible for auditing employers and collecting overdue or unpaid employer contributions. ER 9. Robbins was director of the A&C department. ER

9. The Trust Funds had a Joint Delinquency Committee ("JDC") responsible for overseeing the A&C department. ER 9. The Trust Funds established a corporation, the Cement Masons Southern California Administrative Corporation ("Administrative Corporation") to employ A&C department staff. ER 9.

The Trust Funds also hired a separate company, Zenith American Solutions ("Zenith"), to provide third-party administrative services to the Trust Funds. ER 9. Rice was a Zenith employee who worked on the Trust Funds' matters. ER 9. The Trust Funds' primary contact at Zenith was a manager named Bill Lee. ER 23.

II. Robbins's Concerns About Brain

Robbins had long-held concerns that Brain took actions as a trustee to improperly interfere with the A&C department's collection efforts. ER 43. Trustee David Baldwin recalled her sharing concerns about Brain as early as 2006. ER 19, 44. Robbins's concerns were based, in part, on occasions when Brain advocated for smaller contributions from certain contractors and on statements made by certain contractors that "Brain had told them to 'fly under the radar,' not to worry about certain contributions owed to the Trust Funds, or to ignore the demands by Robbins." ER 43. Robbins was also concerned that Brain appeared at an arbitration brought by the Trust Funds against a contractor and assisted the contractor in presenting its defense. ER 44. Robbins expressed her concerns about Brain's conduct at JDC meetings and to several trustees. ER 43-44.

To that end, Kathryn Halford, the Trust Funds' collections counsel who worked at a different law firm than Cook, and whom the district court found "credible," ER 33, testified that she heard Brain make statements that supported delayed action by the JDC on collection efforts and contravened the contractors' obligations under collective bargaining agreements. ER 34. The district court found that Brain interpreted certain agreements "in a manner that reduced the amount owed by covered contractors." ER 43. It also found that Brain's interpretations were often "inconsistent with those of Robbins or Halford" and "often later determined to be incorrect." ER 43.

III. Cook Manipulated Audit Of A&C Department

Brain and Cook decided to take action against Brain's long-standing critic. ER 55. They used a decision by the Trust Funds to audit the A&C department as their opportunity and pretext for retaliating against Robbins. ER 50-51; ER 61 (finding audit part of their efforts to cause a "predetermined, and expected, outcome": Robbins's termination).

In March and April of 2011, the trustees considered hiring an independent company to perform a compliance audit of the A&C department. ER 45. However, they made no plans to conduct an audit at this point. ER 11.

On September 8, 2011, the JDC held a meeting, and the trustees voted to move forward with an audit of the A&C department. ER 12. Despite lack of

evidence of her expertise in this area, the trustees asked Cook to prepare audit procedures and solicit requests for proposals ("RFPs") from auditing firms. ER 12, 59. Halford reviewed the audit procedures drafted by Cook. Cook asked her associate, Sun Chang, to see if she thought Halford was "watering [] down" the procedures. ER 12. Trustee David Allen also looked at Cook's audit procedures. ER 60. He sent Cook and Halford an email, stating that based on his accounting background, he was concerned that the procedures included a "directive to the auditor." ER 60. Allen wrote, "[W]e cannot tell the auditor what or how to do their job, and this service request is a violation of [Generally Accepted Accounting Procedures] in my opinion in its purest sense." ER 60. The audit "appear[ed] to have been created in an effort to influence the outcome by increasing the likelihood of a finding that the A&C Department was not well run." ER 59.

On October 13, 2011, the JDC decided on two finalists to perform the audit, Bond Beebe and Hemming Morse. ER 12. The firms were scheduled to present at a JDC meeting scheduled in November. ER 12.

By October 2011, or "very shortly thereafter," the "close, personal relationship" between Brain and Cook became romantic, and they misled other trustees about their relationship. ER 49. They communicated extensively with each other, exchanging "flirtatious comments" such as when Brain emailed Cook,

"You figured you couldn't get in enough trouble with your own gorgeous self!" ER 13.

IV. Robbins And Rice Engaged In Protected Activity

During this time, Robbins continued to voice concerns about Brain. ER 43. First, on October 11, 2011, Robbins and Rice met with Allen to discuss Brain's potential misconduct and whether to send a letter about Brain to Pat Finley, president of the Operative Plasterers' and Cement Masons International Association ("OPCMIA"). ER 12. At that time, Allen also wanted to oust Brain. ER 52-53. They considered sending a letter to Finley because the OPCMIA could remove Brain as Local 600 Business Manager, which would cause Brain to lose his trustee position. ER 44. Following the conversation, Rice (using the alias "Brock Landers") sent Allen an email that described alleged misconduct by Brain to recite in the letter to Finley. ER 12, 246. Many allegations suggested breaches of Brain's fiduciary duties under ERISA, such as that he "[acts] to reduce amounts owed to Fund" and "advises contractor how to handle audit." ER 12, 246. The email also stated, "[W]e now have concerns about our own trust attorney," referring to Cook. ER 246.

On October 14, 2011, Robbins spoke to DOL investigator Matt Chandler, who called her cell phone and said he was conducting a criminal investigation of Brain. ER 12. Robbins was not the initial whistleblower to the DOL. ER 44.

Rather, Chandler's call was the result of a complaint made by Thomas Mora, OPCMIA vice president, at some point between March and May of 2011. ER 12. Mora had concerns about Brain's conduct based on conversations with Robbins, Halford, and two trustees. ER 38.

Robbins reported Chandler's call to Halford. ER 12. Robbins also reported the call to Allen, who in turn told Cook on October 26, 2011. ER 12.

V. Cook And Brain Caused Robbins To Be Placed On Administrative Leave

After learning about Robbins's contact with the DOL, Cook and Brain took swift action, causing an unscheduled Joint Board meeting to be held. ER 50. Cook conveyed that the meeting's purpose was to discuss whether to outsource the A&C department's work, ER 13, but the record shows that Cook and Brain's real intent was to end Robbins's employment. ER 50.

a. Cook, Brain, And Allen Called A Joint Board Meeting In Reaction To The DOL Investigation

After Allen told Cook about Robbins's contact with the DOL, Cook began to exchange text messages and phone calls with Allen about Robbins. ER 13. The two also discussed having Zenith take over the services provided by the A&C department. ER 13. Though Allen participated in efforts to draft the OPCMIA letter, Allen tried to distance himself from Robbins once he learned about her DOL contact and saw Cook's and Brain's responses. ER 53, 55. See also ER 53 (email

from Cook to Brain stating that Robbins and Mora were trying to "figure out how they were gonna get out of this one after realizing [Allen] betrayed them!").

On November 11, 2011, Cook told Allen that she believed a special Joint Board meeting should be called and suggested November 18, 2011, in connection with a previously scheduled JDC meeting. ER 13. Allen instructed Lee to send an email to the trustees scheduling the meeting. ER 13. Cook suggested the meeting be held before any action was taken on potentially outsourcing the work of the A&C department to Zenith. ER 13. However, there was no need for a specially scheduled meeting to address that topic and several trustees were surprised that a meeting was called. ER 54, 58.

Instead, "Brain and Cook were 'firing up' their allies for the actions that would be taken in response to Robbins' contacts with the DOL, not for a more pedestrian discussion about a potential change to the performance of the functions of the A&C Department." ER 54. They wanted to "line up their votes at the meeting for the positions that they planned to advance." ER 50, 54. For example, trustee Jaime Briceno emailed Brain to ask what the meeting was about, and Brain said, "That's your friend David Allen, I will call you and get u up to speed. You need to talk with your sister also!" ER 13. Later, Cook sent Brain an email stating that she had also been in contact with Briceno. ER 13. She wrote: "I think [J]aime used up all his cell minutes today. I think he is fired up for this. He said he lined

up his peeps and talked to you several times! I like it!" ER 13. Brain replied to Cook: "Between you and I, Jaime should be good to go! Thank you! Filthy Philys and Mr. Baldwin are wild cards. I will have a serious talk with Baldwin before Friday!" ER 13.

Cook also forwarded to Brain an email that Allen sent to Zenith stating that Allen thought the Joint Board meeting was necessary to discuss outsourcing the A&C department's work. ER 13. Cook wrote to Brain: "It was [Allen]'s idea to do it this way! HA! Revisionist history is amazing!" ER 13.

b. <u>Cook Blamed Robbins For DOL Subpoena</u>

Days before the November 18 meeting, Robbins asked Chandler to issue a DOL subpoena for the Trust Funds' records because she had been told both by Cook and her personal counsel not to provide any records voluntarily to the DOL. ER 44. She also told Chandler to move quickly because she feared she would lose her position. ER 44. Cook's response to the DOL subpoena demonstrates that Robbins's concerns were valid. ER 50, 54.

On November 17, 2011, Robbins received a DOL subpoena and forwarded it to Cook and Halford, telling them that it concerned a criminal investigation of Brain, not the Trust Funds. ER 14. Cook forwarded the subpoena to Chang, stating, "Those bitches!" in reference to Robbins and Halford. ER 14.

Later that day, Cook sent Chang an email stating, "I want to put [Robbins] on paid admin leave asap." ER 14. She went on: "[Brain] was in DC at his intl headquarters all week, do you think this was meant to embarrass him slightly if it came out while he was still there??? He and I knew something BIG would happen this week. But this is crap and I want her out of there." ER 14.

After that, Cook sent Chang another email asking whether Robbins could be put on paid administrative leave "without violating erisa [sic]?" ER 14. Chang responded:

> I was thinking if we put her on paid admin leave assuming she has standing (participant or fiduciary) or the DOL sues, what would be the damages or equitable relief [] since she was paid and is still an employee. Thus, I think she should be put on paid leave to at least prevent her from taking out documents. I also[] think the Corp should proceed with the independent audit and it will find that the Corp is costly/inefficient etc and the directors can then get bids from TPAs to perform collection and audit work and I am sure the bids will be alot [sic] less than what the Corp cost and Jt. Board can just hire a tpa and the directors can dissolve the corporation since it has no clients/revenues.

ER 14-15. In other words, before the November 18 meeting, Cook and Chang considered putting Robbins on leave and outsourcing the A&C department's work as a way to terminate Robbins's employment. ER 13-15. "[T]he ongoing audit" would "provide what could be claimed as a legitimate, non-retaliatory reason to end Robbins' affiliation with the Trust Funds." ER 59. Throughout this period, Brain and Cook communicated frequently concerning Trust Fund matters. ER 54.

c. **<u>Cook And Brain Influenced Trustee Vote To Place Robbins On Leave</u>**

On November 18, 2011, the scheduled JDC meeting was held to discuss the two finalists to perform an audit of the A&C department, and Bond Beebe was selected. ER 15.

The added-on Joint Board meeting was held following the JDC meeting. ER 15. First, the trustees voted to solicit RFPs to see how much it would cost to outsource the collections services performed by the A&C department. ER 15. Then Cook informed the trustees of the DOL subpoena and Robbins's contact with the DOL. ER 15. Cook and Brain took the lead with respect to the discussion of Robbins's contact with the DOL. ER 55.

