No. 06-1616-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JEREMY DICKERSON,
Plaintiff-Appellant,
v.

SHEILA FELDMAN, HELEN NELLING, SUSAN E. BEVINGTON, CHRISTOPHER N. AST, EMPLOYEE BENEFITS PLAN COMMITTEE, PENSION AND SAVINGS FUND COMMITTEE, JOHN HUNTER, ROBERT CLAUSEN, ROBERT POTTER, THE NORTHERN TRUST CO., JOHN DOES 1-100, ROBERT T. BLAKELY, PAUL DONOVAN, PAUL H. HATFIELD, ROBERT H. JENKINS, PHILIP R. LOCHNER, JR., FRANK A. METZ, JR., MICHAEL E. MILLER, J. PATRICK MULCAHY, SALLY G. NARODICK, WILLIAM D. RUCKELSHAUS, JOHN B. SLAUGHTER and NANCY STEMME,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT

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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, Solutia, Inc. The plaintiff, who withdrew his account from the Solutia Savings and Investment Plan ("Plan") shortly after terminating his employment, claims that while he was employed by Solutia, the defendants breached their fiduciary duties under ERISA, causing losses to the Plan. As a result of the losses, the plaintiff's distributions were less than they 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 section 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 the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. See Secretary 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. Here, the district court wrongly found that ERISA deprives the plaintiff of standing

to sue merely because the plaintiff terminated his employment and received distributions of his Plan accounts. If the plaintiff's allegations are correct, the defendants' fiduciary breaches caused losses to the defined contribution plan before the plaintiff terminated his employment and withdrew from the Plan, and thus the defendants caused a diminution in the amount of benefits the plaintiff received when he left the Plan. Because this diminution in benefits gives the plaintiff a "colorable claim" to increased benefits, plaintiff has standing under ERISA to sue.

STATEMENT OF THE FACTS

1. Named plaintiff Jeremy Dickerson is a former employee of Solutia, Inc., an independent spin-off of the Monsanto Company. Complaint ("Compl.") at ¶¶ 13, 100; see also Dickerson v. Feldman, 426 F. Supp. 2d 130, 133 (S.D.N.Y. 2006). Dickerson invested in the Solutia Savings and Investment Plan until shortly after his employment ended in October, 2003. Compl. ¶ 13; 426 F. Supp. 2d at 132. On July 12, 2004, the plaintiff voluntarily withdrew his Plan accounts. 426 F. Supp. 2d at 133.

The Solutia Savings and Investment Plan is a defined contribution plan under ERISA § 3(34), 29 U.S.C. § 1002(34), established for the benefit of employees of Solutia, Inc. Compl. ¶¶ 50, 51, 53. 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 forfeitures of accounts of

other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).[1] During the time period relevant to this case, employees of Solutia could make contributions to the Plan, which were invested in one of a number of different funds at the employees' direction. Compl. ¶¶ 53-57. One of these funds was an employer stock fund, which invested in Solutia stock. Id. ¶ 57; see also Dickerson, 426 F. Supp. 2d at 132-33. Solutia also could make matching and discretionary contributions to the Plan. Compl. ¶¶ 51, 60, 61. These matching and discretionary contributions were made in Solutia stock. 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 Solutia and the Northern Trust Company, which was responsible for Plan administration. Compl. ¶¶ 2-4. The plaintiff alleges that, as Plan fiduciaries, the defendants breached their duties under ERISA between September 1, 1997, and December 15, 2003, by continuing to invest Plan assets in Solutia stock up until two days before Solutia declared

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[1] In a defined contribution plan, participants are vested in their own contributions and earnings made on those contributions at all times. A participant becomes vested in employer contributions and earnings made on those contributions when the participant fulfills the plan's criteria—often a requirement that the participant work for the employer for a certain number of years. See United States General Accounting Office, Answers to Key Questions about Private Pension Plans, GAO-02-745SP at 14 (Sept. 18, 2002), available at http://www.gao.gov/new.items/d02745sp.pdf.

