WHITE v. E & F DISTR. EMPL. PENSION PLAN

922 F. Supp. 132 (1996) | Cited 1 times | C.D. Illinois | April 17, 1996

OPINION

Pension Plan.

Was Plaintiff covered?

No.

Summary judgment for Defendants.

I. BACKGROUND

A. Facts

Thomas D. White is an 81 year old former employee of E & FDistributing Company (E & F) and worked for E & F from 1949through December 31, 1979. For the first three to five years heworked for E & F, White drove a truck and earned a regularsalary. At some point between 1952 and 1955, he became acommissioned liquor salesman. In that capacity, he received noregular salary, was paid a straight 3 or 3.2% commission, andpaid all of his own expenses. This compensation arrangementcontinued until White retired from E & F in 1979.

On September 28, 1968, E & F adopted a pension plan, the E &F Distributing Company Employees' Pension Plan (the Plan). The1968 version of the Plan provided:

Each present salaried employee of the Company and each salaried employee hired after the effective date of this agreement whose customary employment is for more than twenty hours a week and five months a year will be eligible to become a Participant under this Plan as of the Anniversary Date on which he first meets all of the following requirements:

(a) he must be actively at work.

(b) he must be at least age 25, but not more than age 60 as of the First Anniversary Date, or age 55 as of any subsequent Anniversary Date.

(c) He must have been continuously employed by the company for 3 years.

(d) He must file with the Trustee within 20 days after he receives the necessary form, written application for participation in this Plan in which application he must agree to abide by the provisions of this plan and comply in good faith with the requirements of the Insurer.

The 1968 version of the Plan computed pension payments based oneach participant's "annual compensation." The Plan definedannual compensation as: "The amount paid as the fixed salary orwage of a Participant immediately prior to the latestAnniversary Date of the Plan, excluding commissions, bonuses,overtime, premiums, and other non-recurring compensation."

Effective September 28, 1976, E & F replaced the 1968 versionof the Plan. The new Plan specifically excluded commissionedsalesmen from participation.

Despite language in the Plan documents which allows the Planto exclude commissioned salesmen from participation, severalcommissioned salesmen have been allowed to participate.

Henry Manci, who took over White's job when he retired in1980, has been listed as a participant since 1982.

Donald Ginder has been a participant since 1968. At that timeMr. Ginder was a salaried employee. He has been carried as aparticipant through an "administrative error," despite the factthat he has been a commissioned salesman since sometime between1973 and 1981.

James Egizii has been employed by E & F since 1975 and hasbeen a participant since 1977. E & F initially employed JamesEgizii as a merchandiser and paid him a salary. At some pointduring his tenure, James Egizii became a wine salesman and winesales manager. In that position he received both a salary andcommissions.

David Hatfield has been employed by E & F since 1977 and hasbeen a participant since 1979. Like James Egizii, Mr. Hatfieldhas been paid either a salary or a combination of salary andcommission. When E & F first hired Hatfield, he worked as aspecial wine promoter and received a salary. At some point,Hatfield also assumed sales duties, for which he earned acommission.

Lou Wells, Walter Brown, Larry Gawthrop, Robert Stewart,Ronald Adams, and Roger Ortman have been commissioned salesmenfor E & F since the early to mid 1980s and have all beentreated as participants in the Plan.

White requested pension benefits on April 22, 1993. Thislawsuit arises out of the Plan's refusal to pay a pension toWhite.

B. Procedural Background

This case began on May 20, 1994 when White filed hisComplaint, in which he names three separate defendants in threecounts. Count I requests relief from the E & F DistributingCompany Employees' Pension Plan (hereinafter referred to assimply the Plan); Count II requests relief from SpringfieldMarine Bank, n/k/a Bank One, Springfield, as Trustee (BankOne); and Count III requests relief from E & F DistributingCompany as Plan administrator and employer (E & F).

On July 25, 1994, the Defendants answered the complaint byresponding to the allegations of paragraphs 1-16 of each count.Defendants Bank One and E & F, however, failed to respond toseveral allegations in the Counts against them.

On November 3, 1994, United States Magistrate Judge CharlesH. Evans entered the Scheduling Order. The Scheduling Orderprovided that no motions to amend the pleadings or to joinparties could be filed after the date of the order.Additionally, the Scheduling Order set June 23, 1995 as thefinal date for filing dispositive motions.

On March 31, 1995, Defendants sought leave to fileaffirmative defenses. Magistrate Judge Evans denied that motionon reconsideration on June 23, 1995. Then Bank One and E & Ffiled a motion for leave to amend their faulty answers. TheCourt denied that motion on October 2, 1995, at which time theCourt also denied Defendants' objection to Magistrate JudgeEvans' order striking their affirmative defenses.

