2024 WL 1957328
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United States District Court, E.D. Michigan, Southern Division.

KAREN DIEDERICHS, Guardian and Conservator of Mark Diederichs, an Incapacitated Person, Plaintiff,

v.

FCA US LLC, Defendant.

Case No. 23-11287
|
Filed 04/30/2024

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS (ECF No. 15)

Curtis Ivy, Jr. United States Magistrate Judge

I. PROCEDURAL HISTORY

***1** Plaintiff, as guardian and conservator of her husband, Mark Diederichs, filed this action seeking disability benefits from Mr. Diederichs' former employer, Defendant FCA US LLC. The claims are brought under the Employee Retirement Security Act ("ERISA") and Michigan law. The case was referred to the undersigned for all pretrial proceedings. (ECF No. 8). Defendant moved to dismiss the first amended complaint ("FAC"). (ECF No. 15). That motion is fully briefed and ready for report and recommendation. The undersigned separately denied Plaintiff's motion for leave to file another amended complaint. (ECF No. 16).

For the reasons below, the undersigned recommends that Defendant's motion to dismiss be **GRANTED**.

II. AMENDED COMPLAINT ALLEGATIONS

Mr. Diederichs worked for Defendant from March 9, 2017, through December 18, 2018. (ECF No. 14, PageID.174 at ¶ 5). Through his employment, Mr. Diederichs could, if eligible, participate in Defendant's Group Insurance Program, which included the Disability Absence Program ("DAP") and the Long-Term Disability Plan ("LTD Plan"). (*Id.* at ¶ 6). Defendant was the plan administrator for both the DAP and LTD Plan.

Mr. Diederichs stopped working due to his early onset Alzheimer's Disease on October 27, 2018. He was placed on suspended status with pay until December 18, 2018, when he was terminated. (*Id.* at PageID.174-75, ¶¶ 9-11). During his suspension and continuing after his termination, Plaintiff notified human resources personnel of Mr. Diederichs' cognitive and behavioral impairments and inquired into all disability benefits for which he may be eligible through his employment and requested assistance in processing a disability claim. (*Id.* at PageID.175, ¶ 12). On March 17, 2019, Mr. Diederichs was declared legally incapacitated, and Plaintiff was appointed as his conservator. Defendant received a request for copies of disability insurance policies during July 2019 from Plaintiff's attorney; on September 4, 2019, Defendant provided copies to counsel. (ECF No. 15-2). Plaintiff continued to provide Defendant notice of intent to recover on all claims for disability benefits, submitting medical and other documentation to Defendant's third-party claims administrator, Sedgwick. (ECF No. 14, PageID.176, ¶ 13).

Plaintiff did not state when she applied for DAP benefits on behalf of her husband, but she alleges Mr. Diederichs met all necessary conditions for eligibility. (*Id.* at PageID.179, ¶ 21). Defendant denied Plaintiff's claim for DAP benefits by letter dated June 6, 2022. The letter allegedly demonstrated a refusal to investigate and process the claim, contained false factual allegations, and failed to inform Plaintiff of a right to appeal or other procedural requirements. (*Id.* at ¶ 20).

III. ANALYSIS AND RECOMMENDATIONS

A. Governing Standards

When deciding a motion to dismiss under Rule 12(b)(6), the Court must "construe the complaint in the light most favorable to plaintiff and accept all allegations as true." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (concluding that a plausible claim need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action"). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *16630 Southfield Ltd., P'Ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503 (6th Cir. 2013).

***2** If the Court considers matters outside the complaint, the motion to dismiss should be treated as one for summary judgment under Fed. R. Civ. P. 56. Fed. R. Civ. P. 12(d). A court may, however, consider certain documents without converting the motion to dismiss into a summary judgment motion. "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). The Court can consider documents such as the DAP and LTD Plan attached to Defendant's motion to dismiss the FAC because those documents are quoted in the complaint and are central to the claims.

