No. 06-4100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KERMIT D. BRIDGES, on behalf of himself and a class of persons similarly situated and on behalf of American Power System Retirement Savings Plan (formerly known as the American Electric Power System Employees Savings Plan) and Central and South West,
Plaintiff-Appellant,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND REQUESTING REVERSAL

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STATEMENT OF THE ISSUE

The plaintiff in this case is a former employee who participated in a defined contribution plan sponsored by his employer, American Electric Power Company, Inc. The plaintiff filed suit in 2003 claiming that while he was invested in the American Electric Power System Retirement Savings Plan, defendants breached their fiduciary duties under ERISA, causing losses to the Plan. As a result of these losses, the distribution of assets the plaintiff received from his defined contribution account was less than it should have been. The question presented is whether, under these circumstances, the plaintiff has standing to sue on behalf of the Plan as a "participant" within the meaning of ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. The Secretary's interests include promoting the uniform application of ERISA, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. See Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 689–94 (7th Cir. 1986) (en

banc). The Secretary therefore has a strong interest in ensuring the proper interpretation of ERISA.

STATEMENT OF THE FACTS

1. Named plaintiff Kermit D. Bridges ("Bridges") is a former employee of American Electric Power Company ("AEP"). In re AEP ERISA Litig., 437 F. Supp. 2d 750, 753 (S.D. Ohio 2006). Bridges participated in the American Electric Power System Retirement Savings Plan ("Plan") throughout his more than thirty years of employment with AEP. Id. at 753. Bridges retired in 1992 but continued to have an account in the Plan both at the time of his original Complaint and his later Amended Complaint. Id. He did not withdraw his account balance until 2004, when he voluntarily withdrew from the Plan. Id.

The Plan at issue is a defined contribution plan under ERISA § 3(34), 29 U.S.C. § 1002(34), established for the benefit of employees of AEP. 437 F. Supp. 2d at 752. In a defined contribution plan, "benefits [are] 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." ERISA

§ 3(34); 29 U.S.C. § 1002(34).[1] During the time period relevant to this case, AEP employees could make contributions to the Plan, which were invested in one of a number of different funds at each employee's direction. 437 F. Supp. 2d at 752. One of these funds was the AEP Stock Fund, an employer stock fund that invested in AEP stock. Id. In addition, AEP made matching contributions to the Plan in amounts up to 6% of each employee's regular compensation. Id. These matching contributions were invested solely in the AEP Stock Fund until March 1, 2002 when AEP began allowing individual employees to designate other funds to receive matching employer contributions. Id.

Pursuant to ERISA sections 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), the named plaintiff brought this case as a class action against various officers, directors, employers and committees of AEP and its subsidiaries. 437 F. Supp. 2d at 752. The plaintiff alleges that the defendants, as Plan fiduciaries, breached their duties under ERISA between

[1] In a defined contribution plan, participants are always vested in both their own contributions and any earnings made on those contributions. See U.S. Gen. Accounting Office, Publ'n No. GAO-02-745SP, Answers to Key Questions About Private Pension Plans 14 (Sept. 18, 2002), available at http://www.gao.gov/new.items/d02745sp.pdf. A participant only becomes vested in his employer's contributions and any earnings made on those contributions once the participant fulfills the plan's criteria—often a requirement that the participant work for the employer for a certain number of years. Id.

December 9, 1998 and September 8, 2003 by imprudently continuing to invest plan assets in AEP stock while they were aware that AEP stock values were artificially inflated. Id. at 753. The plaintiff also alleges that the defendants breached their fiduciary duties by misrepresenting and failing to disclose material information that was necessary for participants to make informed decisions concerning the appropriateness of investing in AEP stock. Id. These fiduciary breaches allegedly caused losses to the Plan as a whole. Id.[2]

2. In a decision dated July 12, 2006, the district court denied the plaintiff's motion for class certification and dismissed his complaint, holding that the plaintiff was not a participant with standing to bring an action under ERISA. 437 F. Supp. 2d at 762. Relying on Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), the court stated that a former employee is a plan participant if he possesses either "a reasonable expectation of returning to covered employment" or "a colorable claim to vested benefits." 437 F. Supp. 2d at 755 (quoting Firestone, 489 U.S. at 117–18). Because the plaintiff conceded that he did not have a reasonable expectation of returning to covered employment, the district court's analysis centered on whether the plaintiff had a colorable claim for vested benefits. Id. at 754, 756.