Cook described Robbins's conduct as inappropriate and made statements that implied Robbins had initiated the contact with the DOL. ER 50, 55. She did so "in an effort to cause the trustees to be upset with Robbins, and regard her as disloyal for encouraging the DOL investigation into matters related to the Trust Funds." ER 55. Baldwin testified that Cook said, "Come on. You're all smart people here. Do the right thing," conveying that she thought it was appropriate to place Robbins on leave. ER 19, 55. Next, Brain asked Allen whether Robbins had asked him to write a letter to the OPCMIA president. ER 15. Allen said she had been asking him to do so for several months. ER 15. Minutes prepared by Cook state, "[W]hen it appeared the [compliance audit] would proceed, Ms. Robbins attempted

to exert even further pressure on Mr. Allen to send the letter. . . ." ER 15, 249-51. Cook's and Brain's critical statements of Robbins "created an environment that was hostile to her," and "caused" the trustees to vote unanimously to put Robbins on leave "until . . . the matter pending before the DOL is resolved." ER 15, 53, 55.

Brain recused himself from the vote, but remained in the room during the discussion and vote. ER 15. By nature of his position, Brain had the power to remove Local 600 trustees or have them terminated from their jobs with the union.[3] ER 55. In light of this evidence, the district court found Brain's presence was inappropriate given his authority and influence over other trustees. ER 55.

After Robbins was placed on leave, Cook went so far as to tell Robbins that one reason for the decision was her participation in efforts to send a letter to the OPCMIA. ER 50.

VI. Cook And Brain Caused Rice's Termination

In early December, Brain and Cook moved to retaliate against Rice, Robbins's friend. ER 64. Cook talked to Lee at Zenith about Rice's role in efforts to send a letter to the OPCMIA president about Brain. ER 16. Around that time, Brain told Lee that Zenith's work was being put out to bid. ER 16.

[3] Indeed, Brain removed Baldwin, who had concerns about Brain's conduct, from his trustee position in 2013. ER 20, 30, 44.

On December 20, 2011, Lee sent an email to Zenith human resources representative Francey George stating that he had discussed the employment of Rice and Rice's mother, Louise Bansmer (also a Zenith employee), with Cook. ER 16. Lee understood that Cook was very unhappy with Rice's involvement with the OPCMIA letter and testified that Cook told him that "because of Rice's involvement with the letter, it would be in Zenith's best interest to terminate Rice." ER 66. Lee wrote that he did not think terminating Rice was in the Trust Funds' best interest, though Bansmer needed to be dismissed. ER 16. (Lee had issues with Bansmer's performance. ER 15.)

On December 22, 2011, Lee sent George another email stating that Cook had told him that Rice and Bansmer should be "terminated together due to the mother/son connection" because Cook was fearful of retaliation by Rice. ER 16. Lee wrote that he was not comfortable terminating Rice and did not want to terminate him. ER 16, 65.

On December 30, 2011, Lee emailed his supervisors telling them that Cook still had concerns about retaliation by Rice if Bansmer were terminated first. ER 16. He wrote that Cook had asked Lee to speak with Brain, whom Lee identified as "the Trustee with the major concerns/issue with the handling of [Rice]." ER 16.

Later that day, Lee wrote that he had talked to Brain, who said that he had "doubts" about Rice and worries about whether Rice would retaliate, but would

respect Zenith's decision since Rice was a Zenith employee. ER 16. Lee's supervisor responded that Zenith had to do the right thing for its client, the Trust Funds, and she was not sure that retaining Rice was "the right thing. Especially after your conversation with [Brain]." ER 16. Through these communications, "those involved in the decision to terminate Rice knew that Cook and Brain wanted Rice to be terminated" and "Zenith was influenced by the positions of Cook and Brain because it wanted to retain the client." ER 67. They "knew that Cook and Brain had significant influence over the business decisions made by the trustees as to the Trust Funds." ER 51.

On January 4, 2012, Lee emailed the trustees to inform them that Rice and Bansmer had been terminated. ER 16-17. Lee wrote that the reason for terminating Rice was Rice's participation in preparing a letter to the OPCMIA: "Rice's actions in an email exchange to discredit a Trustee[] as well as his ongoing communication with [] Robbins . . . continues to violate [Zenith's] policies of confidentiality." ER 17.

VII. Cook And Brain Caused Robbins's Position To Be Outsourced To Zenith And Zenith Not To Hire Robbins

At a Joint Board meeting on January 19, 2012, the trustees discussed dissolving the A&C department and outsourcing its work to Zenith or another party. ER 17. Cook was asked to send RFPs to potential candidates. ER 17.

Zenith submitted a bid to take over the services of the A&C department on February 13, 2012, but Allen told Zenith to "sharpen [its] pencil," i.e., lower its bid. ER 17, 51. Allen later told Lee that Zenith could reduce the cost of its proposal by hiring replacement staff or lowering salaries of A&C department staff and replacing them if they did not agree to salary reductions. ER 17. In March, Zenith submitted a revised proposal that said: "If [Zenith] is able to hire qualified staff at a lower salary rate than the current staff[,] we will pass that savings on to the Trust Funds. If we are not able to lower salaries (through new people or reduced salaries of current staff)[,] our current fee quote would stand." ER 18.

During this time, Cook engaged in an extensive investigation of Robbins that was not authorized by the Trust Funds. ER 17, 51. Cook reviewed Robbins's phone records and exchanged emails with Brain about them. ER 17. Cook highlighted Robbins's calls with Mora, Allen, Halford, and Baldwin, as well as calls made in connection with DOL's investigation and subpoena. ER 17. Cook sent her opinions on the phone records to Brain, referring to Robbins's placement on administrative leave as when she "got canned": "The fact that [Robbins] called Mora right after she got canned is really key. Remember I told her that one of the reasons for the leave was her conspiring to have one of the labor trustees disciplined by the International." ER 17. "It was also inappropriate for

Cook to have brought Brain into the process because she had been told that the DOL investigation centered on his conduct." ER 51.

Cook also asked the Bond Beebe auditor to review hard drives for emails between Robbins and Mora, Halford, or Allen, as well as emails relating to the DOL investigation, referring to Brain, or containing "opcmia.org." ER 17. Cook forwarded the email to Brain, who added search terms of his own. ER 17.

At a meeting on April 12, 2012, Bond Beebe presented the audit findings to the Joint Board. ER 18. The audit was thorough with one gaping exception—every A&C department employee was interviewed except for Robbins, the department's director. ER 51. The audit results gave the A&C department a "D" grade. ER 18. The results did not recommend outsourcing, but rather gave suggestions for operational improvements. ER 51.

The trustees and Cook then discussed the audit. ER 61. "Cook encouraged the trustees to support outsourcing the services of the A&C Department and to eliminate Robbins." ER 61. Trustee Marcos Enriquez testified that Cook said that the quality of Robbins's work was subpar and Robbins "had to go." ER 61. Cook herself testified that she told the trustees it would be a breach of their fiduciary duty to allow "the existing situation" to continue in light of the deficiencies identified by the audit. ER 61. Cook also stated that the sub-committee reviewing the RFPs (comprised in part by Brain and Allen, ER 60) recommended that Zenith

take over the A&C department's work. ER 60. Baldwin expressed his view that the decision to solicit bids to outsource the A&C department's work was part of an effort to terminate Robbins. ER 51. After "compressed consideration," the trustees voted to dissolve the A&C department and outsource its functions to Zenith. ER 18. The whole meeting lasted about 95 minutes with Bond Beebe's presentation comprising 60 minutes. ER 60.

On April 14, 2012, Lee informed his supervisors that Zenith was selected for new work with the Trust Funds. ER 18. Lee had talked to Brain and Cook, his primary contacts at the Trust Funds, on numerous occasions. ER 61. He knew that Brain and Cook were upset with Robbins because of her involvement in the DOL investigation and did not want her to return to work for the Trust Funds. ER 61. Indeed, Lee testified that after Robbins was placed on leave, Cook told him during several conversations that Robbins should not return to her position as A&C department director. ER 61. Lee relayed these views to his supervisors, who were eager to please their client, the Trust Funds. ER 61. He informed his supervisors that he had told Cook that Zenith may "need to hire all current employees (with the exception of [] Robbins) to ensure a seamless transition." ER 18.

In fact, every A&C department employee was hired by Zenith except for Robbins. ER 51. Moreover, Zenith did not eliminate Robbins's position. ER 62. Instead, aided by Cook, it immediately began to look for a replacement. ER 62.

There was "no evidence that Lee or any other person at Zenith decided not to hire Robbins due to the quality of her work as director of the A&C Department." ER 63.

VIII. The Secretary's Action

The Secretary brought the underlying action to seek remedies for flagrant ERISA violations. ER 407. On November 21, 2014, the Secretary filed a Second Amended Complaint ("Complaint") pursuant to ERISA sections 502(a)(2) and (a)(5), 29 U.S.C. § 1132(a)(2), (a)(5), against the Trust Funds, Joint Board members, Administrative Corporation, Zenith, Lee, and the Cook Defendants. ER 358-67. The Complaint alleged that the defendants retaliated against Robbins and Rice for attempting to send a letter regarding their concerns about Brain, and against Robbins for participation in a DOL investigation, all in violation of ERISA section 510, 29 U.S.C. § 1140. ER 381-83. It also alleged that Brain breached his fiduciary duty of loyalty to the Trust Funds and his duty to act with the care and diligence of a prudent person in violation of ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A),(B), and that the Cook Defendants knowingly participated in Brain's breach. ER 388-90. Finally, the Complaint alleged that some defendants had co-fiduciary liability under ERISA section 405(a), 29 U.S.C. §1105(a). ER 368-90.

On August 24, 2015, the district court entered a Consent Judgment and Order reflecting a settlement between the Secretary and all defendants except Briceno, Brain, and the Cook Defendants. ER 331-339.

IX. The District Court's Decision

Following a five-day bench trial, the district court issued a seventy-one page opinion finding that Brain and the Cook Defendants committed numerous violations of ERISA. ER 7-77. The court concluded that they violated ERISA section 510 by (1) causing Robbins to be placed on administrative leave, (2) causing the A&C department's work to be outsourced to Zenith and causing Zenith not to hire Robbins, and (3) causing Zenith to terminate Rice, all in retaliation for protected conduct, namely, their involvement with the OPCMIA letter and Robbins's DOL communications. ER 67, 76. The court also found that Brain independently breached his fiduciary duties by failing to manage the Trust Funds prudently and solely in the best interests of the Trust Funds' participants and beneficiaries in violation of ERISA sections 404(a)(1)(A) and (B), and that the Cook Defendants were liable for Brain's breaches because they knowingly participated in them. ER 77.

The district court removed Brain as a trustee to the Trust Funds and permanently enjoined Brain from acting as fiduciary and the Cook Defendants from acting as counsel to the Trust Funds. ER 77. It also ordered the Cook

Defendants to disgorge $61,480.62 to the Trust Funds for fees received for "work" performed that was actually conduct in violation of ERISA. ER 76.

Brain filed a motion for stay of the judgment enjoining him from acting as a fiduciary to the Trust Funds, which was denied. Sec'y ER 1.

SUMMARY OF THE ARGUMENT

Defendants have failed to demonstrate that the district court erred in any of its legal conclusions, committed clear error as to any factual finding, or abused its discretion in any manner with respect to any of the questions presented.