B. Discussion

1. Count II – DAP Claim

The undersigned will address Count II, the "DAP Claim," first because it is necessary to establish whether the DAP is an ERISA plan or payroll practice before addressing the other claims. In this count, Plaintiff alleges that Mr. Diederichs was eligible for DAP benefits, yet Defendant failed to pay benefits. Instead, Defendant refused to investigate and process Plaintiff's claim, gave false factual allegations in the June 2022 claim denial letter, and failed to inform Plaintiff of a right to appeal and other procedural requirements. (ECF No. 14, PageID.179).

Plaintiff insists that the DAP is an ERISA plan, so the claim is viable. In the alternative, she asserts that the DAP is an enforceable contract under Michigan law. The undersigned disagrees.

The DAP is not governed by ERISA. "Determining the existence of an ERISA plan is a question of fact to be answered in light of all the surrounding circumstances and facts from the point of view of a reasonable person." *Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 847 (6th Cir. 2006) (citing *Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 434 (6th Cir. 1996)). How the employer characterizes the plan is one factor to consider, but it is not dispositive of the issue.

Defendant points to a Sixth Circuit case in which the court ruled that Defendant's DAP is a payroll practice, not an ERISA plan. *See Langley v. DiamlerChrysler Corp.*, 502 F.3d 475, 479-80 (6th Cir. 2007). The court ruled this way because ERISA applies only to an "employee welfare benefit plan" or a "welfare plan." The terms "welfare benefit plan" or "welfare plan" refer to a plan established or maintained by the employer or employee organization to provide benefits to participants or beneficiaries through the purchase of insurance or otherwise. 29 U.S.C. § 1002(1). On the other hand, "normal compensation" paid to an employee as a result of a disability from the employer's "general assets" does not constitute an employee welfare benefit plan, but is a payroll practice. *Langley*, 502 F.3d at 479 (citing 29 C.F.R. § 2510.3-1(b)(2) (as effective August 19, 2019)). The DAP pays disability benefits out of Defendant's general assets, so it is a payroll practice outside of ERISA.

Plaintiff does not dispute that the DAP pays benefits out of its general assets. She argues that it does not pay "normal compensation," and thus is governed by ERISA. (ECF No. 19, PageID.370). The DAP, as it would have applied to Mr. Diederichs, provides for 100% of the employee's pay for the first 39 weeks of disability, then 70% of pay for the next 13 weeks.[1] (ECF No. 15-3, PageID.246). This reduction in normal pay, she insists, does not qualify as "normal compensation," which converts the DAP to an ERISA plan. She fails to bridge the fact that the employees would earn less than their normal pay under the DAP and how that fact transforms the program into a plan governed by ERISA.

***3** *Langley* did not address what constitutes "normal compensation" or the effect of earning less than the employee's normal pay for work performed. That said, there is a statement in *Langley* about the purpose of ERISA that helps casts Plaintiff's argument as a red herring. The court explained,

> when benefits are paid solely from general assets, the protections of ERISA are not necessary. ERISA is intended to protect employees from abuses and mismanagement of private retirement and welfare funds controlled by employers or third parties.... Rather, employees face the same general risk with their disability payments as they do

> with their wages or salaries: the company might not have enough general assets to pay them.

Langley, 502 F.3d at 481. Thus, even though the DAP reduces disability compensation to 70% after the first 39 weeks, the plan still pays the employee's *compensation* out of the company's general assets and does not require the protections of ERISA. That the compensation changes after 39 weeks does not create a risk that the employer will abuse or mismanage private funds protected by ERISA.