Shortly after this Court denied Defendants leave to amendtheir answers, Defendants' attorney sought to withdraw fromthis case. Defendants' attorney felt that the proceedingsconcerning Defendants' Answers had created a conflict betweencounsel and clients. Eventually, the Court allowed thatmotion and replacement counsel stepped in.[1]

The Court held a final pretrial conference on February 20,1996. The case was set on the Court's March 1996 trialcalendar. Due to the number of criminal and civil jury trialsset that month, finding time for the bench trial in this caseseemed unlikely. Plaintiff, not wanting to simply waste thetime waiting for trial, filed a motion for summary judgment onCounts II and III. And here we are.

Plaintiff's motion precipitated cross-motions and responses.Ordinarily the Court would not entertain such untimely motionsfor summary judgment (the deadline for filing dispositivemotions was June 23, 1995).[2] This case, however, is set fora bench trial. The motions for summary judgment propose toresolve this case, either partially or wholly, without the needfor a trial. Therefore, this is one instance in which deviationfrom the scheduling order actually serves the interests ofjustice by decreasing the burden on the Court's scarceresources, especially trial time.

C. Positions of the Parties

Plaintiff opened the floodgates to late-filed motions forsummary judgment when, on March 15, 1996, he filed a motion forsummary judgment. That motion related only to Counts II andIII, which are against Bank One and E & F. White's motion,which did not comply with Local Rule 7.1(D)(1) (requiring thata "Statement of Undisputed Facts" accompany all motions forsummary judgment), raised only one issue. White argued thatbecause Bank One and E & F neglected to answer Count III,paragraphs 17-20, and Count III, paragraphs 17-24,respectively, they had admitted them under Fed.R.Civ.P. 8(d).

Without objecting to the lateness of Plaintiff's motion, thePlan filed a motion for summary judgment on March 18, 1996. ThePlan's motion related only to Count I and argued simply thatWhite was never eligible to participate in the Plan, andconsequently could not claim that Defendants wrongly denied himpension benefits. Just like Plaintiff's motion, this motion didnot comply with Local Rule 7.1(D)(1).

Also on March 18, 1996, E & F filed a cross-motion forsummary judgment with respect to Count III. This motion, againlacking the required statement of undisputed facts, adopted thePlan's argument and additionally asserted that under theEmployee Retirement Income Security Act of 1974 (ERISA), Whitecould not recover from a plan fiduciary the relief he sought inCount III. E & F contended that even if it had failed to answersome portions of the complaint, it had denied that White waseligible to participate in the Plan. E & F also argued thatWhite was not entitled to the relief he sought as a matter oflaw, so E & F's failure to answer part of the Complaint had noeffect.

Finally, on March 21, 1996 Bank One chimed in. Its motionaddressed Count II. Unlike the other motions, Bank One's motionwas accompanied by the required statements regarding disputedand undisputed facts. Like the other two defendants, Bank Oneargued that White was not eligible to participate in the Plan.Bank One also argued that White could not recover his benefitsthrough an individual action against the Plan's trustee.

On April 4, 1996 White responded to the Plan's motion forsummary judgment. This time, White filed a statement ofundisputed facts. In that statement, White partially adoptedBank One's statement of undisputed facts and added newinformation, supported by discovery material.

Finally, on April 12, 1996, Bank One responded to White'sstatement of undisputed facts.

II. SUMMARY JUDGMENT STANDARD

Under Fed.R.Civ.P. 56(c), summary judgment "should be grantedif the pleadings andsupporting documents show that `there is no genuine issue as toany material fact and that the moving party is entitled to ajudgment as a matter of law.'" Ruiz-Rivera v. Moyer,70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden ofproviding proper documentary evidence to show the absence of agenuine issue of material fact. Celotex Corp. v. Catrett,477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuineissue of material fact exists when "there is sufficientevidence favoring the nonmoving party for a jury to return averdict for that party." Anderson v. Liberty Lobby, Inc.,477 U.S.

242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).Courts must consider evidence in the light most favorable tothe nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144,90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).[3]

Once the moving party has met its burden, the opposing partymust come forward with specific evidence, not mere allegationsor denials of the pleadings, which demonstrates that there isa genuine issue for trial. Howland v. Kilquist, 833 F.2d 639(7th Cir. 1987). "A scintilla of evidence in support of thenonmovant's position is insufficient to successfully opposesummary judgment; `there must be evidence on which the jurycould reasonably find for the [nonmoving party].'" Brownell v.Figel, 950 F.2d 1285 (7th Cir. 1991) (quoting Anderson v.Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505,2512, 91 L.Ed.2d 202 (1986)).