bankruptcy and after they were aware of Solutia's "precarious financial condition." Compl. ¶ 2. The plaintiff also alleges that Solutia stock was "an imprudent investment since it was both artificially inflated in price and too speculative to serve as a retirement investment." Id. These fiduciary breaches allegedly caused a loss to the Plan. Id. ¶ 6.[2]

Defendants moved to dismiss, arguing inter alia that the named plaintiff was not a participant in the Plan within the meaning of ERISA and thus lacked standing to sue. Def. Solutia's Mem. in Supp. of Mot. to Dismiss 8-13. Under the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989), former employees are plan participants under ERISA if they have "a reasonable expectation of returning to covered employment or . . . a 'colorable claim' to vested benefits." The defendants contended that the plaintiff, who had withdrawn the full value of his plan accounts and had no expectation of returning to covered employment, had no "colorable claim to vested benefits." Def. Solutia's Mem. in Supp. of Mot. to Dismiss 11.

The plaintiff countered that he had a colorable claim to vested benefits because he had not received all benefits due to him under the Plan. But for the defendants' breach of their fiduciary duties, both the total amount of plan assets

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

and the plaintiff's account would have been greater. Pl.'s Mem. in Opp. to Mot. to Dismiss 11.

2. In an order dated March 30, 2006, the district court dismissed the plaintiff's claims, holding that the plaintiff lacked standing to sue under ERISA. Dickerson, 426 F. Supp. 2d at 130, 135. ERISA creates a right of action only for participants, beneficiaries, and fiduciaries of benefits plans. Id. at 134 (citing 29 U.S.C. § 1132(a)(3)). In defining "participants" to include "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have a 'colorable claim' to vested benefits," Firestone, 489 U.S. at 117 (alteration in original; citation omitted), the Supreme Court adopted in part the definition of "participant" set out in Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir. 1986). The district court read Kuntz – a case involving a defined benefit plan – to deny standing to former employees whose vested benefits had already been distributed in a lump sum, and concluded that "a plaintiff lacks standing to sue under ERISA where he has taken a final distribution of vested benefits under a defined contribution plan." Dickerson, 426 F. Supp. 2d at 135.

The district court rejected the plaintiff's contention that he had a reasonable expectation of returning to covered employment, because the plaintiff had made no specific request for reinstatement. 426 F. Supp. 2d at 136. Nor did the plaintiff have a colorable claim to vested benefits, according to the district court, because

the plaintiff no longer held a plan account and "the Court would be powerless to craft a remedy in which [plaintiff], a non-participant in the Plan, would have any stake." Id. The district court concluded, on this basis, that the plaintiff could not satisfy the redressability element of Article III standing.

In holding that the plaintiff did not have a colorable claim to vested benefits, the district court distinguished Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994), where this Circuit observed that a plaintiff has standing under ERISA if he is "within the 'zone of interests ERISA was intended to protect.'" Dickerson, 426 F. Supp. 2d at 136 (citation omitted). The Mullins plaintiff claimed that he did not receive the full amount due to him under a defined contribution plan because plan fiduciaries knew and deliberately concealed from him their decision to offer employees certain enhanced retirement benefits. He argued that, but for the defendants' misrepresentations, he would have prolonged his retirement in order to receive the enhanced benefits. According to the district court, the Mullins plaintiff could have standing under ERISA because "the purpose of ERISA would be frustrated if the employer were permitted through its own malfeasance to defeat the employee's standing." Dickerson, 426 F. Supp. 2d at 137 (internal quotation marks and citations omitted). By contrast, according to the district court, because the Dickerson plaintiff did not allege that he was misled into cashing out his benefits,

the holding in Mullins was "irrelevant." Id. The district court granted the defendants' motion to dismiss and this appeal followed.