1. The district court properly concluded that Brain and the Cook Defendants retaliated against Robbins and Rice in violation of ERISA section 510. Robbins and Rice participated in efforts to write a letter to the OPCMIA president about Brain's potential misconduct, and Robbins participated in a DOL investigation—all protected activity under ERISA section 510. In response to this activity, Brain and Cook called an unscheduled Joint Board meeting and pressured the trustees to place Robbins on administrative leave. They also shepherded the process of outsourcing Robbins's work to Zenith, then persistently conveyed their displeasure with Robbins to Zenith. Cook repeatedly told Zenith that Robbins should not return to her director position. Similarly, Cook told Zenith to terminate Rice, and Brain likewise emphasized his "doubts" about Rice. Brain's and Cook's actions in causing Zenith to terminate Rice and not hire Robbins fly in the face of

ERISA section 510, which broadly protects individuals who have "given information" about violations of ERISA. The district court concluded through careful legal and factual analysis that Brain and the Cook Defendants caused the adverse employment actions at issue.

2. The district court also properly concluded that by conducting plan business, including outsourcing the A&C department's work, in order to carry out a personal vendetta against Robbins and Rice for ERISA-protected conduct, Brain independently violated his fiduciary duties under ERISA section 404(a)(1)(A) and (B) to act prudently and "solely in the interest of the participants and beneficiaries" and that the Cook Defendants knowingly participated in Brain's breach. Through their actions, Brain and Cook made clear that they placed personal and romantic interests above the interests of the participants and beneficiaries they were supposed to serve.

3. In light of this deliberate, concerted, and prolonged unlawful behavior, the district court did not err in permanently enjoining Brain from acting as a fiduciary and the Cook Defendants from acting as counsel to the Trust Funds.

ARGUMENT

I. The District Court Properly Concluded That Brain Violated ERISA Section 510

Section 510 makes it "unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has

testified or is about to testify in any inquiry or proceeding relating to [ERISA]." 29 U.S.C. § 1140. The district court found that Brain and Cook were "very upset" with Robbins and Rice's involvement with the OPCMIA letter and Robbins's contact with the DOL. ER 55, 67. In retaliation, Brain and Cook used their positions to influence other trustees to place Robbins on administrative leave and cause Zenith to terminate Rice and not to hire Robbins. ER 53, 63, 67.

Establishing a prima facie case of retaliation under section 510 requires showing that (1) an employee engaged in activity protected under ERISA, (2) suffered an adverse employment action, and (3) a causal connection existed between the two. Kimbro v. Atl. Richfield Co., 889 F.2d 869, 881 (9th Cir. 1989).

Brain argues that (1) the district court erred in finding that Robbins engaged in protected activity when she participated in efforts to send a letter to Finley, the OPCMIA president, about Brain's potential misconduct, and (2) the district court erred by effectively applying the "motivating factor" standard of causation instead of the more stringent "but for" standard when determining whether a causal connection existed between Robbins's protected activity and the decision to place her on administrative leave. Brain Br. 39. These challenges to the district court's application of law are reviewed de novo. Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002). Neither argument has merit.

a. The District Court Properly Found That Robbins Engaged In Protected Activity Under ERISA Section 510

Brain argues that the district court erred in finding that Robbins engaged in protected activity by participating in efforts to send a letter to Finley about Brain's potential misconduct as a trustee. Brain Br. 33.

Brain's argument provides no basis for reversal. The district court held that Robbins engaged in two forms of protected activity: 1) participation in a DOL investigation, and 2) participation in efforts to send a complaint letter to Finley. ER 43-44. Each activity serves as an independent basis for finding violations of ERISA section 510. See ER 52 ("Robbins engaged in two forms of protected conduct."). Brain's challenge is directed only at Robbins's efforts to send the letter, perhaps because participation in a DOL investigation is so clearly protected activity under section 510. See McBride v. PLM Int'l, Inc., 179 F.3d 737, 741 (9th Cir. 1999) (finding employee had standing for section 510 protection based on his writing a letter to DOL). By failing to challenge Robbins's participation in a DOL investigation as an independent basis for the district court's judgment, he has now waived the issue on appeal. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999). Because Brain failed to challenge this independent basis to find a section 510 violation, this Court can affirm the district court's holding without addressing Brain's appellate arguments.

Even considering his arguments, they are meritless. The district court properly concluded that Robbins engaged in protected activity under ERISA section 510 when she participated in efforts to send a letter to Finley about Brain's potential misconduct. Brain argues that Robbins's letter activity was not protected because it was not part of an "inquiry or proceeding" and not directed to someone with "ERISA authority," Brain Br. 34, but as the district court properly held, these arguments are contradicted by the law of this Court. ER 43-44 (citing Sec'y ER 19-20, 50).

The district court twice rejected the argument that Robbins's letter activity was not protected because it was not part of an "inquiry or proceeding," reasoning that Hashimoto v. Bank of Hawaii, 999 F.2d 408 (9th Cir. 1993) compels that result. Hashimoto states:

> [Section 510] may be fairly construed to protect a person in [plaintiff's] position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan. The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.

Id. at 411. See also Sec'y ER 50. As the court properly concluded, Robbins's participation in efforts to send a letter to Finley about Brain's potential ERISA

violations, including her concern that Brain advocated for smaller contributions from certain contractors,[4] ER 43, is plainly an act that section 510 protects.

Brain argues that because Hashimoto addressed whether a state-law retaliation claim was preempted by ERISA, the Court's statements are dicta. Brain Br. 35. To the contrary, as the district court noted, "the construction of [section 510] as encompassing informal complaints was necessary to the holding that Hashimoto's claim . . . was preempted by ERISA." Sec'y ER 50. Indeed, this Court affirmed its holding in Teutscher v. Woodson, 835 F.3d 936, 945 (9th Cir. 2016), where it again held that an unsolicited complaint is protected activity under section 510. In Teutscher, an employee made a complaint to outside law enforcement about possible illegal activity in violation of ERISA. Id. at 940. Analyzing whether the employee had established a retaliation claim under section 510, this Court noted that "ERISA-protected activity [includes] protesting a legal violation in connection with an ERISA-governed plan." Id. at 945 (citing Hashimoto, 999 F.2d at 411). The district court properly applied binding precedent. See Hashimoto, 999 F.2d at 411; accord George v. Junior Achievement

[4] "Plan trustees have a general duty to ensure a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." Collins v. Pension & Ins. Comm. of S. Cal. Rock Prod. & Ready Mixed Concrete Associations, 144 F.3d 1279, 1283 (9th Cir. 1998).

of Cent. Ind., Inc., 694 F.3d 812, 817 (7th Cir. 2012); Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1314-15 (5th Cir. 1994).

Finally, Brain's argument that section 510 does not protect complaints "directed at someone with no ERISA authority," Brain Br. 34, fails because there is no such limitation in section 510. Certainly, this Court has recognized that an internal complaint to "managers of the ERISA plan" is sufficient to establish protected activity, Hashimoto, 999 F.2d at 411, but this does not mean that only an internal complaint to a plan manager is protected activity. Instead, section 510 broadly protects an individual who has "given information" in "any inquiry . . . relating to this chapter." 29 U.S.C. § 1140. A discussion with a union plan trustee about sending a letter to the international union president about suspected ERISA violations by another trustee fits comfortably within this broadly protective language. Brain tries to salvage his argument by saying that Finley had no authority over ERISA plans and could only discipline Brain in a "non-ERISA capacity," Brain Br. 39, but this distinction is irrelevant to section 510's protections. Indeed, in a similar situation, this Court recognized in Teutscher that a complaint to the Riverside Sheriff's Department—an outside party—about potential ERISA violations by the Riverside Sheriffs' Association, an organization representing law enforcement employees, was sufficient. 835 F.3d at 940. Moreover, this argument is also wrong as a matter of fact because the district court

found that Finley could have taken steps to remove Brain from his union position, which would have disqualified Brain from serving as trustee to the ERISA plans. ER 44. The district court thus properly held that Robbins's participation in efforts to draft a letter to Finley was protected activity separate and apart from her protected participation in a DOL investigation.

b. The District Court Properly Applied The "But For" Standard, A Higher Standard Than Required

Although the district court expressly applied a "but for" standard of causation in concluding that Brain violated section 510, ER 49, Brain argues that it effectively applied the lower "motivating factor" standard. Brain Br. 41-44. Brain's argument is meritless. The district court in fact applied the "but for" standard and correctly concluded that but for Brain's and Cook's actions, the adverse actions taken against Robbins and Rice would not have occurred.

Where the "but for" standard applies, a plaintiff must show "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the [defendant]." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (Title VII). Brain argues that the district court improperly found "but for" causation because, in his view, a majority of trustees "voted to put Robbins on leave for non-retaliatory reasons," such that she would have been placed on leave even in the absence of Brain's and Cook's wrongful actions. Brain Br. 45. However, Brain's argument overlooks the fact that

the court found that Brain and Cook retaliated against Robbins by causing the trustees to vote to place Robbins on leave. ER 53. The court found that Brain and Cook "set in motion" and were "involved in or influenced [the trustees'] decision" to put Robbins on leave. ER 53. This factual conclusion was supported by findings that Brain and Cook were involved in the decision to hold a Joint Board meeting, that their "statements critical of Robbins created an environment that was hostile to her," and that they had "substantial influence over the other trustees." ER 55-56. Thus, the court's causation decision was not based on the trustees' post-hoc voting rationale, but rather, on its determination that Brain's and Cook's actions had a dispositive influence on the outcome of the vote to place Robbins on administrative leave. Brain and the Cook Defendants do not provide any basis to suggest that these factual findings are clearly erroneous.

Citing case law about retaliation claims under 42 U.S.C. § 1983, Brain argues that "when a majority of a group decides to take action for non-retaliatory reasons, none of the group is liable." Brain Br. 45. However, these cases are inapposite. First, they concern the liability of municipal bodies based on actions by their members (e.g., members of a city council), and not private individuals who are each individually liable as fiduciaries, as here. E.g., Campbell v. Rainbow City, Ala., 434 F.3d 1306, 1312 (11th Cir. 2006). Under ERISA, each individual who meets ERISA's fiduciary definition is personally liable for his breaches. See

Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1461 (9th Cir. 1995). The district court found that Brain was individually liable as a fiduciary. ER 71. Second, Brain abstained from the vote to place Robbins on leave, and thus was not even a member of the body of decision-makers. Instead, the district court properly attributed liability to Brain based on the "cat's paw" theory, which holds that "liability may be imposed where an individual with discriminatory animus, who does not have ultimate decisionmaking authority, influences the decisionmaker to take an adverse action." ER 53. See also Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011) ("Animus and responsibility for the adverse action can both be attributed to the earlier agent . . . if the adverse action is the intended consequence of that agent's discriminatory conduct."). It was not the trustees' vote, but Brain's and Cook's actions influencing that vote, that formed the basis of their liability.

Finally, disagreeing with the district court's credibility determinations, Brain argues that the district court improperly rejected the non-retaliatory reasons offered by the trustees for voting to put Robbins on leave, as well as their testimony that Brain did not influence their vote. Brain Br. 47-48. The district court noted: "That [the trustees] faced potential liability for their actions can reasonably be seen as affecting the weight of their testimony as to the non-retaliatory nature of the decision." ER 53 n.11. Based on this statement, Brain argues that the court

applied a "presumption of perjury," an exaggeration that is plainly false. Brain Br. 48.

A trier of fact must assign weight to testimony in light of all evidence presented. For this reason, credibility findings are reviewed for clear error and entitled to special deference. See Husain, 316 F.3d at 835, 840. Extensive evidence supported the district court's conclusion that Brain and Cook had power over the trustees and influenced the trustees' decision to put Robbins on leave, including evidence that Brain had the power to remove other trustees, and testimony from Enriquez, whom the district court found credible, that when he confronted Brain about potential misconduct, Brain threatened to take away his job. ER 31.