Summary judgment is an appropriate tool in cases such as thisone, which are essentially contract interpretation cases.GCIU Employer Retirement Fund v. Chicago Tribune Co.,66 F.3d 862, 864 (7th Cir. 1995) ("In this case, there is no disputeover the material facts and the issue presented is solely oneof contract interpretation — a question of law. Resolution atthe summary stage is therefore appropriate.") (citationsomitted); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560,564-65 (7th Cir. 1995) ("Summary judgment is particularlyappropriate in cases involving the interpretation ofcontracts.").

III. ANALYSIS

In their motions and cross-motions, the parties raise threelegal issues: (1) whether White was eligible to participate inthe Plan; (2) whether ERISA allows White to recover the damageshe seeks from E & F and Bank One; and (3) whether E & F andBank One must concede defeat because they failed to answer partof the Complaint.

A. Was White Eligible to Participate in the Plan?

All three Defendants join in challenging White's lawsuitbecause they believe that White was not eligible to participatein the Plan. Defendants do not seem to attack this suit on thebasis of standing, but instead challenge White's ultimate rightto any benefits.

Whether White was eligible to participate in the Plan is acentral question for two reasons. First, if White was noteligible to participate in the Plan, he might not be empoweredto bring this suit. Second, if White was not eligible toparticipate in the Plan, he may not recover any benefits underthe Plan.

First, the question of standing. White sues under theEmployee Retirement Income Security Act of 1974 (ERISA),29 U.S.C. § 1001-1461 (1994). Specifically, White proceeds under29 U.S.C. § 1132(a)(1)(B), 1132(a)(2), 1132(a)(4), and1132(c)(1) (1994). These sections provide various methods forenforcing the terms of, and rights under,pension plans. 29 U.S.C. § 1132 defines the available methodsof civil enforcement:

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title; . . .

Id. (emphasis added). 29 U.S.C. § 1132(c) provides a remedy forplan administrators' failure to supply requested information toparticipants or beneficiaries.

ERISA defines the term "participant" as "any employee orformer employee of an employer, or any member or former memberof an employee organization, who is or may become eligible toreceive benefits of any type from an employee benefit planwhich covers employees of such employer or members of suchorganization, or whose beneficiaries may be eligible to receiveany such benefit." 29 U.S.C. § 1002(7) (emphasis added).

The courts have loosened the absolute-seeming language ofERISA to permit suits by employees or former employees who havecolorable claims to vested benefits. Firestone Tire & RubberCo. v. Bruch, 489 U.S. 101, 117-18, 109 S.Ct. 948, 957-58, 103L.Ed.2d 80 (1989) (holding that the term "participant" includes"former employees who . . . have `a colorable claim' to vestedbenefits") (quoting Kuntz v. Reese, 785 F.2d 1410, 1411 (9thCir.) (per curiam), cert. denied, 479 U.S. 916, 107 S.Ct. 318,93 L.Ed.2d 291 (1986)). Only former employees whose claims are"so bizarre or so out of line with existing precedent [thatthey] necessarily stumble[ ] over the low threshold of the`colorable' requirement" lack standing. Panaras v. LiquidCarbonic Industries Corp., 74 F.3d 786, 790 (7th Cir. 1996)(quoting Andre

v. Salem Technical Services, 797 F. Supp. 1416(N.D.Ill. 1992)). It is not necessary to decide whether White'sclaim is bizarre or out of line with existing precedent becauseDefendants have not explicitly challenged his standing[4] andbecause the Court ultimately concludes that White is notentitled to benefits under the Plan.

But the Court must still determine whether White was evereligible to receive benefits from the Plan. See Tolle v.Carroll Touch, Inc., 977 F.2d 1129, 1133 (7th Cir. 1992)(noting that when someone sues for benefits due "he or she isessentially asserting his or her contractual rights under anemployee benefit Plan. . . . [a]nd, the wrong that the personalleges in bringing such an action is that despite the factthat he or she has satisfied the conditions necessary forbenefits under the plan, the defendant has failed to abide bythe terms of the plan") (citation omitted). If White was noteligible to participate in the Plan, then his claim is futileand the Court must dismiss this suit. To resolve that question,the Court must look to the documents governing the Plan.

In cases brought under ERISA, federal courts apply federalcommon law principles. GCIU Employer Retirement Fund, 66 F.3dat 865. Federal courts "interpretthe terms of [ERISA governed plans] `in an ordinary and popularsense as would a [person] of average intelligence andexperience.'" Hammond v. Fidelity and Guarantee Life InsuranceCo., 965 F.2d 428, 430 (7th Cir. 1992) (quoting Evans v. SafecoLife Insurance Co., 916 F.2d 1437, 1441 (9th Cir. 1990)); seealso Phillips v. Lincoln National Life Insurance Co.,978 F.2d 302, 308 (7th Cir. 1992). "Where the contract is unambiguous, acourt must determine the meaning of the contract as a matter oflaw. The document should be read as a whole so that all itsparts will be given effect." Murphy, 61 F.3d at 565 (citationsomitted).