Plaintiff points to federal regulations defining a payroll practice to argue that a change in disability compensation is not "normal compensation." The regulation, 29 C.F.R. § 2510.3-1(b)(1), defining "payroll practices," states that an employee welfare benefit plan does not include payments of compensation for work performed, including compensation in excess of the "normal rate of compensation," for performance of duties in circumstances that are not ordinary, such as overtime pay or holiday premiums. This subsection is inapplicable to the circumstances presented here. The next subsection's definition applies: payment of normal compensation out of the employer's general assets during the time of disability. This subsection does not include the word "rate" in "normal compensation." As to the lack of the word "rate," Plaintiff says that a reasonable person would view these regulations as stating that payment of something other than the employee's normal *rate* of compensation, i.e., an amount different from their compensation when working, would take the plan out of "payroll practice" status and turn into an ERISA plan. Plaintiff's argument is off base. The regulations do not say that payment of something other than the employee's usual pay constitutes a welfare benefit plan. Plaintiff cites no positive authority for her position.

Lastly, Plaintiff contends that the DAP should be considered an ERISA plan because an employee must exhaust DAP benefits as a pre-requisite to LTD Plan benefit eligibility, and the LTD Plan is an ERISA plan. Plaintiff urges the Court to consider the DAP to be incorporated into the LTD Plan, otherwise the disability program is entirely illusory. (ECF No. 19, PageID.370). She cites no authority for this position, and the Court will not search for any to support the argument.

In short, the DAP is a payroll practice, not an ERISA plan, thus a claim for DAP benefits under ERISA in Count II (or any Count) should be dismissed.

To the extent that Plaintiff intended to raise a breach of contract claim under the DAP (as she attempted in her proposed second amended complaint), the claim should be dismissed because the DAP is not an enforceable contract. Defendant argues that the DAP is not enforceable against it because there was no mutuality of agreement to be bound by the terms as the DAP states that Defendant can amend or terminate the DAP at any time for any reason. (ECF No. 15, PageID.207-09). In support of the breach of contract claim, Plaintiff discusses DAP provisions that appear to bind Defendant to the terms of the plan. For instance, the stated purpose of the DAP is to provide employees with disability absence benefits, and the plan shall be construed according to Michigan law. The DAP adds that eligible participants "shall review DAP payments" and that the plan is binding on the beneficiary or the participant. (ECF No. 19, PageID.372).

***4** Under Michigan law, mutual assent is decided using an objective test that looks "to all the relevant circumstances surrounding the transaction" and asks "whether a reasonable person could have interpreted the words or conduct in the manner that is alleged." *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591, 598 (Mich. 1993). "[M]utuality is not present where one party is bound to perform, but not the other." *Smith v. Chrysler Fin. Corp.*, 101 F. Supp. 2d 534, 538 (E.D. Mich. 2000) (quotation omitted).

Here, the terms of the DAP are clear that Defendant was not bound to perform. Another court in this district came to the same conclusion. "Although Plaintiff has pointed to a number of provisions, along with a few questionable drafting decisions, that could arguably suggest the DAP is enforceable, FCA is ultimately more persuasive in pointing to its overwhelming right to modify the DAP's terms to show that FCA did not intend to be bound by the DAP." *Holmes v. FCA US LLC*, 2022 WL 2402655, at *3 (E.D. Mich. Mar. 8, 2022), *report and recommendation adopted*, 2022 WL 6736294 (E.D. Mich. Oct. 11, 2022); *see also* (ECF No. 15-3, PageID.254-55, § 8.02 ("The Company ... shall have the right at any time, and from time to time, to amend, in whole or in part, any or all provisions of the Plan.... Any such amendment may be made with or without retroactive effect"). The terms of the DAP make plain that "[e]ven if Plaintiff was somehow automatically entitled to a full fifty-two weeks of payments after becoming disabled, FCA has the absolute authority to, for instance, retroactively amend Plaintiff's benefits to be zero percent if it chooses to do so." *Id.* at *5. For this reason, Defendant is not committed to particular performance, and the DAP is not definite enough to enforce. *See also Heurtebise v. Reliable Bus. Computers*, 550 N.W.2d 243 (Mich. 1996).