[2] The Secretary takes no position on the merits of the plaintiff's Complaint.

The court concluded that the plaintiff did not have standing because he "has already collected all vested benefits due to him under the plan." 437 F. Supp. 2d at 760. Relying on Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989), and Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986) (per curiam), the district court distinguished a claim for "vested benefits," justifying ERISA standing, from a claim for "damages," which the court found insufficient to support ERISA standing. 437 F. Supp. 2d at 761–62. The court characterized the plaintiff's claim as seeking "added value" to his previously divested Plan holdings and found it to be similar to the claim for damages in Kuntz. Id. at 762. The court stated that "[t]hese additional damages that *might have* accrued, however, are too speculative to be considered vested under ERISA." Id. at 762 (emphasis in original).[3] Having concluded that the plaintiff did not have a "colorable claim for benefits" and thus lacked standing, the district court denied the

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[3] The district court also disagreed with the plaintiff's argument that his status as a "participant" at the time suit was filed accorded him standing to sue. Acknowledging that "[i]t is uncontroverted that Plaintiff was eligible for benefits *at the time* he brought suit," the district court nevertheless held that "the question, however, is whether his eligibility continues in the face of his Plan divestment." 437 F. Supp. 2d at 757 (emphasis in original). The district court likewise disagreed that the plaintiff's status as a participant at the time of the alleged fiduciary breach accorded the plaintiff standing under ERISA.

plaintiff's motion for class certification and dismissed his claims without prejudice.

SUMMARY OF THE ARGUMENT

ERISA allows plan participants to sue on behalf of plans to remedy fiduciary breaches. ERISA broadly defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." ERISA § 3(7), 29 U.S.C. § 1002(7). Mr. Bridges' claim is that fiduciary breaches caused losses to the Plan while he held an account in the Plan, and because vested benefits under defined contribution plans are linked directly to the performance of the plan's overall assets, 29 U.S.C. § 1002(34), these losses caused a corresponding diminution in the amount of the vested benefits that he received. If he prevails on his claim and the Plan recovers its lost assets, Mr. Bridges will be entitled to the payment of additional benefits from the Plan. He is, therefore, a "former employee" who "is or may become eligible to receive a benefit of any type" and meets the statutory definition of participant. He also has a "colorable claim" to vested benefits and meets the Supreme Court's definition of "participant" in Firestone, 489 U.S. at 116–18. Accordingly, he has standing to bring this action.

To hold otherwise would result in an illogical distinction between the rights of former employees in a defined contribution plan and those of current employees both of whose account balances are equally affected by alleged fiduciary breaches. There is no reason to believe that Congress intended for a participant who has not yet retired to have standing to sue for such breaches, while denying standing to a participant in a defined contribution plan who has retired and received a diminished benefit. Such a result would not promote ERISA's remedial goals nor would it be consistent with the statute's broad definition of participant. Moreover, it would reward a breaching fiduciary for hiding its breaches until participants take distribution of their defined contribution benefits.

ARGUMENT

PLAINTIFF HAS STANDING UNDER ERISA TO BRING THIS SUIT BECAUSE HE HAS A COLORABLE CLAIM THAT HE IS ENTITLED TO ADDITIONAL VESTED BENEFITS UNDER HIS DEFINED CONTRIBUTION PLAN

ERISA was a direct response to inadequacies in existing pension laws that became apparent after the economic collapse of the Studebaker-Packard Corporation left terminated employees without their promised pensions. See Nachman Corp. v. PBGC, 446 U.S. 359, 374–75 & n.22 (1980) (quoting 1 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 1599–1600 (Comm. Print 1976) (statement of Sen.

Williams, a chief sponsor of the Senate bill)). Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation[s] for fiduciaries of [such] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). To this end, ERISA's comprehensive civil enforcement scheme empowers a plan "participant" to bring a civil action and obtain "appropriate relief" to redress fiduciary breaches under ERISA § 409, 29 U.S.C. § 1109. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Section 409 renders a plan fiduciary personally liable to the plan for any losses stemming from breaches of his fiduciary duties. 29 U.S.C. § 1109. ERISA broadly defines "participant" to include "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . ." 29 U.S.C. § 1002(7).

A. The plaintiff has standing because he is a former employee who may become eligible to receive additional benefits from his defined contribution plan should he prevail on his allegations of fiduciary breach.