White makes two arguments regarding his eligibility. First,he argues that the plain language of the Plan unambiguouslyincluded people like him — commissioned salesmen. Second, andalternatively, he argues that the language of the Plan isambiguous in light of certain extrinsic evidence. White arguesthat because the Defendants apparently allowed severalcommissioned salesmen to participate, the terms of the Plan areambiguous. Even though it may appear to exclude commissionedsalesmen, White argues, the Plan's inclusion of somecommissioned salesmen means that the Plan was not really meantto exclude commissioned salesmen.

1. Is the Language of the Plan Ambiguous on its Face?

The terms of the Plan[5] are not ambiguous. The Planclearly excludes commissioned salesmen from the class ofemployees eligible to participate.

The Court must follow well established principles whenreading the Plan documents.

First, we interpret the contract in light of the concrete circumstances in which it was written. If, after placing the document in context, the court finds that a contract is unambiguous, it should interpret the contract as a matter of law. A contract is unambiguous only if it is susceptible to only one reasonable interpretation, or put another way, a contract is ambiguous if both parties were reasonable in adopting their different interpretations of the contract. And although extrinsic evidence can be used to show that a contract is ambiguous, extrinsic evidence cannot be used to create an ambiguity.

Murphy, 61 F.3d at 565 (citations omitted) (emphasis inoriginal).

Defendants argue that by allowing only "salaried employees"to participate, the Plan excluded other types of employees,namely hourly and commissioned employees. Even if the term"salaried employees" is not crystal clear on its face,Defendants claim, its meaning is clarified by the exclusionfrom "annual compensation" of all commissions. The Courtagrees. The term "salaried employee" is unambiguous and doesnot, in its ordinary sense, include individuals paid solely acommission based on sales volume. The Court also agrees thatthe Plan document, taken as a whole, does not includecommissioned salesmen, because it excludes from the calculationof pension benefits any earnings in the form of commissions.

The 1968 version of the Plan listed salaried employees as theemployees eligible to participate in the Plan. The termsalaried means "receiving a salary . . . contrasted withhourly-rated." Webster's Third New International Dictionary2003 (1986). A salary is defined as "Fixed compensation paidregularly (as by the year, quarter, month, or week) forservices." Id. Salary's obsolete definition is "remunerationfor services given." Id. The term "salaried employee,"therefore, means an employee who is paid a fixed amount ofmoney on a periodic basis (the period being larger than anhour).

White relies on an assortment of definitions to argue thatthe term "salary" simply means the amount an employer pays anemployee. Using that definition would mean that the Plancovered hourly, salaried, and commissioned employees. But Whiteconcedes (by including Webster's definition) thatsalaried excludes hourly-paid employees. White's definitiondoes not mesh with the common understanding that pay comes inthree forms, hourly, salaried, and commission. "[I]n theordinary understanding of the word, `commission' meanscompensation based on a percentage of an amount collected,received or agreed to be paid for results accomplished, asdistinguished from `salary' which is a fixed and periodicalamount payable without regard to results achieved."Reliable Life Insurance Co. v. United States, 356 F. Supp. 235,239 (E.D.Mo. 1973); see also Lister v. Stark, No. 88 C 9801(N.D.Ill, Aug. 1, 1989), 1989 WL 88241 at *2 ("Sun's salesmenreceive no salary. They are paid instead on commission.");Division of Employment and Training v. Moen, 767 P.2d 1230,1233, 1234 (Colo.Ct.App. 1988).

Even if the term "salaried employee," standing alone, is notcrystal clear, its meaning is clear when read together with theother parts of the Plan. The Plan calculates retirementbenefits based on "annual compensation." Section II:06 excludesfrom annual compensation, "commissions, bonuses, overtime,premiums, and other non-recurring compensation." Thus, even ifWhite had been eligible to participate in the Plan, he wouldhave received a pension equal to zero because his entireearnings would have been excluded from his annual compensation.

White attempts to rebut this by arguing that his commissionwas not "non-recurring compensation" and therefore not excludedby section II:06. But White's commissions varied depending onthe volume of sales. Thus, it was in at least one sensenon-recurring. Additionally, the modifier "non-recurring" doesnot apply to commissions. Furthermore, if the Court acceptedWhite's argument, the term "commissions" in section II:06 wouldbe superfluous — a non-recurring commission is a bonus, andbonuses are already excluded from annual compensation. Whitealso comments that because the Plan does not define the term"commission", that term is ambiguous. That is not so. See Herrv. McCormick Grain — The Heiman Co., 841 F. Supp. 1500, 1504(D.Kan. 1993) ("There is no ambiguity simply because [the plan]does not define `commission salesmen' — the term has its plainand ordinary meaning."), aff'd in part, vacated in part subnom., Herr v. Heiman, 75 F.3d 1509 (10th Cir. 1996).