Similarly, the court did not ignore the reasons offered by the trustees, but rather methodically concluded that the reasons either supported the finding of retaliation (e.g., that Robbins was suspended for efforts to prepare a letter to Finley), were based on unpersuasive testimony (e.g., that Robbins "pressured" Allen to write the letter), or were too vague to constitute a legitimate, non-retaliatory reason for placing Robbins on leave (e.g., that there was "'chaos' during their meeting"). ER 52-53. Brain has not shown that the court's findings that Brain influenced the trustees' decision to put Robbins on leave and that the

defendants did not establish a legitimate, non-retaliatory reason for putting Robbins on leave were clear error. Husain, 316 F.3d at 835, 840.

Furthermore, Brain does not question the proper legal standard for causation because the district court applied the more stringent "but for" standard he advocated below. The Secretary argued below that the proper causation standard is the "motivating factor" test. ER 49. Because Brain does not present this issue on appeal and the district court properly applied the "but for" standard, this Court can reserve the question of first impression concerning the causation standard for another day.

Nonetheless, the Secretary's view is supported by precedent and the statutory text. This Court has never adopted the "but for" standard in the section 510 context. This Court's precedent dictates that the standard for demonstrating causation in a section 510 claim is whether the protected activity was a "motivating factor" in an adverse employment action, Dytrt v. Mountain States Tel. & Tel. Co., 921 F.2d 889, 896 (9th Cir. 1990). The district court applied a "but for" standard, however, concluding that Dytrt and related cases concern section 510's "interference" prong rather than its "inquiry" prong. ER 47-78. Based on the fact that the "inquiry" prong uses the word "because," the district court relied on cases construing discrimination provisions in other statutes and applied the "but for"

standard. See ER 47-78 (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) and Nassar, 133 S. Ct. 2517).

The cited cases interpret Title VII and the Age Discrimination in Employment Act and do not mandate application of the "but for" standard to section 510 claims. See Gross, 557 U.S. at 174 ("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."). Accord Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2517-18 (2015) (rejecting the dissent's invocation of Nassar for a statutory provision with a "because of" clause due to its different statutory context); see id. at 2527-28 (Thomas, J., dissenting). Most recently this Court in Teutscher reviewed a claim under the "inquiry" prong, and affirmed the judgment on liability because the jury found the protected activity had "motivated" the discharge. 835 F.3d at 945.

Section 510's text also suggests Congress's use of "because" should not hold dispositive weight. ER 47-78. This Court applies a "motivating factor" standard to section 510's "interference" prong, which makes unlawful actions taken "for the purpose of interfering with the attainment of any right." 29 U.S.C. § 1140 (emphasis added). Compare this to section 510's "inquiry" prongs. The "inquiry" prongs are set forth in two parallel clauses, one specific to multiemployer plans,

and Congress used two different formulations, one with "because" and the other with "for." Compare id. ("It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information[.]") (emphasis added) with id. ("In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information[.]") (emphasis added). Section 510 as a whole demonstrates that Congress did not intend to apply different standards of causation for clauses in section 510 solely by using the word "because." While the district court erred in applying the "but for" standard, this Court need not address this question as the result below was correct under either standard.

II. The District Court Properly Held That Brain Breached His Fiduciary Duties And The Cook Defendants Knowingly Participated In That Breach

The district court specifically held that Brain's conduct independently violated both ERISA section 510 and his fiduciary duties under section 404(a)(1)(A) and (B) to prudently and loyalty administer the Trust Funds. ER 68-71, 75-77. It also held that the Cook Defendants were liable for knowingly participating in Brain's breach under ERISA section 502(a)(5). ER 69 (citing Sec'y ER 51-52), 71; Sec'y ER 51-52 (citing Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 241, 248 (2000)).

As a trustee, Brain had the fiduciary responsibility to prudently and loyally administer the Trust Funds and manage plan assets, including when making fiduciary decisions to hire, fire, or discipline plan service providers, such as Robbins and the A&C department, and how to compensate them. See 29 U.S.C. § 1002(21)(A) (defining fiduciary to include persons with "authority or control respecting management or disposition of [plan] assets" and "discretionary responsibility in the administration of such plan"); Bui v. Am. Tel. & Tel. Co. Inc., 310 F.3d 1143, 1152 (9th Cir. 2002) ("Like the selection of providers, the retention of providers is a necessary part of the administration of an ERISA plan."); Christensen v. Qwest Pension Plan, 462 F.3d 913, 918 (8th Cir. 2006) (describing a fiduciary duty in selecting service providers). The district court found that Brain used this fiduciary authority to influence plan decisions (including placing Robbins on paid administrative leave, outsourcing the A&C department's work to Zenith, and causing Zenith not to hire Robbins) in order to retaliate against Robbins and further his own interests in violation of his fiduciary duty to act "solely in the interest of the participants and beneficiaries." ER 71. It also found that Cook knowingly participated in Brain's violation. ER 69, 71.

a. The District Court Did Not Hold That A Violation Of ERISA Section 510 Automatically Constitutes A Breach Of Fiduciary Duty Under ERISA Section 404

Brain challenges the district court's conclusions of law in support of its fiduciary breach holding, which are reviewed de novo. Husain, 316 F.3d at 835. Brain's challenge fails. First, Brain mischaracterizes the district court's decision as holding that his violation of section 510 automatically constitutes a violation of section 404. Brain Br. 24-31. This argument is completely meritless, because the district court clearly considered and then concluded that Brain had committed a fiduciary breach independent of his section 510 violation. See ER 68-73. The court expressly rejected Brain's mischaracterization in denying Brain's motion for a stay: "The Order did not find that a violation of § 510 'automatically' constitutes a breach of duty under Section 404. Rather, the same facts were deemed sufficient to establish the separate violation of each statute." Sec'y ER 4. In addition, the court had already rejected Brain's similar argument in his summary judgment motion. Sec'y ER 37. In rejecting Brain's argument, the district court clearly stated that the fiduciary breach claim was distinct from the retaliation claim, because the former required a finding that Brain and Cook undertook or influenced fiduciary actions to the "detriment of the plan participants and beneficiaries," and the district court later found the Secretary had proved this element at trial. Id.; ER 71. While the elements for the fiduciary duty violation and the section 510

violation differ, the same set of facts can establish violations of multiple ERISA provisions. E.g., Donovan v. Mazzola, 716 F.2d 1226, 1238 (9th Cir. 1983) (prohibited transaction and fiduciary duty violations based on same set of facts).

Second, Brain erroneously complains that the district court erred in holding that a section 510 violation "create[s] or impose[s]" a fiduciary duty toward the victim of retaliation; in this case, Robbins. Brain Br. 24, 29-30. Again, Brain tries to conflate the district court's finding of fiduciary breach with the district court's finding that Brain retaliated against Robbins. In fact, the court held that Brain breached his fiduciary duty to the Trust Funds, not Robbins. ER 2-3, 71. Brain's argument ignores the court's reasoning that "[t]he requirement in § 404 of ERISA that a fiduciary discharge duties 'solely in the interest of the participants and beneficiaries' includes an obligation not to violate other ERISA provisions to the detriment of the plan participants and beneficiaries." ER 71 (emphasis added). In other words, the district court reasonably concluded that Brain was not acting "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104, when he used his authority to influence the trustees to take adverse employment action against Robbins for communicating with the DOL and union officials about his potential wrongdoing as a trustee. ER 71.

The district court quoted Peralta v. Hispanic Business, Inc., 419 F.3d 1064, 1070 n.7 (9th Cir. 2005) to show that "[t]he obligations of a fiduciary include a

duty to 'deal fairly' with others in transactions," ER 71, and thus not interfere with another individual's exercise of rights under ERISA. ER 71. Brain uses this reference as the basis for his claim that the court imposed a fiduciary duty toward Robbins on him. Brain Br. 30. However, the court did not impose a duty toward Robbins, but rather explained the breadth of Brain's fiduciary duty not to violate other provisions of ERISA to the detriment of plan participants and beneficiaries. The duty of loyalty pervades every aspect of the fiduciary's administration of the plan, including his dealings with people, like Robbins, who serve the plan and its administration. Pegram v. Herdrich, 530 U.S. 211, 224-25 (2000) ("'Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons'") (citation omitted); N.L.R.B. v. Amax Coal Co., a Div. of Amax, 453 U.S. 322, 334 (1981); see also Pilkington PLC v. Perelman, 72 F.3d 1396, 1401 (9th Cir. 1995). Brain fails to explain how his self-serving retaliation, made under the pretext of plan administration, against plan personnel who raised ERISA concerns was consistent with his obligations to act with loyalty and care toward plan participants and consistent with what ERISA demands.

b. Brain Breached His Fiduciary Duties In Managing The Trust Funds

With respect to the merits of the fiduciary breach claim, Brain argues that the district court erroneously concluded that he violated ERISA section 404 because it failed to identify a breach of an "enumerated" fiduciary duty. Brain Br. 27-28. This claim is baseless on its face, because the court found that Brain breached ERISA sections 404(a)(1)(A) and 404(a)(1)(B), the duties of loyalty and prudence, and the Cook Defendants knowingly participated in that breach, when they retaliated against Robbins. ER 3, 68, 71. Before concluding that Brain breached his fiduciary duties, see ER 68-73, the court set forth the legal standards of sections 404(a)(1)(A) and 404(a)(1)(B), noting that "[a] fiduciary has a duty to act in the best interests of the plan participants and beneficiaries," Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1994), and that "the prudent person test" applies to fiduciary obligations under ERISA, Mazzola, 716 F.2d at 1231. ER 40.

The district court found ample evidence that Brain and Cook undertook or influenced important fiduciary decisions for the Trust Funds and their participants that were guided by their personal interests rather than ERISA's fiduciary standards, including decisions about choosing and compensating plan service providers. See ER 49 (Cook "did not act in the objective, detached manner that is expected of counsel"); ER 51 (recognizing a "conflict of interest for both Brain and

Cook"). For example, the court credited "Baldwin['s] belie[f] that the decision to solicit bids by outside firms to perform the services previously provided by the A&C Department was likely part of an effort to terminate Robbins." ER 51.

The court's careful analysis, as well as the plain language of its final judgment, ER 3, belie Brain's assertions that it did not find that a specific fiduciary duty was breached. The whole tenor of the court's findings compels the conclusion that Brain and Cook manipulated the Trust Funds' decisions to further their own personal animosity towards Robbins based on her questioning Brain's fiduciary conduct and her contact with the DOL, rather than making important plan decisions based on prudence or loyalty to the Trust Funds. E.g., ER 54 ("The animated conversations that occurred prior to the November 18 meeting show that Brain and Cook were 'firing up' their allies for the actions that would be taken in response to Robbins' contacts with the DOL, not for a more pedestrian discussion about a potential change to the performance of the functions of the A&C Department."). Brain and Cook violated section 510 and also harmed the Trust Funds by tainting plan decisions with their own self-interest. The harm included over $60,000 in fees, which the Trust Funds paid to Cook "as a result of work performed" on the prohibited retaliatory acts. ER 76.