The plaintiff qualifies as a "participant" under the plain terms of ERISA because he is a "former employee" who "is or may become eligible to receive" additional benefits from the Plan if he succeeds on his fiduciary

breach claim. See ERISA § 3(7), 29 U.S.C. § 1002(7). Despite his withdrawal of the moneys in his account, the plaintiff "may become eligible" to receive additional benefits because he was invested in a defined contribution plan. In a defined contribution plan, "benefits [are] based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses . . . which may be allocated to such participant's account." 29 U.S.C. § 1002(34). The amount invested in the participant's account constitutes the participant's vested benefits, and participants are vested in their own contributions and the earnings made on those contributions at all times. See U.S. Gen. Accounting Office, Publ'n No. GAO-02-745SP, Answers to Key Questions About Private Pension Plans 13 (Sept. 18, 2002) [hereinafter GAO Report], available at http://www.gao.gov/new.items/d02745sp.pdf. In a defined contribution plan, the amount of the participant's vested benefits increases in direct proportion to any increase in overall plan assets and diminishes in proportion to any losses. ABA Section of Labor and Employment Law, Employee Benefits Law 175 (2d ed. 2000). Accordingly, the risk of investment performance falls on the employee since all gains and losses are borne directly by the employee's account. Id.; GAO Report at 10.

As a participant in an ERISA-covered defined contribution plan, the plaintiff was entitled to a distribution of the earnings in his account as managed by the Plan's fiduciaries in accordance with ERISA's fiduciary obligations. ERISA protects the interests of plan participants in their retirement benefits by imposing stringent obligations of prudence and undivided loyalty on plan fiduciaries. ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B); see also Kuper v. Iovenko, 66 F.3d 1447, 1453 (6th Cir. 1995) ("ERISA's imposition of a fiduciary duty . . . has been characterized as 'the highest known to law'" (quoting Sommers, 793 F.2d at 1458)). If plaintiff's allegations are true and the Plan fiduciaries breached these obligations, then the breaches caused the Plan to have fewer assets. Because the Plan's assets were diminished as a result of the alleged fiduciary breaches, the plaintiff's account balance was also diminished, and he received a smaller distribution of vested benefits than he was entitled to receive when he withdrew his account balance. In seeking restoration to the Plan for alleged fiduciary breaches that took place before he received his benefits, the plaintiff seeks amounts that can and should be allocated in a manner that ultimately augments his individual vested benefits.[4] These

[4] Even though he no longer has a Plan account, Mr. Bridges may obtain his additional vested benefits through a recovery to the Plan. The district court has the power to establish a constructive trust to distribute any recovery to

amounts are precisely the "vested benefits" to which a plan participant in a defined contribution plan is entitled under ERISA. 29 U.S.C. § 1002(34). Thus, the plaintiff is a "former employee" who is or may become "eligible to receive a benefit" from the Plan in the form of the amount he would have received had the defendants not breached their fiduciary duties. 29 U.S.C. § 1002(7). As such, the plaintiff is a "participant" who has standing to sue under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

Reading the term "participant" to include the plaintiff is fully consistent with the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court considered ERISA's definition of "participant" in the context of ERISA's plan document disclosure provisions. The Court held that, in order to be considered a participant entitled to plan documents, a former employee must either have a "reasonable expectation of returning to covered employment" or "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Id. at 117–18. The plaintiff here has a colorable claim that he will prevail in a suit for benefits

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the participants and beneficiaries. See Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103 (2d Cir. 2005); Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1409–19 (9th Cir. 1988) (finding that a constructive trust may be construed as a "benefit of any type" from an employee benefit plan).

because he alleges that defendants' fiduciary breaches caused losses to the Plan, which reduced the overall amount of vested benefits that he received. If there is a recovery to the Plan for fiduciary breaches that occurred while the plaintiff had an account balance in the Plan, he will have a claim to additional vested benefits.

To hold otherwise would produce the absurd result that when a fiduciary breach causes significant financial loss to a defined contribution plan, thereby substantially diminishing the benefits payable to all accounts, participants will have unequal rights: affected employees who stay in the plan could bring an action to recover their lost benefits, while employees who retired and took a diminished distribution could recover nothing at all. That result cannot be correct—either all affected employees have a "colorable claim" or none do. Certainly, if two participants with equal account balances incur equal losses on the same date, they should both have standing. To find that the participant who had not yet retired retains standing, while the participant who retired—and actually suffered the diminished distribution—does not, would neither promote ERISA's remedial objectives nor comport with its broad definition of "participant." Nothing in ERISA compels such an arbitrary or illogical result.