After considering the entire Plan document, the Court cannotfind that the language is ambiguous. Instead, the Planunambiguously excludes employees paid solely on commission fromparticipation. Only a tortured reading of the Plan would allowWhite to qualify as a participant. Tortured readings are, bytheir nature, inconsistent with the ordinary and popular senseof words.

2. Does the Doctrine of "Extrinsic Ambiguity" Apply?

White argues that although the language used in the Planseems to exclude commissioned salesmen, extrinsic evidenceshows that E & F did not really mean what it said when itadopted the Plan. White invokes the doctrine of "extrinsicambiguity." See FDIC v. W.R. Grace & Co., 877 F.2d 614, 620(7th Cir. 1989), cert. denied sub nom. W.R. Grace & Co. —Connecticut v. FDIC, 494 U.S. 1056, 110 S.Ct. 1524, 108 L.Ed.2d764 (1990). As the Court will explain, White misuses theconcept of extrinsic ambiguity. White does not suggest that theterms "salaried employee" and "commission" meant somethingspecial and unusual to the people who wrote the Plan. Instead,White really hopes to do what he suggests in a footnote in hisresponse to the Plan's motion for summary judgment: ignore theunequivocal terms of the written contract.

In contract law, two types of ambiguity exist: intrinsicambiguity and extrinsic ambiguity. "The first is present whenfrom just reading the contract it is apparent that the contractis unclear. The second is present when although the contract isclear at the semantic or literal level, anyone who knewsomething about the subject matter would realize that thecontract did not mean what it said." United States v. NationalSteel Corp., 75 F.3d 1146, 1149 (7th Cir. 1996); see also AMInternational, Inc., v. Graphic Management Assocs., Inc.,44 F.3d 572, 574 (7th Cir. 1995).

Generally, "[e]xtrinsic evidence should not be used where thecontract is unambiguous." GCIU Employer Retirement Fund, 66F.3d at 865; Murphy, 61 F.3d at 565. When a party candemonstrate that an extrinsic ambiguity exists, however, acourt may admit extrinsic evidence to allow that party to provethe real meaning of the contract terms. The doctrine ofextrinsic ambiguity applies when "the parties were employing aspecial vocabulary, so that the meaning of the contract is theopposite of what an outsider would think." AM International, 44F.3d at 578. Extrinsic evidence comes into play when theparties "couldn't have meant what they seem to have said."Pierce v. Atchison, T & S.F. Ry., 65 F.3d 562, 568 (7th Cir.1995) (quoting Matter of Stoecker, 5 F.3d 1022, 1029 (7th Cir.1993)).

White argues that the fact that Defendants apparently treateda number of commissioned employees as participants alters themeaning of the Plan. The documents governing the Plan documentclearly allow Defendants to exclude people who earn only acommission. The fact that Defendants allowed some people whomthey could exclude to participate does not make the meaning ofany of the words used to define the class of people eligible toparticipate ambiguous. Taking the proffered evidence that thePlan treats some commissioned employees as participants in thelight most favorable to White does not suggest that the Plan isambiguous. Nothing suggests that the terms of the Plan hadspecial meanings to the parties. Cf. Herr, 841 F. Supp. at 1504.Instead, the evidence suggests that Defendants may have simplyignored part of the Plan. To call that an ambiguity would beakin to creating an ambiguity based on extrinsic evidence,something the Court may not do. Murphy, 61 F.3d at 565.

The Eighth Circuit rejected a claim of ambiguity in a similarsituation. In Howe v. Varity Corp., 896 F.2d 1107 (8th Cir.1990), aff'd, ___ U.S. ___, 116 S.Ct. 1065, 134 L.Ed.2d 130(1996), the court disapproved the district court's use ofextrinsic evidence. . . The court found that in the past defendants had exempted retirees from plan changes, thereby implying that retirees' benefits were "untouchable." As a general rule, however, extrinsic evidence may not be relied upon where the documents are unambiguous on their face. See, e.g., Anderson [v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1517 (8th Cir. 1988)] ("[I]f the contract is deemed ambiguous, then the court may weigh extrinsic evidence in its construction.") (quoting Local Union No. 150-A v. Dubuque Packing Co., 756 F.2d 66, 69 (8th Cir. 1985)) (emphasis added). Moreover, it is the extrinsic evidence itself, in our view, that is ambiguous. Merely because defendant chose to exempt retirees from plan changes in the past does not mean that defendants considered themselves forever bound to do so. Plaintiffs have not argued estoppel, nor have they suggested any detrimental reliance on defendants' practices.