Plaintiff faults Defendant for relying on unpublished decisions to support its argument, yet she does not come forward with contrary authority. She also argues that *Holmes* is distinguishable. She points out that the DAP claim in that case was processed and paid before benefits were terminated when the plaintiff's medical condition improved. And it was conceded that the DAP is a payroll practice plan and the LTD plan claim was preserved. (ECF No. 19, PageID.374). These differences, however, do not impact the court's analysis on mutuality of obligation in the DAP. Absent contrary authority, and given the plain terms of Sections 8.01 and 8.02 of the DAP, the undersigned suggests that Defendant's authority is persuasive and follows it here to conclude that the DAP is not an enforceable contract. Count II should be dismissed.[2] The remaining claims for disability benefits will be treated as claims or LTD Plan benefits because DAP claims are not viable.

2. Counts I and IV – Statute of Limitations

***5** Plaintiff alleges that ERISA imposes a duty on Defendant as Plan Administrator to act in the interests of participants and beneficiaries. In Count I, she contends that Defendant had a fiduciary duty to Plaintiff to inform and help her in processing the disability claim in good faith. She says Defendant breached its fiduciary duty to promptly disclose policy provisions and provide information, failed to process the disability claim, and "otherwise obstructed" her efforts to pursue the claim. (ECF No. 14, PageID.176-77). In Count IV, "Breach of Fiduciary duty," Plaintiff alleges that the LTD Plan is illusory if the DAP is an ERISA-exempt plan and is not enforceable under Michigan contract law. She seeks equitable relief under ERISA Section 501(a)(3) to strike the provisions in the LTD Plan which make benefits contingent on exhausting DAP benefits. (*Id.* at PageID.182-83).

Defendant argues the breach of fiduciary duty claims are time barred. The undersigned agrees.

ERISA's fiduciary duty statute of limitations provides that a claim cannot be brought after the earlier of (1) six years after the date of the last action which constitutes part of the breach or (2) three years after the earliest date on which Plaintiff had actual knowledge of the breach. 29 U.S.C. §§ 1113(1) and (2).

Defendant contends that the three-year period applies, Plaintiff argues the six-year period applies. Defendant asserts that Plaintiff had actual knowledge of the alleged breach more than three years before she filed the complaint. (ECF No. 15, PageID.210). Though Plaintiff did not plead the date of her knowledge of the facts, Defendant notes that Plaintiff did not request disability plan information until July 2019, and in September 2019 the DAP and LTD Plan documents (among others) were provided to Plaintiff's counsel. (ECF No. 15-2, PageID.230, 232). The plans disclosed in September 2019 provided the information necessary to alert Plaintiff that she may have been harmed—the documents included the LTD Plan which made clear that exhaustion of DAP benefits was a prerequisite to LTD benefits, and the documents disclosed the time constraints for filing a claim for DAP benefits. Thus, Defendant contends that this lawsuit should have been filed no later than September 2022, not May 2023. (ECF No. 15, PageID.212-13).

Plaintiff does not contest that her counsel received the plan documents in September 2019. Plaintiff contends, however, that the period does not start in September 2019, it starts when Defendant denied the DAP claim in June 2022 and the six-year period applies because the "mere provision of the Plan documents without any processing was not sufficient to put Plaintiff on notice of the systemic defects in the DAP and LTD Plans." (ECF No. 19, PageID.381).