Courts that have recognized the nature of benefits under defined contribution plans have correctly accorded standing to plaintiffs who were actively invested in those plans at the time of alleged fiduciary breaches even though they had received their account balances at the time suit was brought. For example, in Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989), the Fifth Circuit held that plaintiffs, former participants in a terminated defined contribution profit-sharing plan, had standing to bring an ERISA action against fiduciaries for losses allegedly resulting from the sale of the trust's stock for less than fair market value.[5] Even though the plan had already been terminated and the participants had received the entire value of their vested account balances, the court reasoned that plaintiffs' claim to recover the plan's losses gave them standing. Because the plaintiffs had allegedly received reduced distributions as a result of the fiduciary breach, they had a colorable claim for additional vested benefits. Id. at 349–50.

[5] The district court's characterization of the claim in Sommers as a claim for "miscalculated benefits" is incorrect. The Sommers' plaintiffs were not claiming that plan fiduciaries made arithmetic errors or applied the terms of the plan incorrectly, but instead alleged that plan fiduciaries sold the plan stock for less than fair market value, resulting in a diminution of the amount of money held by the plan and, ultimately, the amount received by participants as benefits.

Contrary to the district court's conclusion, the plaintiff's claim here is legally indistinguishable from the plaintiffs' claim in Sommers. Like the plaintiffs in Sommers, the plaintiff here seeks relief that clearly could affect the amount of vested benefits that he will ultimately receive from the Plan. Mr. Bridges was a plan participant when the alleged fiduciary breaches occurred and, as in Sommers, he alleges that the breaches caused a loss to the Plan which reduced the amount of vested benefits that he received. As in Sommers, the Plan distributed the account balances to the Plan's participants in accordance with the plan terms, but the amounts were reduced because of fiduciary misconduct. And, as in Sommers, if the plaintiff is successful in his suit and losses to the Plan are restored, his vested benefits will be augmented. Thus, this case and Sommers are identical in all legally significant respects. Despite having received payment of vested benefits when he left the plan, Mr. Bridges, like the plaintiffs in Sommers, has a colorable claim that he is still "eligible to receive a benefit of any type" in the form of an additional recovery from the Plan and, accordingly, is a "participant" for purposes of ERISA standing.

A large number of district courts have properly followed Sommers to grant standing to former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach. See, e.g.,

Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 923 (S.D. Ohio 1993) (holding that former employees who claimed that the amount in their defined contribution plan, and thus their lump-sum distributions, were diminished because of fiduciary breaches retained a colorable claim to vested benefits and had standing to sue); In re Polaroid ERISA Litig., No. 03 Civ. 8335, 2006 WL 2792202 (S.D.N.Y. Sept. 29, 2006) (holding that former employees have standing as participants where they alleged that the distributions they received from their defined contribution plan were reduced because of fiduciary breaches) (attached as Addendum A to this brief); In re Mut. Funds Inv. Litig., 403 F. Supp. 2d 434, 441–42 (D. Md. 2005) (holding that former employees have colorable claims to vested benefits when they did not receive all the benefits they were due upon withdrawing from a defined contribution plan as a result of fiduciary breaches); In re Williams Cos. ERISA Litig., 231 F.R.D. 416, 422–23 (N.D. Okla. 2005) (holding that former employees have colorable claims to vested benefits where their account balances would have been larger at the time they took their distributions from a defined contribution plan if there had been no fiduciary breach); Rankin v. Rots, 220 F.R.D. 511 (E.D. Mich. 2004) (holding that a former employee has standing where he was a participant in the defined contribution plan during the time when the alleged breaches of fiduciary

duty occurred); Thompson v. Avondale Indus., Inc., No. Civ.A. 99-3439, 2001 WL 1543497, at *2 (E.D. La. Nov. 30, 2001) (unpublished) (attached as Addendum B to this brief).