Howe, 896 F.2d at 1110. Although Howe is not identical to thepresent case, the Eighth Circuit makes clear that only if acontract is ambiguous does extrinsic evidence alter itsmeaning. In this case, even taking White's evidence in thelight most favorable to him, the terms of the contract do notmean anything other than what they might mean to an ordinaryreader. Cf. Herr v. McCormick Grain, 841 F. Supp at 1503-04(rejecting extrinsic evidence to inform the use of the term"commission salesman" where that term retained its ordinarymeaning and the plaintiff did not suggest that it meantanything different).

3. Does Defendants' Conduct Toward Other Commissioned Salesmen Affect White's Eligibility?

Now the Court must tackle the question implicitly raised byWhite's response to Defendants' motions: does Defendants'apparent disregard of the language excluding commissionedsalesmen entitle White to pension benefits?

ERISA requires that "[e]very employee benefit plan shall beestablished and maintained pursuant to a written instrument."29 U.S.C. § 1102(a)(1). Because plans must be maintainedpursuant to a written instrument, the Seventh Circuit has heldthat plan trustees cannot be liable to benefit claimants forbenefits they are not entitled to under the terms of the plan.In Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383,387 (7th Cir.), cert. denied, 479 U.S. 1008, 107 S.Ct. 648, 93L.Ed.2d 703 (1986), the court stated: . . ERISA plan administrators are required to act consistently with the Plan's written terms. Plan fiduciaries are required to act solely in `accordance with the documents and instruments governing the plan.' Section 1104(a)(1)(D).

. . . There is no question that . . . under the terms of the Plan the plaintiffs were not entitled to receive benefits. . . . Under the technical terms of the Plan, defendants violated no provision of ERISA and committed no legal wrong.

Id. One reason why plan fiduciaries should not be forced to paybenefits not called for in the written plan is that "[f]orcingtrustees of a plan to pay benefits which are not part of thewritten terms of the program disrupts the actuarial balance ofthe Plan and potentially jeopardizes the pension rights ofothers legitimately entitled to receive them." Id. at 389; seealso Central States, Southeast and Southwest Areas Health andWelfare Fund v. Neurobehavioral Assocs., 53 F.3d 172 (7th Cir.1995); Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296 (5thCir. 1989).

Not only has the Seventh Circuit been reluctant to allowactions for benefits when a plan does not provide for them, butit has also held that strict enforcement of a plan against oneemployee and not against others does not violate ERISA. InMcGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir.1993), an employee argued that he was the victim ofdiscrimination under 29 U.S.C. § 1140 because the trustees ofhis employer's pension plan strictly enforced eligibility rulesto keep him out of the plan while they apparently allowed inother employees who did not qualify. Id. at 669-670. TheSeventh Circuit said that such conduct by a trustee did notamount to discrimination. "Because the plan must beadministered according to its terms, [plaintiff] cannotcomplain because he is held to those terms; this is true evenif the rules were bent for another individual." Id. at 670(footnote omitted). Although McGath involved a claim ofdiscrimination under ERISA § 510, it is still instructive.McGath held that an employee cannot complain about treatment byhis employer or the plan trustees so long as they acted withinthe scope of the written documents. Furthermore, the SeventhCircuit's statement was not based as much on ERISA § 510 as on29 U.S.C. § 1104(a)(1)(D), which provides that fiduciaries mustdischarge their duties "in accordance with the documents andinstruments governing the plan." 7 F.3d at 670 n. 5.

Allowing White to recover benefits would undermine theexplicit terms of the Plan. The Court does not know why somecommissioned salesmen at E & F have been allowed to participatein the Plan. Perhaps the trustees have violated their fiduciaryduties to the other participants in the Plan by admittingunqualified participants. That fact, however, does not affectthis case. White is clearly not eligible to participate in thePlan. Therefore, the Plan and its fiduciaries cannot be heldliable for failing to pay him a pension.

