Miller & Chevalier

The ERISA Edit: Hughes Take Two: It's All About Context

Employee Benefits Alert
03.30.2023

Seventh Circuit Takes Another Look at Allegations in *Hughes v. Northwestern*

On March 23, 2023, the U.S. Court of Appeals for the Seventh Circuit issued a decision reexamining the plaintiffs' allegations in *Hughes v. Northwestern University*, No. 18-2569 (7th Cir., Mar. 23, 2023), on remand from the U.S. Supreme Court. The plaintiffs brought this ERISA litigation in 2016 alleging fiduciary breaches and prohibited transactions against the university's retirement investment committee and its members related to their handling of investments and recordkeeping contracts for the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan. The Seventh Circuit determined that two of the plaintiffs' three remaining claims alleging breaches of the duty of prudence – failure to monitor and avoid excessive recordkeeping fees and failure to swap out retail shares for cheaper but otherwise identical institutional shares – survive Northwestern's motion to dismiss the amended complaint. Here are some key items from the recent decision that will guide courts and fiduciaries going forward, at least in the Seventh Circuit:

- The Seventh Circuit refused to extend the *Dudenhoeffer* pleading standard to fees cases, explaining that sufficiency of pleadings were "context-specific" and that *Dudenhoeffer* was limited to employee stock ownership plans (ESOPs).
- To plead a breach of the duty of prudence under ERISA, a plaintiff must plausibly allege fiduciary decisions outside a range of reasonableness. How wide that range of reasonableness is will depend on the circumstances prevailing at the time the fiduciary acts. The discretion accorded to an ERISA fiduciary will necessarily be context specific.
- At the pleadings stage, a plaintiff must provide enough facts to show that a prudent alternative action was plausibly available, rather than actually available
- As applied to the *Hughes* allegations, the use of revenue sharing for plan expenses does not amount to a *per se* violation of fiduciary duty under ERISA. But this principle does not foreclose the possibility of violating a fiduciary duty by failing to monitor and incur only reasonable expenses.
- Nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund. This principle does not address the duty of a fiduciary when it has access to a cheaper but otherwise identical fund from the same fund provider.
- A fiduciary need not constantly solicit quotes for recordkeeping services to comply with its duty of prudence. But fiduciaries who fail to monitor the reasonableness of plan fees and fail to take action to mitigate excessive fees — such as by adjusting fee arrangements, soliciting bids, consolidating recordkeepers, negotiating for rebates with existing recordkeepers, or other means — may violate their duty of prudence.
- Plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty. But the Supreme Court rejected the Seventh Circuit's reliance on a categorical rule that a plan fiduciary may avoid liability by assembling a diverse menu of investment options that includes the types of investments a plaintiff desires.

Ninth Circuit to Consider Long COVID as a Disability

Unum Life Insurance Company of America recently filed an appeal to the Ninth Circuit, asking the court to review a lower court decision reversing Unum's denial of long-term disability (LTD) benefits to a law firm partner and litigator who claimed he was unable to work on account of what several of his physicians diagnosed as long COVID. *Abrams v. Unum Life Ins. Co. of America*, No. C-21-0980 (W.D. Wash., Dec. 27, 2022). The lawyer presented evidence that he experienced brain fog, fatigue, decreased attention and concentration, and fevers that left him unable to understand information conveyed to him or participate in legal analysis and made his communications confused. Some of his physicians attributed his condition to chronic fatigue syndrome

(CFS), but a neuropsychologist who examined the plaintiff did not find any evidence of cognitive impairment. Unum argued that plaintiff was faking his condition, failed to submit persuasive evidence that he had even suffered from COVID-19, and that his lack of cognitive impairment was inconsistent with CFS. The district court ruled in December 2022 that the plaintiff was disabled under the terms of his LTD policy and was entitled to benefits. After a *de novo* review of Unum's coverage denial, the court found compelling that, regardless of the diagnosis, the plaintiff's primary physician consistently noted his inability to maintain even part-time employment as a litigator and the fact that the plaintiff sold his house and depleted his savings because of his inability to work. The court rejected the plaintiff's claim that Unum had denied his claim in bad faith. In February 2023, the district court awarded the plaintiff the majority of his requested attorneys' fees.

This case illustrates some of the challenges both disability plans and plaintiffs face in assessing long COVID as a disability. In many instances, plaintiffs are unable to establish that they even had COVID-19 and there can be significant disagreement among medical providers as to the nature and extent of their impairment. The *Abrams* court focused on the symptoms the plaintiff consistently manifested as reported by his physicians and what evidence there was on how those symptoms impacted plaintiff's ability to perform his specific type of work and lifestyle. Disability plans and plan sponsors should expect increased scrutiny from the U.S. Department of Labor (DOL) on their policies and practices governing long COVID coverage determinations as more employees file long COVID disability claims and more of these coverage disputes arise in the courts. *See, e.g., Danforth v. Unum Life Ins. Co. of America*, No. 1:23-cv-01200 (N.D. Ga. Mar. 22, 2023).

In the News

In *Bloomberg Law*, Joanne Roskey discussed proposed Republican-backed legislation to ban retirement plan fiduciaries from considering factors such as ESG when investing in retirement accounts. Republicans reason that investors have the right to invest according to their values, fiduciaries managing other people's retirement accounts must focus solely on maximizing returns. In the context of maximizing returns, Roskey said, "**[i]t's pretty reasonable to suggest that, in some instances, ESG can be something you consider**."