The district court's reliance on the Ninth Circuit's pre-Sommers decision in Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986) (per curiam), is misplaced because Kuntz involved plaintiffs in a defined benefit pension plan who had already received all of their promised benefits, undiminished by any fiduciary breach. The Kuntz court held that former employees who filed suit after they had received all of their vested benefits in a defined benefit plan lacked standing under ERISA. 785 F.2d at 1411. In a defined benefit plan, the participant is promised a fixed benefit according to a formula set forth in the plan document, usually dependent on factors like an employee's years of service and final salaried income. GAO Report at 8–10; Wilson v. Bluefield Supply Co., 819 F.2d 457, 459 (4th Cir. 1987) (noting that a defined benefit plan is "designed and administered to provide fixed—or 'defined'—benefits to the participants based on a benefit formula set forth in the Plan"); see also Phillips v. Alaska Hotel & Rest. Employees Pension Fund, 944 F.2d 509, 512 (9th Cir. 1991).[6] In contrast to defined

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[6] The employer is required to make contributions to the plan, and the assets of the plan are invested to insure that there will be sufficient money in the

contribution plans, the amount of the benefit for each participant in a defined benefit plan does not increase or decrease when the plan experiences gains or losses. GAO Report at 8–10.[7] Thus, when an employee retires and receives a lump sum distribution from a defined benefit plan, that employee has received all the benefits that he is entitled to receive under the plan. Thus, Kuntz and other cases involving defined benefit plans, are inapposite; the plaintiff in Kuntz, unlike the plaintiff here or in Sommers, had received all of the benefits they had been promised, unreduced by any fiduciary breach.

A number of district courts (including several cited in the district court opinion) have incorrectly denied standing to former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach.[8] These cases, several of which are on appeal, see supra

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plan to cover the promised benefits when employees retire. GAO Report at 8–10.

[7] Also unlike defined contribution plans, in defined benefit plans the risk of investment performance is shouldered by the employer. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999). In addition, defined benefit plans are covered by ERISA's pension insurance program. Connolly v. PBGC, 475 U.S. 211, 230 (1986). In contrast, defined contribution plans are not covered by ERISA's insurance program. GAO Report at 10.

[8] See e.g., Graden v. Conexant Sys., Inc., No. 05-0695, 2006 WL 1098233 (D.N.J. Mar. 31, 2006), appeal docketed, No. 06-2337 (3d Cir. Apr. 27, 2006) (attached as Addendum C to this brief); In re RCN Litig., No. 04-

note 8, fail to account for the nature of benefits under a defined contribution plan. Specifically, the decisions disregard the fact that the amount of a participant's vested benefits in a defined contribution plan increases in direct proportion to any increase in overall plan assets and decreases in proportion to any losses.

In sum, the plaintiff has a "colorable" claim that the defendants breached their duties by, among other actions, imprudently continuing to allow investment of plan assets in AEP stock despite knowing that the stock price was artificially inflated. The plaintiff also has a "colorable" claim that these breaches caused losses to the Plan which directly resulted in a decrease in the amount of benefits the plaintiff received when he withdrew his account. The plaintiff seeks nothing more and nothing less than the amount he should have received when he withdrew from the Plan, and that he would have received but for the fiduciary breach. Such a claim is a claim for vested benefits under ERISA. Because the plaintiff presents a colorable

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5068, 2006 WL 753149 (D.N.J. Mar. 21, 2006) (attached at Addendum D to this brief); Holtzscher v. Dynegy, Inc., No. 05-3293, 2006 WL 626402 (S.D. Tex. Mar. 13, 2006), appeal docketed, No. 06-20297 (5th Cir. Apr. 18, 2006) (attached at Addendum E to this brief); LaLonde v. Textron, Inc., 418 F. Supp. 2d 16 (D.R.I. 2006) (settled on appeal); In re Admin. Comm. ERISA Litig., No. C03-3302, 2005 WL 3454126 (N.D. Cal. Dec. 16, 2005) (attached as Addendum F to this brief); Hargrave v. TXU Corp., 392 F. Supp. 2d 785 (N.D. Tex. 2005), appeal docketed, No. 05-11482 (5th Cir. Dec. 29, 2005).

claim to additional vested benefits under his defined contribution plan, he has standing under the statute.

B. Reading ERISA to deny plaintiffs standing to sue when they have received a lump-sum distribution that was diminished as a result of a fiduciary breach is contrary to the purposes and policies of ERISA.