Possibly, White could have invoked estoppel to claim thatDefendants could not deny him the right to participate afterhaving allowed other commissioned salesmen to participate.See Weatherly v. Illinois Bell Telephone, 856 F. Supp. 1301(N.D.Ill. 1994).[6] The Seventh Circuit has approved the useof equitable estoppel in at least one type of case. Black v.TIC Investment Corp., 900 F.2d 112, 115 (7th Cir. 1990); seealso Krawczyk v. Harnischfeger Corp., 41 F.3d 276, 280 (7thCir. 1994) (noting that the Seventh Circuit has approved use ofestoppel for unfunded welfare plans, but declining to addresswhether the concept should apply to funded plans); Russo v.Health, Welfare & Pension Fund, Local 705 InternationalBrotherhood of Teamsters, 984 F.2d 762, 767 (7th Cir. 1993).But the Court can find no authority for the proposition thatplan fiduciaries maybe estopped to withhold pension benefits from a former employeesimply because the fiduciaries have allowed other similarlysituated employees to participate.[7] White might also arguethat Defendants' conduct constituted an informal modificationof the terms of the agreement. But such modifications are notpermitted. "[A]s a general rule, ERISA does not recognize oralmodification of a written benefit plan. . . ." Russo, 984 F.2dat 767.

Even if the Court adopted the theory White proposes, it isunclear what benefits he would be entitled to. No employeeshired before 1980 who have been exclusively commissionedsalesmen have been allowed to participate. White lists threeemployees hired before 1980 who have been listed asparticipants: Donald Ginder, James Egizii, and David Hatfield.These three employees were all either eligible to participateunder the plain language of the Plan at some point since 1968or are still eligible.

Mr. Ginder has been a participant since 1968, when he was asalaried employee. He has been carried as a participant throughan "administrative error," despite becoming a commissionedsalesman since at some point between 1973 and 1981. Mr. Egiziihas been employed by E & F since 1975 and has been aparticipant since 1977. During his employment, Mr. Egizii hasbeen paid either a salary or a combination of salary andcommission. Therefore, Mr. Egizii has always been eligible toparticipate, but may not be entitled to a pension based on histotal compensation. Mr. Hatfield has been employed by E & Fsince 1977 and has been a participant since 1979. Like Mr.Egizii, Mr. Hatfield has been paid either a salary or acombination of salary and commission.[8]

The Court declines White's invitation to ignore theunambiguous language of the Plan. Even if the Court did ignorethe Plan's exclusion of commissioned salesmen, the extrinsicevidence White offers does not lead to the conclusion thatWhite should receive pension benefits. See Howe, 896 F.2d at1110 ("[I]t is the extrinsic evidence itself . . . that isambiguous.")

B. Is White Entitled to the Relief He Seeks in Counts II and III?

Even though Defendants are entitled to summary judgmentbecause White was not eligible to become a participant, theCourt will address Bank One's and E & F's alternate argumentthat if White was eligible to participate in the Plan, ERISAdoes not authorize the relief he seeks from them.

Counts II and III are virtually identical. These Counts statethat they arise under 29 U.S.C. § 1132(a)(1)(B), 1132(c)(1),1109, 1132(a)(2), 1025(c), and 1132(a)(4). Count II demands:(1) that the Court order Bank One to pay Plaintiff all benefitsdue under the Plan, (2) that the Court declare that Plaintiffhas vested and non-forfeitable rights in the money deemed due,and (3) costs and attorneys fee's. Count III requests identicalrelief with respect to E & F.

Of the ERISA sections listed in the Complaint only two allowcivil actions against Bank One and E & F. Sections 1132(a)(2)and 1132(c) provide for relief against fiduciaries andadministrators respectively. The Court will address only §1132(a)(2) because whether White is entitled to relief under1132(c) depends on whether he was a participant — an issue theCourt has already addressed.

Section 1132(a)(2) provides that a civil action may bebrought "for appropriate relief under section 1109 of thistitle." 29 U.S.C. § 1109 provides:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . .

A plan participant may not individually recover unpaid benefitsunder § 1132(a)(2). Massachusetts Mutual Life Insurance Co. v.Russel, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).White suggests that the Supreme Court's recent decision inVarity Corp. v. Howe, ___ U.S. ___, 116 S.Ct. 1065, 134 L.Ed.2d130 (1996), somehow changed the law. In Varity Corp., however,the Court distinguished Russell because that case dealt onlywith § 1132(a)(2), while the plaintiff in Varity Corp. hadproceeded under § 1132(a)(3). Id. at ___, 116 S.Ct. at 1076.

White makes two arguments to evade the consequences ofproceeding solely under 1132(a)(2). First, he argues that theduty he is trying to enforce is one found in the Plan, not inERISA. Second, he argues that his failure to bring his suitunder 29 U.S.C. § 1132(a)(3), which allows individual relief,is inconsequential because he may amend his pleadings toreflect the evidence.

White's first argument is circular. While the Plan imposesduties on its fiduciaries, ERISA imposes a duty on thefiduciaries to follow the terms of the Plan.29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties withrespect to a plan solely in the interest of the participantsand beneficiaries and — . . . (D) in accordance with thedocuments and instruments governing the plan . . . ").Therefore, although White may rely on the language of the Plan,any right to sue the fiduciaries comes from ERISA.