In the Sixth Circuit, "the relevant knowledge required to trigger the statute of limitations under 29 U.S.C. § 1113(2) is knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute." *Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003). As mentioned, Plaintiff did not plead when she learned of the facts forming the fiduciary duty claims. That said, the complaint contains allegations that allow the inference that Plaintiff must have known there was a problem with disability benefits in 2019. Plaintiff became her husband's conservator in March 2019. She knew then that her husband was not receiving disability benefits from his former employer. Then, Plaintiff's counsel requested plan information from Defendant. In September 2019, plan documents were sent to Plaintiff's counsel. The plan documents described the time limits and requirements for eligibility for DAP and LTD Plan benefits. Despite having possession of documents that provide all the information necessary for Plaintiff's claims, she did not pursue a claim until 2022. That the complaint is silent about when she acquired actual knowledge does not require the Court to conclude that she acquired actual knowledge within three years of filing her complaint. The

obligation to plead facts in avoidance of the statute of limitations defense is triggered by the fact that "it is apparent from the face of the complaint that the time limit for bringing the claim[s] has passed." *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 520 (6th Cir. 2008) (quoting *Hoover v. Langston Equip. Assocs., Inc.*, 958 F.2d 742, 744 (6th Cir. 1992)).

***6** Plaintiff's argument that she was unaware of the systemic defects in the DAP and LTD Plans until her 2022 DAP claim was denied is unavailing. The DAP claim was denied as untimely because such a claim must be filed within 20 days of commencement of the disability. (ECF No. 15-3, PageID.251). There can be no question that the disability began in 2018 when Mr. Diederichs was terminated (or at the latest on March 17, 2019, when Plaintiff became conservator). By 2022, the DAP claim was untimely. The LTD Plan is clear that exhaustion of DAP benefits is a prerequisite to eligibility. (*Id.* at PageID.297). Plaintiff cannot credibly assert that she was unaware of DAP's 20-day filing requirement or DAP exhaustion for LTD benefits until her DAP claim was denied in June 2022.

A complaint containing factual allegations that create the mere suspicion of a right to relief is insufficient. *Twombly*, 550 U.S. at 555-56. The allegations must be enough to "raise a right to relief above the speculative level" and state a claim that is "plausible on its face." *Id.* "Where, as here, defendants have highlighted the apparent untimeliness of the complaint, plaintiffs may not simply rely on the bare assertion that they were unaware of the facts underlying their cause of action." *Bishop*, 520 F.3d at 520 (citation omitted).

In the view of the undersigned, the statute of limitations began during September 2019 when plan documents were provided to Plaintiff's counsel and the three-year limitations period applies.

Plaintiff argues that Defendant's failure to timely disclose the existence of disability benefits and to process the claim constitute "concealment," so the six-year statute of limitations should apply. (*Id.* at PageID.381-82). The ERISA statute of limitations provides that in cases of fraud or concealment, the statute of limitations is six years from the date of discovery of the breach of fiduciary duty. 29 U.S.C. § 1113. Plaintiff did not explain how disclosure of plan documents in September 2019 constitutes concealment for purposes of the statute of limitations. She does not argue that she became aware of previously unknown plan information or obtained more plan documents after September 2019 that would have altered her course of conduct or otherwise impacted the statute of limitations.

In support of the six-year statute of limitations argument, Plaintiff cites *Moyer v. Met. Life Ins. Co.*, 762 F.3d 503 (6th Cir. 2014). That case is inapposite. There, the insurance company failed to include information about seeking judicial review of a denial of ERISA benefits. ERISA requires denial letters to describe review procedures and time limits. *Id.* at 505. Failure to include that information resulted in denial of a right to judicial review, so the case was remanded. *Id.* at 507. Here, the DAP denial was not a denial of an ERISA benefit, so ERISA requirements are inapplicable. Nor did Plaintiff connect the failure to explain an appeals process in the June 2022 DAP denial letter and her ability to seek judicial review of LTD Plan benefits when that plan was disclosed to her in September 2019. What is more, Plaintiff concedes that the DAP documents included information about an appeals process, so she was not left in the dark. (*See id.* at PageID.372-73).

Plaintiff has not made the case that the six-year period applies to her claims. Plaintiff needed to bring her breach of fiduciary duty claims within three years of actual knowledge of the claims. She was given actual knowledge in September 2019 with the plan documents. A lawsuit needed to be filed during or before September 2022. Plaintiff's May 2023 lawsuit is late.