Finally, Brain implies that he was not acting as a fiduciary when he took the complained-of actions toward Robbins. Brain Br. 24-25, 30. However, Brain

acted in his capacity as a trustee on the Joint Board, which was responsible for "coordinat[ing] the administration of the Trust Funds," ER 9, when he influenced the trustees to place Robbins on administrative leave in response to her communications with the DOL and others about his potential wrongdoing. See 29 U.S.C. § 1002(21) (defining fiduciary to include a person "exercis[ing] any discretionary authority or discretionary control respecting management of such plan or exercis[ing] any authority or control respecting management or disposition of its assets") (emphasis added). The district court was undoubtedly correct that Brain acted as a fiduciary and violated his fiduciary duties when he exercised control over plan management, including his role in influencing the selection of a service provider by replacing Robbins and her internal department with Zenith, to further his own personal interests, rather than the Trust Funds' interests.

III. The District Court Did Not Abuse Its Discretion In Removing Brain As Trustee And The Cook Defendants As Counsel To The Trust Funds

The district court did not abuse its discretion in removing Brain as trustee and permanently enjoining him from acting as a fiduciary to the Trust Funds. See Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 782-83 (9th Cir. 2015). The Secretary brought this action under ERISA sections 502(a)(2) and (a)(5). ER 359. Section 502(a)(2) provides that the Secretary may bring an action against a breaching fiduciary "for appropriate relief

under [section 409(a) of ERISA]," 29 U.S.C. §1132(a)(2). Section 409 provides for removal of a fiduciary from his position. 29 U.S.C. § 1109(a). Enjoining Brain from acting as a fiduciary to the Trust Funds was appropriate because "ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries." Mazzola, 716 F.2d at 1235. Indeed, "[c]ourts . . . have a duty to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust." Id.

Brain argues that removal of a fiduciary is not an appropriate remedy under ERISA section 502(a)(5) for a breach of ERISA section 510. Brain Br. 49. First, Brain ignores the fact that the district court found that he violated ERISA section 404 when Brain breached his fiduciary duties and the Cook Defendants knowingly participated in that breach. ER 2-3, 77. ERISA section 409 expressly provides that a breaching fiduciary, like Brain, "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a).

Second, section 502(a)(5), 29 U.S.C. § 1132(a)(5), provides that the Secretary may bring an action "(A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violations[,]" including section 510, thereby authorizing the court's injunctive relief against the non-fiduciary knowing-participant Cook Defendants to

cease their relationship with the Trust Funds. ER 74, 76; see Solis v. Couturier, No. 2:08CV02732-RRB-GGH, 2009 WL 1748724, at *6 (E.D. Cal. June 19, 2009) (holding that section 502(a)(5) permits an injunction against a law firm from serving ERISA plans based on its knowing participation in a fiduciary breach); cf. Concha v. London, 62 F.3d 1493, 1504 (9th Cir. 1995) (noting that "equitable relief" includes injunctions against non-fiduciaries). Thus, the remedy imposed by the district court is expressly authorized by ERISA.

Third, even assuming, as Brain does, that no fiduciary breach was committed, there is no basis in ERISA for the proposition that section 502(a)(5) does not also allow the district court to enjoin Brain from acting as a fiduciary to the Trust Funds based on the nature of the section 510 violations here. An injunction is a traditional equitable remedy well within the scope of the relief provided by section 502(a)(5). See CIGNA v. Amara, 563 U.S. 421, 440 (2011) (interpreting "equitable relief" by relying on Restatement (Second) of Trusts § 199 cmt. e (1957), which includes "removal of trustee"). Moreover, the legislative history emphasizes Congress's wish to grant "broad remedies for redressing or preventing" violations of section 510. S. Rep. 93-127, reprinted in, 1974 U.S.C.C.A.N. 4838, 4871.

Brain also argues that the district court abused its discretion because removal is only appropriate when there is "egregious self-dealing . . . or repeated violations

leading to the loss of plan funds." Brain Br. 54-55. There is no statutory basis for this proposition, nor does Brain cite any case law limiting a court's authority in this way. To the contrary, this Court has long recognized that "[u]nder the broad remedial provision of ERISA . . . removal of fiduciaries [is] an appropriate remedy upon findings of imprudence, divided loyalties, and prohibited transactions." Mazzola, 716 F.2d at 1238-39. No showing of plan loss is required before a fiduciary may be removed:

> Requiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no tangible harm, and that the beneficiaries are powerless to rein in the fiduciaries' imprudent behavior until some actual damage has been done. This result is not supported by the language of ERISA, the common law, or common sense.

Shaver v. Operating Eng'rs Local 428 Pension Tr. Fund, 332 F.3d 1198, 1203 (9th Cir. 2003). Accordingly, removal of a fiduciary is proper even when there is no monetary loss. Severely "divided loyalties," and "imprudence," as found in this case based on Brain's and Cook's sustained and concerted efforts to retaliate against Robbins and Rice, justifies the injunctive relief here. Moreover, the Trust Funds did also suffer monetarily. The court ordered the disgorgement of over $60,000 in fees that the Trust Funds improperly paid to Cook for work that supported the "prohibited conduct" by Brain and Cook. ER 76 & n.15.

Brain argues that the cases cited by the district court to justify a permanent injunction are not "parallel" as the court stated because they involve self-dealing

and mismanagement of plan assets. Brain Br. 55. However, the district court was not drawing a parallel to the facts of these cases, but rather the fact that other circuits agree with this Court that an injunction permanently removing a fiduciary or a service provider is an appropriate remedy. As the district court noted, ER 75, the Second Circuit has emphasized that permanent injunctions are part of the full range of equitable remedies that Congress intended to make available under ERISA:

> To deny the power in federal courts to issue permanent injunctions would . . . fly in the face of both precedent, Congressional intent, and common sense . . . . ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction.

Beck v. Levering, 947 F.2d 639, 641 (2d Cir. 1991). Similarly, in Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992), the Eighth Circuit modified an injunction against an accountant and his CPA firm who abused fiduciary powers to further enjoin them from acting as a service provider to any ERISA plan where the accountant "displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries." Id. at 673. These cases support the district court's decision to permanently enjoin Brain from acting as fiduciary to the Trust Funds, and Cook and her firm from acting as counsel to the Trust Funds, in light of the defendants' choices to stifle reports of Brain's potential ERISA violations and put personal interests above the plans' interests.

IV. The District Court Properly Concluded That The Cook Defendants Violated ERISA Section 510 By Retaliating Against Robbins

Much of the Cook Defendants' brief is devoted to challenging the findings of fact supporting the district court's determination that the Cook Defendants retaliated against Robbins. See Cook Br. Sections E-J. Findings of fact are reviewed for clear error, Husain, 316 F.3d at 835, and considerable evidence supported the district court's determination.

a. The District Court Did Not Err In Finding That The November 18, 2011 Joint Board Meeting Was Called In Reaction To The DOL Investigation

The Cook Defendants argue that the district court erred in finding that the November 18, 2011 Joint Board meeting was called in reaction to the DOL investigation. Cook Br. 24-27. They insist instead that the meeting was held solely to "discuss alternatives to the Administrative Corporation," Cook Br. 26, but this claim is belied by the record.

The district court found that although the trustees had considered an audit of the A&C department, whether to outsource the A&C department or remove Robbins from her position was not raised until early November 2011—two weeks after Cook and Brain learned about Robbins's contact with the DOL. ER 49. It also found that in the days preceding the November 18, 2011 meeting, Cook and Brain rallied support for their position in favor of outsourcing the A&C department

in order to remove Robbins. ER 13, 50 (quoting emails about communications with other trustees). The court concluded that "[t]he animated conversations that occurred prior to the November 18 meeting show that Brain and Cook were 'firing up' their allies for the actions that would be taken in response to Robbins' contacts with the DOL, not for a more pedestrian discussion about a potential change to the performance of the functions of the A&C Department." ER 54.

The Cook Defendants also argue that the district court "ignored" their contention that Allen wanted to schedule a meeting to discuss outsourcing the work of the A&C department in order to "stop the audit, which would likely uncover the impropriety of his company's delinquencies." Cook Br. 26. However, the court explicitly acknowledged Allen's role in causing the meeting to be held, stating that "Allen, Cook and Brain each played an equal role." ER 49. That Allen may have had personal motives for holding the meeting does not change the fact that Cook also had personal motives.

Cook's personal motives are well documented in the record. Cook was angry with Robbins after receiving the DOL subpoena, calling her a "bitch[]" and saying "I want her out of there." ER 14, 50. Cook also asked Chang if Robbins could be placed on administrative leave "without violating erisa [sic]?" ER 14. Chang responded, "I think she should be put on paid leave to at least prevent her from taking out documents," adding, "I also[] think the Corp should proceed with

the independent audit and it will find that the Corp is costly/inefficient . . . and [the] Jt. Board can just hire a tpa and the directors can dissolve the corporation[.]" ER 15. From these statements, the district court reasoned that "emails exchanged by Cook and Chang prior to the November 18, 2011 meeting make clear that each saw the proposed dissolution of the Administrative Corporation as a means of separating Robbins through an action that would not be deemed a violation of ERISA." ER 59. These findings show that the Cook Defendants and Brain intended to use the November 18, 2011 meeting to take adverse action against Robbins, which they did.

b. The Cook Defendants Do Not Establish A District Court Error Related to Cook's Legal Advice About Robbins's Whistleblower Protections

Without isolating what they find objectionable about the district court's decision, the Cook Defendants argue that Cook "advised the trustees that Robbins had whistleblower protection due to her DOL communications." Cook Br. 27 (capitalization omitted). The Cook Defendants attempt to recast their efforts to place Robbins on leave as merely providing legal advice. Id. They describe the events surrounding Robbins's receipt of a DOL subpoena in a manner highly colored by their own viewpoint, with cites to sources that the district court found not credible, or less credible than other evidence. Compare Cook Br. 27-30 (citing to Cook's and Allen's declarations and Cook's trial testimony) with ER 35 ("Allen

was not a very credible witness.") and ER 20 ("[Cook's] testimony was often presented in a defensive manner, and occasionally in a combative one. This reduced her credibility[.]").

As discussed infra in Section VIII of this brief, Cook's actions went beyond providing legal advice. Whether Cook also gave legal advice regarding the extent of Robbins's whistleblower protections is not determinative of her liability, because Cook's actions as a whole led to the district court's determination that she violated section 510 and knowingly participated in Brain's breach of his fiduciary duties under section 404.

c. The District Court Did Not Err In Finding Robbins Credible

Continuing to attack Robbins, the Cook Defendants argue that the district court erred in finding Robbins to be a credible witness in light of a discrepancy in her testimony. Cook Br. 31. They point to a discrepancy noted and considered by the district court; namely, that Robbins told DOL investigators that she had seen Chang at a Nordstrom, and that Chang had apologized to her. ER 25. Chang testified that the encounter did not happen, Cook ER 99, and Robbins testified that it could have been someone else, Cook ER 25.

The district court did not err in finding Robbins to be a credible witness despite this discrepancy. To the contrary, the court appropriately found that Robbins was credible after "a consideration of all of the testimony by Robbins, as

well as her demeanor, attitude and tone." ER 25 (emphasis added). Accord Anderson v. City of Bessemer, 470 U.S. 564, 573-75 (1985). In reaching conclusions about Robbins's testimony, the district court noted that it was corroborated by others (e.g., "The reasonableness of Robbins' belief [that Brain was engaging in misconduct] is also supported by the statements and concerns expressed by others who also observed Brain's conduct." ER 45.).

Moreover, the district court did not give credence to the disputed portions of Robbins's testimony. Rather, it concluded that "it is appropriate to give substantial weight to those portions of [Robbins's] testimony where no similar issues were raised as to its reliability." ER 25. This disputed testimony on a tangential issue does not cast doubt on Robbins's testimony when the evidence is considered as a whole.