White's second argument also fails. It should be clear toeveryone involved in this case that the Court does not takelightly motions to amend the pleadings filed late in the case.Furthermore, amending the Complaint would have no effect atthis point, because the Court has entered a Pretrial Order.That Order does not mention 29 the other statute sectionsincluded in the Complaint. Therefore, Plaintiff has forfeitedhis right to proceed under that section. See Nagy v. RibletProducts Corp., 79 F.3d 572, 574-75 (7th Cir. 1996).

White also improperly relies on amendments to conformpleadings to the evidence. Rule 15(b) allows such amendments"[w]hen issues not raised by the pleadings are tried by expressor implied consent of the parties. . . ." Fed.R.Civ.P. 15(c).Obviously, Defendants do not consent to Plaintiff's attempt toproceed under § 1132(a)(3).

C. Defendants' Partial Failure to Answer

Ultimately, it is unnecessary to resolve the third legalissue the parties raise in their motions. White was nevereligible to participate in the Plan and the relief he seeks inCounts II and III is barred by ERISA. Therefore, even if BankOne and E & F did admit part of the Complaint by failing toanswer it, their admission would have no impact on the outcomeof this case.

IV. CONCLUSION

Despite all the wrangling over the pleadings that hasoccurred in this case, this case boils down to a simple legalquestion that could, and probably should, have been resolved bya motion to dismiss or a timely-filed motion for summaryjudgment. Considering the resources the parties and the Courthave expended in this matter, the outcome is unfortunate, butit is the outcome that the law mandates. The Court must grantsummary judgment in favor of Defendants because White is notentitled to the relief he seeks.

Ergo, Plaintiff's Motion for Partial Summary Judgment isDENIED; Defendant E & F Distributing Company Employees' PensionPlan's Motion for Partial Summary Judgment is ALLOWED;Defendant E & F Distributing Company, as Plan Administrator andEmployer's Cross-Motion for Summary Judgment is ALLOWED;Defendant Springfield Marine Bank, n/k/a Bank One, Springfield,as trustee's Cross-Motion for Summary Judgment on Count II isALLOWED.

As no other issues remain to be resolved, this cause isDISMISSED with prejudice, each party to bear its own costs.

CASE CLOSED.

1. The new attorneys promptly sought reconsideration of theCourt's order denying Defendants leave to amend their answers.The Court denied the motion for reconsideration.

2. The Court's January 29, 1996 Order makes amply clear theimportance of adhering to the dates set in the SchedulingOrder.

3. Determining what facts are in dispute is made easier byLocal Rule 7.1(D). CDIL-LR 7.1(D)(1). That rule requiresparties moving for summary judgment to state what undisputedfacts support their motion. A party responding to a motion forsummary judgment on the ground that disputed factual issuesexist must rebut those facts and cite discovery materials thatsupport the contention that genuine issues of material factexist. The rule allows the Court to deem admitted unopposed"undisputed facts" or strike motions or responses that are notaccompanied by required statements of fact. Cf. Rosemary B. v.Board of Education of Community High School District No. 155,52 F.3d 156, 159 (7th Cir. 1995) (holding that a district courtmay strike a response to a summary judgment motion for failureto comply with local rules regarding that response).

4. The Court would be hesitant to dismiss this case for lackof standing because it is not clear that White's claim isfrivolous, although the Court ultimately rejects his claim.Cf. Sallee v. Rexnord Corp., 985 F.2d 927, 929-30 (7th Cir.1993) (concluding that a claim was not colorable when made byemployees who voluntarily left employment knowing thatseverance benefits did not vest unless they were terminated).

5. As the Court noted previously, two versions of the Planapplied to White. The Court will direct its analysis at thisstage to the 1968 version of the Plan. The 1978 versionspecifically excluded "commissioned salesmen" fromparticipation. When the Court reaches White's "extrinsicambiguity" argument, the Court will consider both plans,because if White's argument that the language of the plan oughtto be ignored holds true, it applies to both plans.

6. White has not argued estoppel. Arguments not raised inopposition to summary judgment motions are waived. See Cooperv. Lane, 969 F.2d 368, 371 (7th Cir. 1992).

7. In this case, White did not rely on a promise of benefitsor an oral interpretation of the plan. See Russo, 984 F.2d at767; cf. Miller v. Taylor Insulation Co., 39 F.3d 755 (7th Cir.1994). In fact, White has introduced no evidence to support aclaim of estoppel.

8. White also lists several commissioned salesmen who workedfor E & F, starting after White retired, who have been listedas Plan participants. If the Court accepted White's propositionthat the unambiguous language of the Plan may be ignored, theCourt could not base White's remedy on informal changes to thePlan that occurred after White retired from E & F.