Lastly, Plaintiff contends that equitable estoppel saves her claim because she diligently pursued a disability claim and extraordinary circumstances stood in her way. (ECF No. 19, PageID.383-84) (citing *Rice v. Jefferson Pilot Fin. Ins. Co.*, 578 F.3d 450 (6th Cir. 2009)). She points out that Mr. Diederichs was mentally incapacitated and she was not knowledgeable about Defendant's benefits programs. According to Plaintiff, she "promptly and repeatedly" contacted human resources to inquire into disability eligibility, but Defendant obstructed her and failed to disclose plan information. As an initial matter, in response to Plaintiff's motion to file a second amended complaint, Defendant maintains that it had no fiduciary obligation to provide information to Plaintiff until she became Mr. Diederichs' conservator. It owes a duty to participants or beneficiaries, but not spouses of participants. *See* 29 U.S.C. § 1024(b)(4). So Plaintiff's informing HR about her husband's condition did not trigger a duty to disclose plan information. Even if it did, the undersigned marks the beginning of the limitations period at the time she received the plan documents.

Thus, her lack of knowledge of plan benefits before that time does not hurt her claims.

***7** Equitable estoppel does not apply here. Plaintiff was not diligent in pursuing a disability claim. Plaintiff waited until March 2022 to file a DAP claim, which was denied as untimely in June 2022. And despite her counsel receiving disability plan documents in September 2019, Plaintiff did not file a lawsuit about the LTD Plan until May 2023. Plaintiff cannot keep the statute of limitations from running by waiting years to file a claim. Plaintiff mentions another red herring assertion to conclude her argument: Plaintiff contends that Defendant should not benefit from its bad-faith behavior, so even if the claim is time-barred, she meets the requirements for equitable estoppel. (*Id.* at PageID.384). Though Plaintiff is unsatisfied with the results of her efforts, she has not shown or alleged any bad-faith behavior from Defendant during the process.

Counts I and IV for breach of fiduciary duty should be dismissed as time barred. Given this recommendation, the undersigned will not address the remaining arguments on these counts.

3. Count III – LTD Claim

Count III alleges that Defendant failed to pay LTD Plan benefits despite (1) Mr. Diederichs' mental incapacity, (2) Plaintiff's informing the Claims Administrator of an intent to pursue disability benefits, (3) Mr. Diederichs' being found disabled under Social Security law, and (4) despite not exhausting DAP benefits because Defendant refused to process and pay DAP benefits. (ECF No. 15).

The Court should find no wrongdoing with respect to the DAP because, as explained above, any DAP-related claims should be dismissed because it is not an ERISA plan and because Defendant is not bound by the DAP. This claim is about Defendant's failure to pay LTD Plan benefits to Plaintiff.

Defendant argues that this claim should be dismissed because Plaintiff did not exhaust administrative remedies under the LTD Plan before filing the lawsuit. Plaintiff acknowledges that she did not apply for LTD benefits because she did not exhaust DAP benefits, but she did not address exhaustion of administrative remedies before this lawsuit. When an application would have been futile, she argues, the requirement should be excused. (ECF No. 19, PageID.384). She insists that the requirement to exhaust DAP benefits for LTD Plan eligibility should be stricken because it renders disability benefits illusory and is an unconscionable violation of policy. (*Id.* at PageID.384-85). Defendant also argues that any LTD Plan benefits would have ceased on Mr. Diederichs' termination, effectively precluding Mr. Diederichs from LTD Plan benefits in whole. Plaintiff did not address this.

It is unclear, as Defendant asserts, that Plaintiff was required to plead facts demonstrating exhaustion of administrative remedies. *See Beaman v. Assurant Emp. Benefits*, 917 F. Supp. 2d 662, 666 (W.D. Mich. 2013). The claim should not be dismissed for failure to plead exhaustion.