V. The District Court Properly Concluded That Robbins Had A Good-Faith Belief That Brain Was Engaging In Conduct That Violated ERISA

The Cook Defendants challenge the district court's finding that Robbins had a good-faith belief that Brain was engaging in conduct in violation of ERISA. Cook Br. 7-13. However, they cannot establish clear error. See Husain, 316 F.3d at 835.

The district court found that "Robbins reasonably believed that: (i) Brain was engaged in conduct that could be deemed in violation of his duties under

ERISA; and (ii) her actions were taken in good faith." ER 45. In reaching this conclusion, the district court considered testimony from Robbins, ER 25-26, as well as "statements and concerns expressed by others who also observed Brain's conduct." ER 45. Indeed, the district court noted in its analysis of witness testimony that Baldwin testified that he had observed Brain acting improperly with a contractor, ER 19, Lee testified that Brain recommended delaying formal efforts to collect from contractors, ER 23, and Enriquez testified that he believed Brain was doing favors for contractors, ER 31. Thus, the testimony of multiple witnesses led to the district court's conclusion that Robbins had a good-faith belief that Brain was violating ERISA. The district court found Enriquez, Lee, and Baldwin all "credible witness[es]." ER 18, 22, 31.

The Cook Defendants argue that Robbins did not communicate with the DOL based on a good-faith belief that Brain was engaging in misconduct, but rather, out of a desire to prevent an audit of the A&C department which she managed. Cook Br. 7, 10-11. However, this argument was properly considered and rejected by the district court, which found that "Robbins' protected activity was not motivated by a bad faith desire to prevent the audit of the A&C Department or because of her fear that the audit would lead to her termination." ER 45. In reaching this conclusion, the district court noted that Mora was the original whistleblower, and that Robbins did not communicate with the DOL until

Investigator Chandler called her. ER 45. The district court reasoned, "If Robbins were motivated by a desire to prevent an audit of the A&C Department it would be expected that she would have taken a more active role in communicating with the DOL." ER 45. The district court also looked at evidence that while the Joint Board had considered an audit in March and April 2011, it made no set plans to move forward until September 2011, well after Mora made his first contact with the DOL. ER 45.

The Cook Defendants claim that Robbins influenced the timing of the DOL subpoena to forestall an audit, Cook Br. 11-12, but the district court considered this argument and held that "[n]o persuasive evidence was presented that suggested or showed that Robbins believed that the issuance of a subpoena by the DOL would cause the Joint Board to defer any audit of the A&C Department." ER 45. Nor do the Cook Defendants point to any such evidence in their appeal.

The Cook Defendants also argue that Jesse Meldru, a Zenith manager, testified that Robbins directed Bansmer to falsify records regarding delinquent contributions by Samrod Corporation, and that the district court erred in "failing to recognize" this testimony. Cook Br. 8. This exaggeration is unsupported by the testimony cited by the Cook Defendants. The Cook Defendants point to testimony that Meldru discovered Bansmer falsified the dates that certain contribution payments from Samrod were received, that Meldru thought she lied about the

circumstances, Cook ER 77, 86, and that Bansmer wrote on her disciplinary action form that "I am at the mercy of the admin corp. They rule collection checks." Cook Br. 88. This is a far cry from the Cook Defendants' claim that Robbins directed the falsification of records and does not reveal any error by the district court.

In making arguments about Robbins's good faith, the Cook Defendants also argue that the district court erred in finding that the audit procedures drafted by Cook were "designed with the expectation that the results of the audit would be unfavorable to Robbins." ER 50; Cook Br. 9. However, this conclusion was supported by extensive evidence in the record. This evidence includes an email from Cook to Chang asking if edits made by Halford were "watering [] down" the audit procedures. ER 12, 59-60. It also includes Halford's testimony that "she believed that the audit procedures that Cook drafted appeared to target certain matters related to the A&C Department, but over which it had little or no control." ER 60. Finally, Allen told Cook and Halford that he thought the auditing procedures contained improper directives and violated general accounting principles. ER 60. Thus, the district court had several grounds for concluding that the audit procedures were designed to target Robbins.

In sum, the Cook Defendants have not raised a clear error because ample evidence supports the district court's findings.

VI. <u>The District Court Properly Concluded That The Cook Defendants Violated ERISA Section 510 By Causing Robbins's Discharge</u>

a. <u>The District Court Properly Concluded That The Cook Defendants Influenced The Trustees' Decision To Outsource Work To Zenith</u>

The Cook Defendants argue that the district court erred in "failing to give deference" to the Joint Board's decision to outsource the A&C department. Cook Br. 35. This makes no sense, but, in any event, according deference is irrelevant to defendants' violations. Rather, the issue concerns the defendants' actions in causing that decision to occur: whether Brain and the Cook Defendants retaliated against Robbins by causing the work performed by the A&C department to be outsourced to Zenith, and causing Zenith not to hire Robbins. ER 46-63.

The district court found Cook and Brain caused the trustees' decision to outsource the A&C department's work to Zenith after properly applying the burden-shifting framework of <u>McDonnell Douglas Corp. v. Green</u>, 411 U.S. 792 (1973) to assess the defendants' liability. <u>See</u> <u>Lessard v. Applied Risk Mgmt.</u>, 307 F.3d 1020, 1025 (9th Cir. 2002).

Under this framework, (1) the plaintiff must establish a prima facie case. If the plaintiff does so, then (2) the defendant has a "burden of production" to articulate a legitimate, non-discriminatory reason for the adverse action. If the defendant does so, then (3) the burden shifts to the plaintiff to "show that the

articulated reason is pretextual either directly by persuading the court that a [retaliatory] reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Nicholson v. Hyannis Air Serv., Inc., 580 F.3d 1116, 1126-27 (9th Cir. 2009).

The district court gave appropriate consideration to the non-retaliatory reasons offered for the Joint Board's decision to outsource the work of the A&C department to Zenith. Applying the second step of the McDonnell Douglas framework, it found that the defendants "presented sufficient evidence as to legitimate, non-retaliatory reasons," including "the findings of the Bond Beebe audit," and "that outsourcing to Zenith would be more efficient and cost effective." ER 58. The district court then properly turned to the third step and found that the Secretary established that these reasons were pretextual and that Brain and the Cook Defendants actually caused the adverse action. ER 58.

To the extent that the Cook Defendants are challenging the district court's determination that these reasons were pretextual, it fails. Contrary to the Cook Defendants' assertion that the trial court "merely substitute[d] its opinion that the Trustees' decision was improper," Cook Br. 35, the district court looked to the evidence to conclude that Brain and the Cook Defendants had a determinative influence on the decision to outsource the A&C department's work to Zenith.

With respect to the Cook Defendants, before the Joint Board was even presented with the idea to outsource, Cook and Chang exchanged emails that showed they were considering outsourcing as a way to get rid of Robbins. ER 14-15, 59. The district court concluded that this email exchange "is direct evidence that supports a finding that the Cook Defendants wanted to use the ongoing audit to provide what could be claimed as a legitimate, non-retaliatory reason to end Robbins' affiliation with the Trust Funds, i.e., one that was not tied to her contacts with the DOL." ER 59.

Nor was the decision to outsource based on the audit results, as demonstrated by the timeline of events. The Joint Board solicited bids from potential outsourcing options in January 2012, prior to the audit's completion in April 2012. ER 60. Moreover, Zenith was asked to submit a revised bid before the audit results were presented. ER 60. The district court noted that "all of the preliminary steps related to whether to outsource the work of the A&C Department occurred before the audit was completed and its results presented." ER 60.

Additionally, the Joint Board was presented with the audit results on April 12, 2012, the same day it voted to outsource the work of the A&C department. ER 18. The district court considered the fact that both of these events occurred in 95 minutes and reasoned: "Such a compressed consideration of this issue is consistent with the view that the audit was designed, at least in part, to provide 'cover' for

Brain and the Cook Defendants, as to the separation of Robbins." ER 60. The district court noted that this finding was also consistent with evidence that the audit was not designed to determine whether the A&C department was too costly or whether it should be outsourced. ER 60.

Finally, the district court found that Cook was adamant that the trustees should vote in favor of outsourcing the A&C department. ER 61. It also noted Enriquez's testimony that, during the meeting, Cook said the quality of Robbins's work was subpar, and that she "had to go." ER 61.

The district court considered proffered non-retaliatory reasons for outsourcing the A&C department's work to Zenith, but reasonably concluded that the weight of the evidence warranted a finding of pretext. ER 57-63.

b. The District Court Properly Concluded That The Cook Defendants Caused Zenith Not To Hire Robbins

The Cook Defendants also argue that "Zenith made an independent decision not to offer Robbins a position" based on the audit results and a determination that "the director position should be eliminated in an effort to cut fees." Cook Br. 36-37. However, the district court determined that Cook and Brain "caused Zenith to elect not to hire Robbins," ER 63, and Cook identifies no clear error in the court's supporting factual findings.

First, Zenith hired every employee of the A&C department but Robbins. Lee communicated with Cook about this decision and informed his supervisors that he had told her that Zenith may "need to hire all current employees (with the exception of []Robbins) to ensure a seamless transition." ER 18. The fact that every employee was hired but Robbins suggests that Zenith was not considering employee performance in its initial hiring decision, because the Bond Beebe audit, which Lee reviewed, concluded that except for one employee, all individuals in the A&C department had performed poorly. ER 63. This evidence demonstrates that Robbins was singled out for different treatment due to the influence of Cook and Brain on Zenith. ER 61-63.

Second, Zenith did not actually eliminate the director position. After electing not to hire Robbins, Zenith decided to hire a new person to perform the responsibilities Robbins previously handled. ER 62. The court found that Cook aided Zenith's search and suggested candidates. ER 62. No evidence was presented to show that the new person would be hired at a lower salary, further suggesting the falsity of this claim. ER 63.

VII. <u>The District Court Properly Concluded That The Cook Defendants Retaliated Against Rice</u>

Recycling arguments rejected at trial, the Cook Defendants argue that the district court erred in finding that Cook retaliated against Rice. Cook Br. 37-38.

The Cook Defendants first argue that Zenith human resources representative Francey George provided a purported non-retaliatory reason for Rice's termination: "[T]he company terminated Rice because it was displeased with his decision to create and use a false alias email to transmit information used in a letter to the International Union President complaining about the Trust without consulting management." Cook Br. 38.

On its face, the Cook Defendants' claim that George presented a legitimate, non-retaliatory reason for terminating Rice fails because the stated reason is a prohibited one. The district court found that Rice's participation in efforts to write a letter to Finley was protected activity. ER 66. "Defendants must present a legitimate non-retaliatory reason for the adverse action 'absent that [protected] conduct.'" ER 52 (quoting NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 267 (9th Cir. 1995)). The Cook Defendants have not pointed to a legitimate, non-retaliatory reason apart from Rice's protected activity.

Next, the Cook Defendants argue that there was no "direct evidence" to support the district court's conclusion that Cook influenced the decision to terminate Rice. Cook Br. at 37-38. However, retaliation claims may be proved through direct or circumstantial evidence, Lessard, 307 F.3d at 1025, and the record is rife with findings of fact that support the court's conclusion.