Affirming the district court's narrow reading of ERISA's standing requirements would undermine the remedial goals of ERISA, "[t]he primary purpose of [which] is the protection of individual pension rights." H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4639; see also Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (noting that one of ERISA's basic remedies for a breach of fiduciary duty is "to restor[e] plan participants to the position in which they would have occupied but for the breach of trust"). Courts have broadly construed ERISA's standing requirements in order to effectuate these remedial purposes. See Leuthner v. Blue Cross & Blue Shield, 454 F.3d 120, 128–29 (3d Cir. 2006) (holding that Congress intended "federal courts to construe [ERISA's] statutory standing requirements broadly in order to facilitate enforcement of its remedial provisions"); Vartanian v. Monsato Co., 14 F.3d 697, 702 (1st Cir. 1994) ("[t]he legislative history of ERISA indicates that Congress intended the federal courts to construe the Act's jurisdictional requirements broadly in order to facilitate enforcement of its remedial provisions"). The term

"participant" should not be read to close the courthouse doors to former employees who, like the plaintiff here, have allegedly not received all that they are due under their plan.

A holding affirming the district court would produce the incongruous result that fiduciaries could deprive employees of the right to seek redress for serious violations of ERISA simply by making distributions or terminating the plan altogether. See Rankin, 220 F.R.D. at 519–20 (recognizing absurdity of allowing employers to cut off participant status simply by paying some level of benefits); Vartanian, 14 F.3d at 702 ("[s]uch a holding would enable an employer to defeat the employee's right to sue for a breach of fiduciary duty by keeping his breach a well guarded secret until the employee receive[d] his benefits or, by distributing a lump sum and terminating benefits before the employee can file suit"); Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1418–19 (9th Cir. 1988) ("were we to hold that payment of plan benefits cuts off the standing to sue of plan beneficiaries, we would, in effect, be saying that a fiduciary . . . has the power to deprive plan beneficiaries of standing to sue the fiduciary for misuse of plan assets"). ERISA should not be read to deny employees the right to recover what is rightfully theirs under the plan simply because they received a reduced distribution of benefits.

Moreover, the possibility that employees will leave employment and take lump-sum distributions without realizing that their benefits have been reduced by a fiduciary breach is particularly significant in the case of defined contribution plans, like the plan at issue in this case. Defined contribution plans are designed to be portable—participants can change jobs and take their retirement benefits with them by receiving a distribution of their plan accounts and either rolling the money over into individual retirement accounts or depositing it into their new employer's plan. GAO Report at 10. Former employees' interest in being paid the full amount that they are owed by the plan is no less great than those of current employees who continue to work and participate in the plan. By holding that these former employees lack standing to sue despite the fact that the benefits they received were allegedly diminished because of fiduciary breaches defeats the purposes of ERISA and endangers employees' retirement security.

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court reverse the decision of the district court denying class certification and dismissing the case.

Respectfully submitted,

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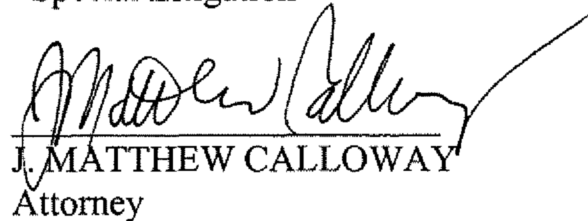

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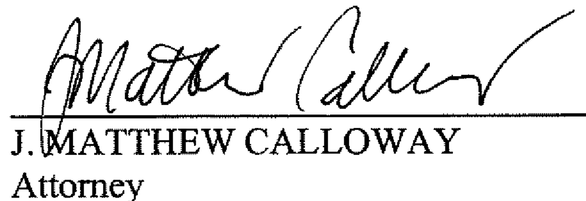

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I hereby certify that on this 19th day of October 2006, 2 copies of the Brief of the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant and Requesting Reversal were served, via Federal Express courier service, to the parties listed below:

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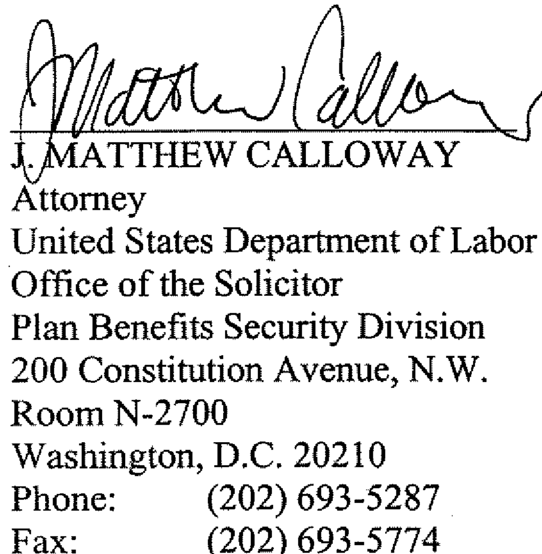

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