The LTD's requirement that DAP benefits be exhausted as a prerequisite to benefits is a reason to dismiss the claim. Plaintiff cannot maintain a claim for payment of benefits to which she or her husband are not entitled. Mr. Diederichs' termination is another reason to dismiss this claim—the LTD Plan makes clear that if the employee resigns or is discharged, LTD coverage ceases as of the last day worked. (ECF No. 15-3, PageID.304). Even if Mr. Diederichs were somehow receiving LTD benefits, his coverage would have ended in December 2018 when he was terminated from work. And the plan explains that LTD benefits would be reduced based on any other income the employee receives. (*Id.* at PageID.298-99). Plaintiff alleges that Mr. Diederichs was paid through his termination on December 18, 2018. (ECF No. 14, PageID.175, at ¶ 11). So there was no period of LTD eligibility. Plaintiff/Mr. Diederichs was not eligible for benefits on the face the complaint and the documents, so the claim for benefits should be dismissed.

***8** Although Defendant raises these issues in the motion to dismiss and in the response to the motion for leave to amend the complaint, Plaintiff did not engage with the argument. She did not rebut the fact that Mr. Diederichs became ineligible for benefits on his termination. She does not address the fact that she is claiming entitlement to benefits her husband was never entitled to.

Because Mr. Diederichs became ineligible for plan benefits after he was terminated in December 2018, the claim for benefits should be dismissed.

The last argument on this claim is that it is time barred. Plaintiff also did not address this argument. Setting aside the fact that Mr. Diederichs needed to exhaust DAP benefits first, the LTD Plan requires covered employees to submit

"proof of disability within one year from the time satisfactory proof was otherwise required." (ECF No. 15-3, PageID.271). Defendant says this means the latest Plaintiff could submit an LTD benefit claim would have been within one year of employment termination, i.e., December 18, 2019. (ECF No. 15, PageID.218-19). If Plaintiff timely submitted proof that day, this litigation is time barred. The LTD Plan requires a civil action contesting denial of a claim to be brought within one year of the date of denial or when the claim is deemed denied. (ECF No. 15-3, PageID.281, § 7.04(f)). Failure to respond to a claim within 45 days is deemed a denial. 29 C.F.R. 2560.503-1(i)(1)(i), (i)(3)(i); (l)(2) (indicating that the claims administrator must inform the claimant of a decision within 45 days of the application). If Plaintiff filed the claim on December 18, 2019, and Defendant failed to respond within 45 days, the denial is deemed to be February 1, 2020. The latest date to bring a claim contesting that denial is February 1, 2021. The May 2023 lawsuit falls outside that time.

Plaintiff has not given cause to move Claim III forward in this litigation.The claim should be dismissed.

4. Claim V – Request for Interest, Costs and Attorney Fees

Claim V should be dismissed because it is premised on success on any of the preceding four claims. Because the undersigned has recommended that those four claims be dismissed, this claim should also be dismissed.

IV. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that Defendant's motion to dismiss (ECF No. 15) be **GRANTED** and that the complaint be **DISMISSED**.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Loc. 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

All Citations

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Footnotes

1 Plaintiff says the DAP provides for 100% of pay for the first 26 weeks, then 70% of pay the next 26 weeks. (ECF No. 19, PageID.370). It is unclear where Plaintiff reads 26 weeks. The DAP lays out a payment plan for the first 39 weeks, then the remaining 13 weeks in a year.

2 Plaintiff asserts in her response that even if the DAP breach of contract claim does not survive, then the doctrine of promissory estoppel should be applied. (ECF No. 19, PageID.374-76). Plaintiff did not plead promissory estoppel in the FAC, so the undersigned will not address it as a claim here. The undersigned addressed a promissory estoppel claim in the Order denying leave to amend the complaint, filed separately. The Court found that the claim would be futile. That analysis would apply here if the claim was raised in the FAC.

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