In early December 2011, Cook talked to Lee at Zenith about Rice's role in efforts to send a letter to Finley about Brain. ER 16. Around that time, Brain told Lee that Zenith's work was being put out to bid. ER 16. Later that month, Lee sent two emails to George stating that he had discussed terminating Rice's employment at Zenith with Cook. ER 16. Lee also talked to Brain at Cook's suggestion, and Brain relayed concerns about Rice. ER 16. When Lee told his supervisor about the conversation, she responded that Zenith had to do the right thing for the client, and she was not sure retaining Rice was "the right thing. Especially after your conversation with [Brain]." ER 16. This evidence of persistent involvement by Cook and Brain shows that the district court had a sound basis for its conclusion that Cook and Brain had a determinative influence on the decision to terminate Rice and did not commit clear error. ER 63-67.

VIII. The District Court Properly Concluded That The Cook Defendants Are Not Immune From ERISA Liability Due To Their Role As Counsel

Though the district court thrice rejected the Cook Defendants' argument that they are immune from liability by virtue of their role as counsel, the Cook Defendants raise this argument again on appeal. Cook Br. 15; Sec'y ER 19, 54; ER 41. This challenge is reviewed de novo, Husain, 316 F.3d at 835, and fails for the same sound reasons noted by the district court. The Cook Defendants also

challenge the district court's related findings of fact, which are reviewed for clear error. Id. These findings are supported by extensive evidence.

a. The Cook Defendants Do Not Have Attorney Immunity

The Cook Defendants argue that the district court erred in holding that they did not have "attorney immunity" to the ERISA claims against them. Cook Br. 15-16.

The plain language of section 510 makes it unlawful for "any person" to retaliate against an individual for giving information about a potential ERISA violation, and thus imposes an obligation on the Cook Defendants. See Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124, 1132 n.4. Similarly, just as the Cook Defendants have an obligation not to violate ERISA section 510, they also have an obligation not to knowingly aid fiduciaries in actions that violate ERISA section 404. See Harris Tr., 530 U.S. at 248. Thus, the district court properly concluded that "Cook's position as an attorney does not immunize her from liability for any actions she takes in violation of duties imposed on her by ERISA." ER 41.

At trial, the district court further concluded that the Cook Defendants' actions "went beyond providing legal advice." ER 41. Specifically, it found that "[Cook] partnered with Brain to take certain actions adverse to Robbins and Rice" and that "some of her actions were the result of her personal relationship with Brain." ER 41.

The Cook Defendants argue that "courts have repeatedly rejected attempts to create a duty to third-parties arising from an attorney's legal representation of a client." Cook Br. 17. However, this argument ignores the district court's conclusion that Cook's actions went beyond providing legal advice. Courts have readily imposed liability on attorneys for knowingly participating in a fiduciary breach when the attorney was involved beyond the legal representation, particularly when the attorney was acting in her personal, and not the client's, interests. E.g., N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno, 816 F. Supp. 138, 148 (N.D.N.Y. 1993), aff'd 18 F.3d 179, 182 n.1 (2d Cir. 1994) (affirming district court and noting attorney liability was not challenged); Rispler v. Sol Spitz Co., No. 04-CV-1323 DLI ARL, 2007 WL 1926531, at *6 (E.D.N.Y. June 6, 2007).

None of the Cook Defendants' state law cases are apposite, because they discuss situations where the attorney is only impartially providing legal advice, and not situations where the attorney is influencing decisions based on personal interests. Goodman v. Kennedy, 18 Cal. 3d 335, 342-43 (1976), held that an attorney was not liable to a third-party for allegedly negligent advice given to a client. The district court properly rejected arguments based on Goodman because "[t]he Cook Defendants did more than provide legal advice." ER 42. Similarly, Whitehead v. Rainey, Ross, Rice & Binns, 997 P.2d 177, 181 (Okla. Civ. App.

1999), held that attorneys providing proper legal advice to clients should not be liable to third parties who may be harmed by that advice. However, "the actions here do not involve 'proper' legal advice, but advice and actions motivated by a desire by Cook to retaliate against Robbins and Rice." ER 42. Finally, the district court properly rejected arguments based on Heffernan v. Hunter, 189 F.3d 405 (3d Cir. 1999), because it concerned a rule that "no conspiracy can exist [between the client and the attorney] where an attorney's advice or advocacy is for the benefit of his client," id. at 411. The Cook Defendants did not participate in a conspiracy with their client (the Trust Funds) for the benefit of the client; instead, Cook undertook actions to the detriment of her client to further her personal interests. ER 49. "[I]f the challenged conduct occurs outside the scope of representation, no reason for immunity exists[.]" Heffernan, 189 F.3d at 413.

In looking out for her romantic partner rather than her plan client, Cook did not act as an attorney should, so there is no danger that holding the Cook Defendants liable for retaliation would, as the Cook Defendants argue, "chill an attorney's role in advising her client." See Cook Br. 21.

b. The District Court Did Not Err In Concluding That Cook And Brain Were In A Romantic Relationship That Affected Cook's Actions As Counsel

The Cook Defendants challenge the district court's findings that Cook was in a personal relationship with Brain before the November 18, 2011 meeting, that

Cook's actions went beyond providing legal advice, and that Cook's relationship with Brain influenced her actions and advice as counsel. Cook Br. 22-23, 30-31. The Cook Defendants cannot establish that any of these findings was clearly erroneous.

First, the district court did not err in finding that "Cook and Brain were in a close, personal relationship by October 2011" that "became romantic either then, or very shortly thereafter." ER 49. The district court based this finding on "text messages and other evidence suggest[ing] that it likely started as early as November 2011." ER 20. This other evidence included emails exchanged between Cook and Brain in October. ER 13. Brain also testified at his deposition that their first kiss was on December 5, 2011. ER 30.

Second, extensive evidence supported the district court's findings that Cook's actions went beyond providing legal advice and that "Cook's actions and advice as counsel were both substantially affected by her relationship with Brain." ER 41, 49. For example, Cook did not merely "assist[] and organize[] a response to the subpoena" as she asserts. Cook Br. 22. Rather, after receiving the DOL subpoena from Robbins, Cook sent Chang an email calling Robbins and Halford "bitches." ER 14. Later on, she asked if Chang thought the subpoena was meant to embarrass Brain, adding, "this is crap and I want her out of there." ER 14. These emails indicate that Cook's actions were impacted by her relationship with Brain, and that

she "responded with an emotional approach rather than with an analytical one." ER 49. Similarly, Cook did not simply "investigat[e] allegations made by an alleged whistleblower." Cook Br. 22. Rather, Cook engaged in an unauthorized review of Robbins's records and talked to Brain about them. ER 17, 51. She also asked Bond Beebe to search for any emails relating to Brain and sought Brain's input about what search terms to include. ER 17. This evidence shows that Cook did not act "in the objective, detached manner that is expected of counsel." ER 49.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

STATEMENT OF RELATED CASES

The Secretary is unaware of related cases pending in this Court.

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-56529,-56532

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is ______ words or ______ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/Blair Lane Byrum

Date: 5/26/2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 26, 2017, I electronically filed the foregoing SECRETARY'S ANSWERING BRIEF with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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ADDENDUM

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Title 28. Judiciary and Judicial Procedure (Refs & Annos)
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28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

Notes of Decisions (3398)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

Notes of Decisions (3063)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle A. General Provisions

29 U.S.C.A. § 1002

§ 1002. Definitions

Currentness

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which--

(i) severance pay arrangements, and

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(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of Title 26) making payments or supplements described in section 457(e)(11)(D)(i) of Title 26, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of Title 26) making payments of benefits described in section 457(f)(4)(A) of Title 26, shall, for purposes of this subchapter, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

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(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947 [29 U.S.C.A. § 141 et seq.], or the Railway Labor Act [45 U.S.C.A. § 151 et seq.]

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan--

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of--

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation. [1]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of--

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(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

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(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

(20) The term "security" has the same meaning as such term has under section 77b(1) of Title 15.

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to--

(A) medical benefits, and

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(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

(23) The term "accrued benefit" means--

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution.

(24) The term "normal retirement age" means the earlier of--

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of--

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 1102(a)(2) of this title) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

(27) The term "present value", with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe.

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(28) The term "normal service cost" or "normal cost" means the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(29) The term "accrued liability" means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(30) The term "unfunded accrued liability" means the excess of the accrued liability, under an actuarial cost method which so provides, over the present value of the assets of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(31) The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C.A. § 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. § 288 et seq.]. The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of Title 26), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of Title 26), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function) [2]

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.

(B) The term "church plan" does not include a plan--

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of Title 26), or

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(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph--

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes--

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan--

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of Title 26) at the time of such separation from service.

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(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means--

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant--

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

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(36) The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37)(A) The term "multiemployer plan" means a plan--

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 1301(b)(1) of this title are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this subchapter, notwithstanding the preceding provisions of this paragraph, for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in this paragraph (37) as in effect immediately before such date.

(E) Within one year after September 26, 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 1453(b) and (c) of this title, that the plan shall not be treated as a multiemployer plan for all purposes under this chapter or the Internal Revenue Code of 1954 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980--

(i) the plan was not a multiemployer plan because the plan was not a plan described in subparagraph (A)(iii) of this paragraph and section 414(f)(1)(C) of Title 26 (as such provisions were in effect on the day before September 26, 1980); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(F)(i) For purposes of this subchapter a qualified football coaches plan--

(I) shall be treated as a multiemployer plan to the extent not inconsistent with the purposes of this subparagraph; and

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(II) notwithstanding section 401(k)(4)(B) of Title 26, may include a qualified cash and deferred arrangement.

(ii) For purposes of this subparagraph, the term "qualified football coaches plan" means any defined contribution plan which is established and maintained by an organization--

(I) which is described in section 501(c) of Title 26;

(II) the membership of which consists entirely of individuals who primarily coach football as full-time employees of 4-year colleges or universities described in section 170(b)(1)(A)(ii) of Title 26; and

(III) which was in existence on September 18, 1986.

(G)(i) Within 1 year after August 17, 2006--

(I) an election under subparagraph (E) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to August 17, 2006, the plan would have been a multiemployer plan but for the election under subparagraph (E), and

(II) a plan that meets the criteria in clauses (i) and (ii) of subparagraph (A) of this paragraph or that is described in clause (vi) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if--

(aa) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(bb) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 of Title 26, and

(cc) the plan was established prior to September 2, 1974.

(ii) An election under this subparagraph shall be effective for all purposes under this chapter and under the Internal Revenue Code of 1986, starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under clause (i)(II).

(iii) Once made, an election under this subparagraph shall be irrevocable, except that a plan described in clause (i)(II) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501 of Title 26.

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(iv) The fact that a plan makes an election under clause (i)(II) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(v)(I) No later than 30 days before an election is made under this subparagraph, the plan administrator shall provide notice of the pending election to each plan participant and beneficiary, each labor organization representing such participants or beneficiaries, and each employer that has an obligation to contribute to the plan, describing the principal differences between the guarantee programs under subchapter III of this chapter and the benefit restrictions under this subchapter for single employer and multiemployer plans, along with such other information as the plan administrator chooses to include.

(II) Within 180 days after August 17, 2006, the Secretary shall prescribe a model notice under this clause.

(III) A plan administrator's failure to provide the notice required under this subparagraph shall be treated for purposes of section 1132(c)(2) of this title as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title.

(vi) A plan is described in this clause if it is a plan sponsored by an organization which is described in section 501(c)(5) of Title 26 and exempt from tax under section 501(a) of such Code and which was established in Chicago, Illinois, on August 12, 1881.

