01-9220

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MARC ANDREW MARIO,

Plaintiff-Appellant,

v.

P & C FOOD MARKETS, INC.,

Defendant-Cross-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Brief of Secretary of Labor as Amicus Curiae in Support of Appellee

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QUESTION PRESENTED

Whether ERISA § 102, 29 U.S.C. § 1022, or the corresponding regulations, 29 C.F.R. § 2510.102-3, require a summary plan description ("SPD") to state that the plan itself grants the plan administrator discretion to interpret the plan in order for the plan administrator's exercise of discretion to be given deference upon judicial review.

INTEREST OF THE DEPARTMENT OF LABOR

The Secretary of Labor has primary enforcement authority for Title I of ERISA. The Secretary's interests in this regard include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). Furthermore, the Secretary issued the regulation at the center of the dispute in this case. Thus, the Secretary has a specific and substantial interest here in assuring that the court correctly interprets and applies her regulation. This brief is submitted in response to the court's order of July 12, 2002, inviting the Secretary to express her views on the issue of whether, under the relevant statutory and regulatory provisions, an SPD must specify that discretion is given to the plan administrator.

STATEMENT OF THE CASE

A. Statement of the facts

Marc Mario, the plaintiff, was born in 1955 as Margo Mario, a female. Mario v. North American Health Plans, Inc., 98-CV-264A, slip op. at 2 (Mag. March 12, 2001). In September 1996, Mario underwent a hysterectomy and double mastectomy as treatment for the "gender dysphoria," or transsexualism, from which he allegedly suffered. Id. He then sought reimbursement through his employer's ERISA-covered health care plan. Id. After researching gender dysphoria and possible treatments, the plan administrator denied Mario's claim on the grounds that the surgery was not "medically necessary" within the meaning of that term under the plan. Id. at 3.

Mario then sought judicial review of the benefit determination. He alleged that the plan had improperly denied him benefits and that he had been discriminated against on the basis of his gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and Section 296 of the New York Human Rights Law, N.Y. Executive Law § 296. Mag. Recommendation at 2.

B. Decision below

The plan administrator filed a motion for summary judgment, arguing that he had not acted arbitrarily and capriciously in denying Mario's claim for medical benefits, and that the plan's refusal to cover the hysterectomy and mastectomy did not constitute sex discrimination under the federal or state discrimination laws. The district court, adopting the magistrate judge's report and recommendation, granted the administrator's motion, holding that the administrator was entitled to deference because the plan document gave it discretionary authority over questions of plan interpretation.[1] Mario v. North American Health Plans, Inc. and P&C Food Markets, Inc., No. 98-CV-264A, slip op. at 2 (W.D.N.Y. Sept. 26, 2001). The magistrate judge had rejected Mario's argument that the SPD must refer to the administrator's discretionary authority for an arbitrary and capricious standard to apply. Mag. Recommendation at 5. The magistrate judge deferred to the administrator's decision, finding that "[t]he requisite grant of authority may be derived from any number of plan documents, including the plan itself." Id.

[1] The court also ruled in favor of the defendant on the claims arising under Title VII and the New York Human Rights Law.

Mario timely appealed. After the case was briefed and oral argument heard, the Court of Appeals ordered the parties to brief the issue outlined above and requested that the Secretary of Labor also brief the issue.

ARGUMENT

AN SPD NEED NOT CONTAIN INFORMATION CONCERNING THE DISCRETION AFFORDED THE PLAN ADMINSITRATOR TO INTERPRET PLAN TERMS

ERISA requires that an SPD be furnished to plan participants and beneficiaries. ERISA § 102, 29 U.S.C. § 1022. ERISA further provides that the SPD "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." Id. Thus, the purpose of the SPD is to provide plan participants with a summary of the information necessary for them to understand the benefits available under the plan, as well as their rights and obligations as plan participants.

In order to flesh out these requirements, both the text of the statute and the accompanying regulations identify specific items to be disclosed in the SPD. These include the name and type of administrator of the plan, whether a health insurance issuer is responsible for the financing or administration of the plan, the name of the agent for service of legal process,

the names of the trustees and administrator, eligibility requirements for participation and benefits, the source of plan financing, the procedure for presenting claims for benefits under the plans, and, as most relevant here, circumstances that may result in disqualification, ineligibility, denial, or loss of benefits. ERISA § 102(b), 29 U.S.C. § 1022(b); 29 C.F.R. § 2520.102-3.

This detailed list of mandatory disclosures does not expressly require an SPD to specify whether the plan gives the plan administrator discretion over matters of plan interpretation. This Court has asked, however, whether such a grant of discretionary authority comes under the rubric of "circumstances which may result in . . . denial . . . of any benefits that a participant . . . might otherwise reasonably expect the plan to provide." 29 C.F.R. § 2520.102-3(l). Although the Secretary has not previously addressed the issue, the Secretary has concluded, based on both the text and purposes of the relevant statutory and regulatory provisions, that a grant of discretion is not a "circumstance[] that may result in the denial of benefits", and therefore an SPD need not include information on whether the plan grants discretion in interpreting the plan document to the plan administrator.[2]

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[2] The Secretary has interpreted the disputed language in the context of plan terminations. In published guidance, she stated that plan termination is a circumstance which may result in a denial or loss of benefits and that the