SUMMARY OF THE ARGUMENT

The plaintiff has standing under ERISA to sue as a former employee who seeks to recover losses to the Solutia Savings and Investment Plan which, when paid, will likely cause him to receive an additional distribution of benefits. ERISA allows plan participants to sue to remedy fiduciary breaches, and it 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." 29 U.S.C. § 1002(7). The plaintiff's claim is that fiduciary breaches caused losses to the Plan, and, because benefits under defined contribution plans are linked directly to the performance of the plans' assets, 29 U.S.C. § 1002(34), caused a corresponding diminution in the amount of the benefits that he received upon pay-out. If plaintiff prevails on this claim and the plan recovers its lost assets, plaintiff will likely be entitled to receive an augmentation of the benefits he received at pay-out. As such, the plaintiff "may become eligible to receive a benefit" and meets the statutory definition of participant. Because he has a "colorable claim" to vested benefits, the plaintiff also meets the Supreme Court's definition of "participant" in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989). A former employee such as the

plaintiff here who receives less than he should have when he leaves the plan because of fiduciaries' mismanagement of pension plan assets is precisely the type of plaintiff that the statute was designed to protect.

ARGUMENT

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

Congress enacted ERISA following the economic collapse of the Studebaker-Packard Corporation as a direct response to the inadequacies of the existing pension laws, which failed to ensure that the terminated Studebaker employees received the pensions that they had been promised. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980) (quoting 2 Legislative History of ERISA 1599-1600 (Comm. Print 1976) (statement of Sen. Williams, one of the chief sponsors of the bill)). In enacting ERISA, Congress sought "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of [such] plans," and by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

To this end, ERISA's comprehensive civil enforcement scheme provides, in section 502(a)(2), 29 U.S.C. § 1132(a)(2), that "a civil action may be brought" by a plan "participant" to obtain "appropriate relief " under ERISA section 409, 29

U.S.C. § 1109. Section 409 makes a plan fiduciary personally liable to the plan for any losses stemming from fiduciary breaches. The statute expansively 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." 29 U.S.C. § 1002(7).

A. Plaintiff has standing because he is a former employee who may become eligible to receive additional benefits from the Solutia Savings and Investment Plan

The plaintiff qualifies as a "participant" under the plain terms of the statute because he is a "former employee" who "may become eligible to receive" additional benefits from the Solutia Savings and Investment Plan if he succeeds on his fiduciary breach claim. The plan at issue here is a defined contribution plan within the meaning of section 3(34) of ERISA, 29 U.S.C. § 1002(34). In such a plan, "benefits [are] based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). The amount in the participant's account constitutes the participant's vested benefits. See United States General Accounting Office, Answers to Key Questions about Private Pension Plans, GAO-02-745SP at 13 (Sept. 18, 2002) ("GAO Report"), available at http://www.gao.gov/new.items/d02745sp.pdf. Thus, the amount of the participant's vested benefits in a defined contribution plan

increases in direct proportion to any increase in overall plan assets and diminishes in proportion to any losses.

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 plan fiduciaries in accordance with ERISA's fiduciary obligations. Because the fiduciary breaches alleged by the plaintiff resulted in fewer assets in the Plan, the plaintiff received less than he should have when he withdrew his benefits from the Plan. In seeking restoration to the Solutia Savings and Investment 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 benefits.[3] These amounts are precisely the "benefits" to which a plan participant in a defined contribution plan is entitled under ERISA. 29 U.S.C. § 1002(34). Thus, plaintiff may be "eligible to receive a benefit" from the Solutia Savings and Investment Plan – the amount he would have received had the defendants not breached their fiduciary duties – and has standing to sue under ERISA section 502(a)(2). 29 U.S.C. §§ 1002(7), 1132(a)(2).

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[3] If the plaintiff here proves his claim and no longer has a plan account, the district court may set up a constructive trust to distribute any recovery to 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 (9th Cir. 1988). Thus, the district court incorrectly stated that it is powerless to craft a remedy. Dickerson, 426 F.Supp.2d at 136.