(vii) For purposes of this chapter and the Internal Revenue Code of 1986, a plan making an election under this subparagraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 1102(a)(2) of this title)--

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.]; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act [15 U.S.C.A. § 80b-3a(a)], is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

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(39) The terms "plan year" and "fiscal year of the plan" mean, with respect to a plan, the calendar, policy, or fiscal year on which the records of the plan are kept.

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained--

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph--

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 1301(b) of this title, except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent,

(iv) the term "rural electric cooperative" means--

(I) any organization which is exempt from tax under section 501(a) of Title 26 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of Title 26 which is exempt from tax under section 501(a) of Title 26 and at least 80 percent of the members of which are organizations described in subclause (I), and

(v) the term "rural telephone cooperative association" means an organization described in paragraph (4) or (6) of section 501(c) of Title 26 which is exempt from tax under section 501(a) of Title 26 and at least 80 percent of the

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members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

(41) [3] Single-employer plan

The term "single-employer plan" means an employee benefit plan other than a multiemployer plan.

(41) [3] The term "single employer plan" means a plan which is not a multiemployer plan.

(42) the term "plan assets" means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term "benefit plan investor" means an employee benefit plan subject to part 4, [4] any plan to which section 4975 of Title 26 applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity.

CREDIT(S)

(Pub.L. 93-406, Title I, § 3, Sept. 2, 1974, 88 Stat. 833; Pub.L. 96-364, Title III, §§ 302, 305, Title IV, §§ 407(a), 409, Sept. 26, 1980, 94 Stat. 1291, 1294, 1303, 1307; Pub.L. 97-473, Title III, § 302(a), Jan. 14, 1983, 96 Stat. 2612; Pub.L. 99-272, Title XI, § 11016(c)(1), Apr. 7, 1986, 100 Stat. 273; Pub.L. 99-509, Title IX, § 9203(b)(1), Oct. 21, 1986, 100 Stat. 1979; Pub.L. 99-514, Title XVIII, § 1879(u)(3), Oct. 22, 1986, 100 Stat. 2913; Pub.L. 100-202, § 136(a), Dec. 22, 1987, 101 Stat. 1329-441; Pub.L. 101-239, Title VII, §§ 7871(b)(2), 7881(m)(2)(D), 7891(a)(1), 7893(a), 7894(a)(1)(A), (2)(A), (3), (4), Dec. 19, 1989, 103 Stat. 2435, 2444, 2445, 2447, 2448; Pub.L. 101-508, Title XII, § 12002(b)(2)(C), Nov. 5, 1990, 104 Stat. 1388-566; Pub.L. 102-89, § 2, Aug. 14, 1991, 105 Stat. 446; Pub.L. 104-290, Title III, § 308(b)(1), Oct. 11, 1996, 110 Stat. 3440; Pub.L. 105-72, § 1(a), Nov. 10, 1997, 111 Stat. 1457; Pub.L. 109-280, Title VI, § 611(f), Title IX, §§ 905(a), 906(a)(2)(A), Title XI, §§ 1104(c), 1106(a), Aug. 17, 2006, 120 Stat. 972, 1050, 1051, 1060; Pub.L. 110-28, Title VI, § 6611(a)(1), (b)(1), May 25, 2007, 121 Stat. 179, 180; Pub.L. 110-458, Title I, § 111(c), Dec. 23, 2008, 122 Stat. 5113.)

Notes of Decisions (1266)

Footnotes

1 So in original. The period probably should be a comma.

2 So in original. Probably should end with a period.

3 So in original. Two pars. (41) have been enacted.

4 So in original. Probably should be "part 4 of subtitle B,".

29 U.S.C.A. § 1002, 29 USCA § 1002

Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1104

§ 1104. Fiduciary duties

Currentness

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

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Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

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(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

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(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

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(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

CREDIT(S)

(Pub.L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub.L. 96-364, Title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub.L. 101-508, Title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388-565, 1388-566; Pub.L. 104-188, Title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub.L. 107-16, Title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub.L. 107-147, Title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub.L. 109-280, Title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub.L. 110-458, Title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107.)

Notes of Decisions (1019)

29 U.S.C.A. § 1104, 29 USCA § 1104
Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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29 U.S.C.A. § 1105

§ 1105. Liability for breach of co-fiduciary

Currentness

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees--

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

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(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that--

(A) the named fiduciary violated section 1104(a)(1) of this title--

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or

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omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

CREDIT(S)

(Pub.L. 93-406, Title I, § 405, Sept. 2, 1974, 88 Stat. 878.)

Notes of Decisions (102)

29 U.S.C.A. § 1105, 29 USCA § 1105
Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1109

§ 1109. Liability for breach of fiduciary duty

Currentness

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

CREDIT(S)

(Pub.L. 93-406, Title I, § 409, Sept. 2, 1974, 88 Stat. 886.)

Notes of Decisions (556)

29 U.S.C.A. § 1109, 29 USCA § 1109
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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement

29 U.S.C.A. § 1132

§ 1132. Civil enforcement

Effective: December 16, 2014
Currentness

<Notes of Decisions for 29 USCA § 1132 are displayed in two separate documents. Notes of Decisions for subdivisions I to VI are contained in this document. For Notes of Decisions for subdivisions VII to end, see second document for 29 USCA § 1132.>

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

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(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts;

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan; or

(11) in the case of a multiemployer plan, by an employee representative, or any employer that has an obligation to contribute to the plan, (A) to enjoin any act or practice which violates subsection (k) of section 1021 of this title (or, in the case of an employer, subsection (l) of such section), or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

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(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

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(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) Secretarial enforcement authority relating to use of genetic information

(A) General rule

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The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section 1181 or 1182(b)(1) of this title with respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period--

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary--

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

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(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if--

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(11) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) [2] of Title 42.

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(12) The Secretary may assess a civil penalty against any sponsor of a CSEC plan of up to $100 a day from the date of the plan sponsor's failure to comply with the requirements of section 1085a(j)(3) of this title to establish or update a funding restoration plan.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

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(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

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(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

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(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

CREDIT(S)

(Pub.L. 93-406, Title I, § 502, Sept. 2, 1974, 88 Stat. 891; Pub.L. 96-364, Title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295; Pub.L. 99-272, Title X, § 10002(b), Apr. 7, 1986, 100 Stat. 231; Pub.L. 100-203, Title IX, §§ 9342(c), 9344, Dec. 22, 1987, 101 Stat. 1330-372, 1330-373; Pub.L. 101-239, Title II, § 2101(a), (b), Title VII, §§ 7881(b)(5)(B), (j)(2), (3), 7891(a)(1), 7894(f)(1), Dec. 19, 1989, 103 Stat. 2123, 2438, 2442, 2445, 2450; Pub.L. 101-508, Title XII, § 12012(d)(2), Nov. 5, 1990, 104 Stat.1388-573; Pub.L. 103-66, Title IV, § 4301(c)(1) to (3), Aug. 10, 1993, 107 Stat. 3767; Pub.L. 103-401, §§ 2, 3, Oct. 22, 1994, 108 Stat. 4172; Pub.L. 103-465, Title VII, § 761(a)(9)(B)(ii), Dec. 8, 1994, 108 Stat. 5033; Pub.L. 104-191, Title I, § 101(b), (e)(2), Aug. 21, 1996, 110 Stat. 1951, 1952; Pub.L. 104-204, Title VI, § 603(b)(3)(E), Sept. 26, 1996, 110 Stat. 2938; Pub.L. 105-34, Title XV, § 1503(c)(2)(B), (d)(7), Aug. 5, 1997, 111 Stat. 1062; Pub.L 107-204, Title III, § 306(b)(3), July 30, 2002, 116 Stat. 783; Pub.L. 108-218, Title I, §§ 102(d), 103(b), 104(a)(2), Apr. 10, 2004, 118 Stat. 602, 603, 606; Pub.L. 109-280, Title I, § 103(b)(2), Title II, § 202(b), (c), Title V, §§ 502(a)(2), (b)(2), 507(b), 508(a)(2)(C), Title IX, § 902(f)(2), Aug. 17, 2006, 120 Stat. 816, 884, 885, 940, 941, 949, 951, 1039; Pub.L. 110-233, Title I, § 101(e), May 21, 2008, 122 Stat. 886; Pub.L. 110-458, Title I, §§ 101(c)(1)(H), 102(b)(1)(H), (I), Dec. 23, 2008, 122 Stat. 5097, 5101; Pub.L. 111-3, Title III, § 311(b)(1)(E), Feb. 4, 2009, 123 Stat. 70; Pub.L. 113-97, Title I, § 102(b)(6), Apr. 7, 2014, 128 Stat. 1117; Pub.L. 113-235, Div. O, Title I, § 111(d), Dec. 16, 2014, 128 Stat. 2793.)

Notes of Decisions (7535)

Footnotes

1 So in original. Probably should be "subtitle".

2 See References in Text note set out under this section.

29 U.S.C.A. § 1132, 29 USCA § 1132

Current through P.L. 115-30.

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United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement

29 U.S.C.A. § 1140

§ 1140. Interference with protected rights

Effective: August 17, 2006
Currentness

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information or testifying in any inquiry or proceeding relating to this chapter before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

CREDIT(S)

(Pub.L. 93-406, Title I, § 510, Sept. 2, 1974, 88 Stat. 895; Pub.L. 109-280, Title II, § 205, Aug. 17, 2006, 120 Stat. 889.)

Notes of Decisions (427)

29 U.S.C.A. § 1140, 29 USCA § 1140
Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimited on Preemption Grounds by Molinelli-Freytes v. University of Puerto Rico, D.Puerto Rico, July 27, 2010

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Effective: October 19, 1996
Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in six separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For additional Notes of Decisions, see 42 § 1983, ante.>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Notes of Decisions (5772)

42 U.S.C.A. § 1983, 42 USCA § 1983
Current through P.L. 115-24. Also includes P.L. 115-26 and 115-30. Title 26 current through 115-30.

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United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 43, 28 U.S.C.A.

Rule 43. Substitution of Parties

Currentness

(a) Death of a Party.

(1) After Notice of Appeal Is Filed. If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) Before Notice of Appeal Is Filed--Potential Appellant. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative--or, if there is no personal representative, the decedent's attorney of record--may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) Before Notice of Appeal Is Filed--Potential Appellee. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) Substitution for a Reason Other Than Death. If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) Public Officer: Identification; Substitution.

(1) Identification of Party. A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) Automatic Substitution of Officeholder. When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

CREDIT(S)

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

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ADVISORY COMMITTEE NOTES
1967 Adoption

Subdivision (a). The first three sentences describe a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a) [rule 25(a), Federal Rules of Civil Procedure]. The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b) [rule 73(b), Federal Rules of Civil Procedure], which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 Cyclopedia of Federal Procedure (3d Ed.) § 63.21. The states commonly make special provision for the even of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev.Rules 1:3-3; New York Civil Practice Law and Rules, § 1022; Wisconsin Statutes Ann. 274.01(2). The Provision in the proposed rule is derived from California Code of Civil Procedure, § 941.

Subdivision (c). This subdivision is derived from FRCP 25(d) [rule 25(d), Federal Rules of Civil Procedure] and Supreme Court Rule 48, with appropriate changes.

1986 Amendment

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Notes of Decisions (24)

F. R. A. P. Rule 43, 28 U.S.C.A., FRAP Rule 43
Including Amendments Received Through 5-1-17

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