As the Secretary's regulation recognizes, it is important in this regard for participants to know the circumstances that may result in a denial of benefits so that they do not forfeit valid claims by failing to exercise their rights or fulfill their obligations (e.g., by filing untimely or making improper claims). The grant of authority to interpret plan provisions, however, is not a circumstance that could cause a loss or denial of benefits, such as a failure to pay employee contributions, an untimely filing of an appeal, or plan termination. The grant of such discretion is no more likely to result in a denial of benefits than in a determination favorable to the claimant, as the administrator must, in any case, follow the terms of the plan. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Indeed, the grant of discretion primarily functions simply to determine the standard of judicial review after the claims process is complete and litigation has begun. See 29 C.F.R. § 2560.503-1(h)(3)(ii) (a group health plan must "provide for a review that does not afford deference to an initial adverse benefit determination"). Where a plan grants discretion, a reviewing court must then defer to the administrator's interpretation of the plan. Firestone v. Bruch, 489 U.S. 101, 115 (1989) (if the plan gives the administrator discretionary authority over

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SPD must include termination provisions. 11 BNA Pension Reporter 653-54 (May 14, 1984).

plan interpretation, the courts should apply a deferential standard of review to the administrator's benefit decisions). Knowledge of the discretion granted to the plan administrator and the resulting standard of review would not further in any way a participant's understanding of the circumstances that could cause a denial of benefits, nor would it help participants avoid potentially harmful procedural missteps or assist them in understanding their substantive rights under the plan. The SPD, therefore, need not include that information.

The model statement of ERISA rights set forth in the regulation does not include a statement concerning the plan administrator's discretion or the governing standard of review. 29 C.F.R. § 2520.102-3(t). This model statement is designed to inform participants of their procedural rights under ERISA, including their rights to internal appeals and judicial review. Id. An SPD adequately informs participants of their procedural rights if it includes the statements set forth in the model. 29 C.F.R. § 2520.102-3(t)(2). Because the Secretary did not include a reference to the discretion granted to a plan administrator in the model statement, in her view an SPD need not mention that discretion in order to meet this requirement. Thus, in the Secretary's view, there are no grounds upon which to require the SPD to

inform participants about the deference, if any, granted the plan administrator.

This conclusion comports with the decisions of every appellate court to have considered the issue. These courts unanimously held that the SPD need not include information on the discretion granted the plan administrator in order to comply with ERISA § 102, 29 U.S.C. § 1022. Cagle v. Brunner, 112 F.3d 1510, 1517 (11th Cir. 1997) (rejecting plaintiff's argument that an explanation of the discretion held by the plan administrator must be in the SPD); Wald v. Southwestern Bell Corp. Customcare Medical Plan, 83 F.3d 1002, 1006 (8th Cir. 1996) (an SPD need not contain a description of a plan administrator's discretion); Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317, 1321 (9th Cir. 1995) (holding that the provision regarding discretion "has no bearing on the *events* or *actions* determinative of eligibility under the plan" and therefore need not be included in the SPD); accord The Utah Alcoholism Foundation v. Battelle Pacific Northwest Laboratories Non-Bargaining Unit Employees' Comprehensive Medical Benefits Plan, 204 F. Supp.2d 1295, 1301 (D. Utah 2002); cf. Martin v. Blue Cross & Blue Shield of Va, Inc, 115 F.3d 1201, 1205 (4th Cir. 1997) (holding that a plan provision conferring the discretion did not conflict with SPD, which was

silent on the issue, and that provision conferring discretion was therefore controlling).

This Court should follow the lead of its sister courts and decline to add new disclosure requirements that tell participants little or nothing about the substantive terms of their plans or how to effectively assert their claims. It is important that the SPD remain a "summary" document if it is to serve its function of advising participants of important rights and obligations "in a manner calculated to be understood by the average plan participant." ERISA § 102, 29 U.S.C. § 1022; 29 C.F.R. § 2520.102-2. As a summary document, the SPD need not and should not include every plan provision, or it runs the risk of diverting participants' attention from what is most relevant to protecting their rights and protecting their interests. For this reason, the statute and the regulation require an SPD to inform participants concerning the most important information about their plan, and to do so in a manageable, summary form.

Significantly, the inclusion of a reference to the administrator's discretion would not enhance the typical participant's understanding of his plan or his rights, even if accompanied by a technical explanation of the standard of review under Firestone and the relationship between the Supreme Court's holding in Firestone and the grant of discretion to the plan

administrator. Furthermore, if a participant wants information beyond that required in the SPD, including information on the administrator's discretion, the participant can obtain it since ERISA requires that the plan documents be made available to participants to view in a central location as well as copied upon request. ERISA §§ 104(b)(2) and (4), 29 U.S.C. § 1024(b)(2) and (4). Requiring that an SPD contain information on the discretion granted to the plan administrator and the resulting standard of judicial review, however, would not further the statutory goal of providing necessary information to participants in an understandable and summary form.

CONCLUSION

For the reasons cited above, the court should rule that nothing requires an SPD to identify the discretion granted to a plan administrator.

Respectfully submitted this 10th day of September, 2002,

Sara Pikofsky

Sara Pikofsky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Secretary of Labor's brief as amicus curiae was served upon the clerk of the Second Circuit Court of Appeals and counsel of record listed below, charges prepaid, this 10th day of September 2002:

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