Reading the term "participant" to include the plaintiff here 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 the statutory definition of "participant" in the context of a suit to enforce ERISA's plan document disclosure provisions. Id. at 107. 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. Plaintiff has a colorable claim that he will prevail in a suit for benefits, because he alleges that defendants' fiduciary breaches caused losses to the Plan and reduced the overall amount of benefits to which he was entitled. Thus the plaintiff is a "participant" as that term is defined in Firestone.[4]

To hold otherwise would produce the absurd result that when a fiduciary breach causes significant financial losses to a defined contribution plan, thereby substantially diminishing the benefits payable to all of the plan's participants, affected employees who stayed in the plan could bring an action to recover their lost benefits, while employees who retired and took a diminished distribution could

[4] The plaintiff also argues that he has standing under Firestone because he has a reasonable expectation of returning to covered employment. The Secretary does not address that argument.

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, it would neither promote ERISA's remedial objectives nor comport with its broad definition of "participant" to find that the participant who had not yet retired retains standing to recover the losses sustained in his account, but that the participant who had actually received a retirement distribution, which was reduced to the same extent because of the exact same breach, did not have standing. Nothing in ERISA compels such an arbitrary or illogical result.

Indeed, this Circuit has recognized that Firestone should not be read to unduly restrict standing in ERISA cases. See Mullins v. Pfizer, Inc., 23 F.3d 663, 668 (2d Cir. 1994) (discussing Vartanian v. Monsanto Co., 14 F.3d 697, 701 (1st Cir. 1994) and Christopher v. Mobile Oil Corp., 950 F.2d 1209, 1221 (5th Cir. 1992)).[5] As this Circuit observed, the Supreme Court's "discussion in Firestone [of the ERISA term 'participant'] was not developed in the 'standing' context and 'did not mandate a finding' of lack of standing" in a fiduciary breach claim where the

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[5] See also Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 790-91 (7th Cir. 1996) (finding the Supreme Court's language in Firestone does not support an overly technical and narrow reading of "vested benefits," but instead suggests that the phrase should be interpreted expansively and "[t]he requirement of a colorable claim is not a stringent one."); Davis v. D.L. Featherstone, 97 F.3d 734, 737-38 (4th Cir. 1996) ("A claim is colorable if it is arguable and nonfrivolous, whether or not it would succeed on the merits.").

employee had already received payments from the plan. Mullins, 23 F.3d at 668 (citing Vartanian, 14 F.3d at 701). Instead, this Court held that "ERISA's goal of deterring fiduciary misdeeds" supports a "broad view of participant standing under ERISA." Financial Institutions Ret. Fund v. Office of Thrift Supervision, 964 F.2d 142, 149 (2d Cir. 1992); see also Vartanian, 14 F.3d at 702 ("The 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 . . . .").

Consequently, in this Circuit, "the basic standing issue [under ERISA] is whether the plaintiff is 'within the zone of interests ERISA was intended to protect.'" Mullins, 23 F.3d at 668 (emphasis omitted); see also, e.g., Leuther v. Blue Cross & Blue Shield, __ F.3d __, 2006 WL 1881438, at *5 (3d Cir. July 10, 2006) (attached as Appendix E to this brief) (concluding that ERISA's statutory standing requirements are a codification of the "zone of interest" analysis).[6] A former employee, like the plaintiff here, who received less than he should have because of fiduciaries' mismanagement of pension plan assets, is precisely the type

[6] Disregarding this Circuit's endorsement in Mullins of the prudential standing "zone of interest" analysis, the district court instead combined constitutional and statutory standing analyses to deny plaintiff standing in this case. The district court held that the plaintiff lacked Article III standing because his injury was not redressable, and that his injury was not redressable because he could not obtain individual relief under ERISA. See Dickerson, 426 F. Supp. 2d at 135. Because the plaintiff's injury is redressable in a suit brought under ERISA section 502(a)(2), he has both statutory and constitutional standing.

of plaintiff that the statute was designed to protect. Such a participant, therefore, should have standing to sue.

The district court incorrectly read Mullins as applicable only to cases where the defendant has misled the plaintiff into cashing out his benefits. The fiduciary breach at issue in Mullins was the defendant's intentional misrepresentations regarding the future availability of enhanced retirement benefits. Mullins, 23 F.3d at 667-68. The plaintiff argued that, "but for" the defendant's breach, he would have received the enhanced retirement benefits because he would not have retired.[7] In holding that the plaintiff had standing, the Court stated that to rule otherwise "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 receives his benefits or, by distributing a lump sum and terminating benefits before the employee can file suit." Id. Thus, Mullins supports the principle that plaintiffs who receive lump-sum distributions from a defined contribution plan have

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[7] Other courts of appeals have adopted a similar "but for" test applicable to cases where the plaintiffs claim that the challenged fiduciary breaches led to their status as former plan participants. See Swinney v. Gen. Motors Corp., 46 F.3d 512, 519 (6th Cir. 1995); Christopher, 950 F.2d at 1221; Murdock, 861 F.2d at 1410; but see Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1536 (10th Cir. 1993) (reasoning that "[t]o say that but for [the employer's] conduct, plaintiffs would have standing is to admit that they lack standing"); Stanton v. Gulf Oil Corp., 792 F.2d 432, 435 (4th Cir. 1986) ("The effect of reading in a 'but for' test is to impose participant status on every single employee who but for some future contingency may become eligible.") (emphasis omitted).

standing to sue as participants if they allege that fiduciary breaches reduced the amount they would have otherwise received. Id.

This case is similar to Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 348-50 (5th Cir. 1989), where the Fifth Circuit held that a plaintiff similarly situated to the plaintiff here had standing to sue under ERISA. The court held that plaintiffs who had been participants in a terminated defined contribution 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. The court reasoned that the claim was akin to a claim by a former participant for miscalculated benefits, and thus concluded that the plaintiffs had a colorable claim to vested benefits even though they had already received a lump-sum distribution from the terminated plan. Id. at 349-50.

Like the plaintiffs in Sommers, the plaintiff in this case seeks relief that could affect the amount of benefits to which he was entitled when he received his lump sum distribution. The plaintiff was a plan participant when alleged fiduciary breaches occurred that caused losses to the Plan. Compl. ¶ 2. Just as in Sommers, the plaintiff here alleges that his benefits were adversely affected by the fiduciaries' imprudence and disloyalty and, if the plaintiff is successful in his suit and losses to the Plan are restored, his benefits should be augmented. Thus, despite having cashed out his benefits from the Plan, plaintiff has a colorable claim that he is still

"eligible to receive a benefit of any type" from the Plan and accordingly is a "participant" for purposes of ERISA standing. 29 U.S.C. § 1002(7).

To be sure, some district courts (including several cited in the district court opinion) have disregarded Sommers to hold that standing under ERISA does not extend to plaintiffs, like Dickerson, who took distributions of their benefits from defined contribution plans before filing suit for fiduciary breach.[8] But those decisions are wrong because they do not account for the nature of benefits under a defined contribution plan. Specifically, those 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. Thus, where a fiduciary breach results in fewer assets to the plan, plan participants do not receive all of the benefits to which they are entitled when they cash out their benefits. Such participants have standing to sue to recover the amount they would have received were it not for the fiduciary breach.

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[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 Appendix A to this brief); In re RCN Litig., No. 04-5068, 2006 WL 753149 (D.N.J. Mar. 21, 2006) (attached at Appendix 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 Appendix B 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 Appendix C 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).

By contrast, a number of district courts have properly followed Sommers to grant standing to plaintiffs similarly situated to the plaintiff here. See, e.g., In re Mut. Funds Inv. Litig., 403 F. Supp. 2d 434, 441-42 (D. Md. 2005) (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) (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) (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 Appendix F to this brief); and Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 923 (S.D. Ohio 1993) (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), aff'd sub nom. Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995).

The district court also mistakenly believed that because the plaintiff received a final disbursement of vested benefits, his standing is foreclosed by the Ninth Circuit's decision in Kuntz. Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir. 1986) (per curiam). But Kuntz did not hold that a plaintiff lacks standing whenever he has received a "final" distribution from a pension plan. See, e.g., Sommers, 883 F.2d at 349. Rather, Kuntz stands for the commonsense proposition that plaintiffs who have received all of the benefits to which they are entitled are no longer "participants" within the meaning of ERISA and, therefore, lack standing to sue. Kuntz involved a defined benefit plan, a type of plan that is "designed and administered to provide fixed – or 'defined' – benefits to the participants based on a benefit formula set forth in the Plan." Wilson v. Bluefield Supply Co., 819 F.2d 457, 459 (4th Cir. 1987); accord Phillips v. Alaska Hotel & Rest. Employees Pension Fund, 944 F.2d 509, 512 (9th Cir. 1991).[9] The Kuntz court held that former employees who filed suit after they had received all of their vested benefits in a defined benefit plan, alleging that defendants had misrepresented their level of benefits, lacked standing under ERISA. 785 F.2d at 1411. The Kuntz plaintiffs did not allege that fiduciary misconduct had reduced the amount of their benefits;

[9] In a defined benefit plan, the participant receives a fixed benefit set forth in the plan document. 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 plan to cover the promised benefits. The amount of the benefit for each participant does not increase or decrease when the plan experiences gains or losses. See GAO Report at 8-10.

they had already received every dollar they were entitled to receive under the terms of the plan. As such, the court concluded that even "if successful, the plaintiffs' claim would result in a damage award, not an increase of vested benefits." Id. In contrast, the plaintiff here alleges that he did not receive all the benefits to which he was entitled at the time of distribution because fiduciary breaches caused losses to the Plan while he was an employee accruing benefits under the Plan.[10]

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

Affirming the district court's cramped 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) (one of ERISA's basic remedies for a

[10] Also distinguishable from this case is Crawford v. Lamantia, 34 F.3d 28, 32-33 (1st Cir. 1994), the only court of appeals case cited by the district court for the proposition that "a plaintiff lacks standing to sue under ERISA where he has taken a final distribution of vested benefits under a defined contribution plan." Dickerson, 426 F. Supp. 2d at 135. In Crawford, the First Circuit held that a former employee lacked standing to sue the trustees of his employee stock ownership plan (ESOP) for purchasing employer stock at an excessive price. The plaintiff conceded that he had already received a distribution of all the benefits due to him, and the court's decision turned on the fact that "plaintiff ha[d] failed to show that [the] defendants' . . . breach of fiduciary duty had a direct and inevitable effect on his benefits." 34 F.3d at 33 (emphasis in original). The court denied standing because the plaintiff suffered no injury and thus no diminution in benefits.

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"). The term "participant" should not be read to close the courthouse doors to former employees like the plaintiff here, who claims that he has not received all that he is due under the Plan because of the defendants' breaches.

Such a holding would produce the incongruous result that employees could be deprived of the right to sue simply by giving them a payment of benefits that is less than all of the benefits to which they are entitled or terminating the plan all together. 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); see Vartanian, 14 F.3d at 702 ("Such 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) (finding former employees who were receiving benefits due under the plan continued to be participants with standing to sue where necessary to prevent fiduciary from retaining ill-gotten profits).

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 real in the case of defined contribution plans, like the plan at issue in this case. Defined contribution plans are designed to be portable, meaning that 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.

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 Solutia stock despite knowing that the stock price was artificially inflated, that these breaches caused losses to the Plan, and caused a resulting 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. Such a claim is a claim for vested benefits under ERISA. Because the plaintiff presents a colorable claim to

additional vested benefits under his defined contribution plan and is within the zone of interest ERISA was designed to protect, he has standing under the statute.

CONCLUSION

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

Respectfully submitted,

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JULY 2006

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PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(2)
FOR CASE NUMBER 06-1616

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Dated: July 18, 2006

/s/
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