IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SANDRA M. MENNENOH,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant.

OPINION AND ORDER

02-C-567-C

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This is a civil action for declaratory relief and money damages initiated by plaintiff Sandra M. Mennenoh in the Circuit Court for Bayfield County, Wisconsin. Plaintiff asserted four common law claims: breach of contract, bad faith, malicious prosecution and abuse of process in connection with the termination of disability benefits to which she claims to be entitled under her former employer's employee benefit fund. Defendant UNUM Life Insurance Company of America removed the action to this court, arguing that plaintiff's allegations fall under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. Conceding that ERISA preempts her breach of contract and bad faith claims, plaintiff filed an amended complaint seeking relief under the act. 29 U.S.C. §

1132(a)(1)(B). She continues to pursue state common law claims of malicious prosecution and abuse of process based on defendant's filing of a complaint of possible insurance fraud with the Bayfield County Sheriff's Department. Jurisdiction is present. 28 U.S.C. §§ 1331 and 1367.

Presently before the court are two motions by defendant: (1) a motion to dismiss plaintiff's claims of malicious prosecution and abuse of process; and (2) a motion to limit discovery relating to the remaining federal law claims to the administrative record. Defendant's first motion raises the question whether ERISA preempts plaintiff's claim that defendant violated state law when it lodged a complaint of possible insurance fraud with the sheriff's department. Alternatively, defendant argues that if ERISA does not preempt the claim, the complaint should be dismissed on the ground that defendant is immune from civil liability under Wis. Stat. § 895.486, which provides civil immunity to persons reporting suspected insurance fraud absent malice, or on the ground that plaintiff is unable to establish a prima facie case of either malicious prosecution or abuse of process. I conclude that plaintiff's claim is preempted because it is an impermissible attempt to use state law to challenge defendant's plan administration and constitutes an alternate enforcement mechanism to § 502 of ERISA. This conclusion makes it unnecessary to address defendant's alternative arguments in its first motion.

In its second motion, defendant argues, correctly, that discovery should be limited to

the administrative record. Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 982 (7th Cir. 1999), holds that when review is deferential, as it is in this case, discovery is appropriate only in limited circumstances. Because plaintiff has not shown that any such circumstance applies and she does not deny that defendant evaluated her application, conducted an investigation and addressed the application on its merits, I will grant defendant's motion and limit discovery of the federal law claims to the administrative record.

For the purpose of deciding defendant's motions, I accept plaintiff's allegations in her complaint as true.

ALLEGATIONS OF FACT

Plaintiff Sandra Mennenoh was a food service worker at Memorial Medical Center for approximately two years. As part of her employment package, she was enrolled in a disability plan provided by defendant UNUM Life Insurance Company of America. In spring 1999, plaintiff became partially disabled as a result of an ongoing degenerative spinal disease. By August 31, 1999, she was no longer able to perform her job and ceased her employment at Memorial.

Before leaving her job, plaintiff applied for disability benefits from defendant. Initially, defendant approved her claim and made payments for several months. However,

in February 2000, it stopped making payments and informed plaintiff that it had undertaken surveillance of her and had concluded that she was no longer disabled. Defendant never sent plaintiff notice informing her of the "adverse benefit determination" or of her right to appeal this determination.

On or about October 25, 2000, defendant filed a complaint of "possible insurance fraud" with the Bayfield County Sheriff's Department. Defendant told both the sheriff's department and the Bayfield County district attorney that in January 2000, plaintiff had been performing the "exact same duties" she had performed while employed at Memorial Medical Center. In support of its complaint, defendant submitted certain information, including the results of its investigation. Defendant knew its allegations were false and that plaintiff was entitled to ongoing disability payments.

On December 7, 2000, plaintiff was charged with providing false proof in support of an insurance claim, specifically with obtaining disability insurance benefits from defendant for the time period August 22, 1999, to February 21, 2000, and not informing defendant that in January 2000, she had engaged in waitressing activities in the tavern she and her husband owned. The circuit court dismissed the criminal complaint after finding that it was not supported by probable cause.

OPINION

A. Defendant's Motion To Dismiss on the Ground of ERISA Preemption

The parties do not dispute that the disability plan provided by defendant qualifies as an "employee benefit plan" under ERISA. The only question is whether plaintiff's claims for malicious prosecution and abuse of process "relate to" the plan and are therefore preempted under 29 U.S.C. § 1144, which provides for the supersession of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The expansiveness of the term "relate to" has caused problems for the courts in numerous instances, see, e.g., California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519 U.S. 316 (1997) (holding that ERISA did not preempt California law requiring public works project contractor to pay prevailing wage but allowing payment of lower wage to participants in state-approved apprenticeship program); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 656 (1995) (holding that ERISA did not preempt state statute requiring surcharges on hospital bills of patients covered by certain kinds of insurance but not others). As to at least three categories of state laws, however, the task is not as complex. It is settled that ERISA preempts (1) laws that seek to mandate employee benefit structures or their administration, id. at 658; (2) laws that bind employers or plan administrators to particular choices or

preclude uniform administrative practices, id. at 659-60; or (3) laws that provide alternative enforcement mechanisms to ERISA. Id. at 658.

Deciding whether a particular law provides an alternative enforcement mechanism to ERISA begins with a review of § 502 of the act, 29 U.S.C. § 1132(a) (1)-(4), which gives plan participants, beneficiaries and fiduciaries the right to sue to enforce rights under the plan, as well as to recover benefits due and to clarify rights to future benefits. The Supreme Court has read this statute as incorporating the exclusive remedies for plan beneficiaries and participants asserting a breach of fiduciary duty. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under [ERISA] would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."). In Pilot Life, the Court held that plan beneficiaries may not assert common law claims of tortious breach of contract and bad faith against a plan or plan fiduciary that are based on the improper processing of a claim for benefits related to ERISA. Any such claim would be grounded on the "alleged improper processing of a claim for benefits under an insured employee benefit plan," id. at 48, and would conflict with the carefully crafted enforcement scheme in ERISA.

Plaintiff argues that her common law claims of malicious prosecution and abuse of process have nothing to do with employee benefits, do not bind defendant or any other

administrator to any particular choices and do not provide an alternative enforcement provision. The fact is, however, that she is bringing these claims in connection with a challenge to the processing of her claim for continued disability benefits. She contends that defendant acted in filing a complaint of insurance fraud after it terminated her benefits. Neither of those actions falls outside the scope of defendant's duties as a fiduciary. See Pegram v. Herdrich, 530 U.S. 211, 226 (2000) ("In every case charging breach of ERISA fiduciary duty . . . the threshold question is not whether the actions of some person employed to provide services under the plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.") A plan fiduciary's duties encompass the pursuit of legal actions intended to protect the financial integrity of an employee benefit fund. Bringing a criminal action for fraud against a beneficiary is not the act of a "rogue administrator, acting entirely outside the scope of its duties." Darcangelo v. Verizon Communications, Inc., 292 F.3d 181, 193 (4th Cir. 2002). See Trustees of AFTRA Health Fund v. Biondi, 303 F.3d 765, 775 (7th Cir. 2002) (finding common law fraud claim against plan participant "in participants' and beneficiaries' best interests, as well as being consistent with the Trustees' fiduciary obligations under ERISA.")

However couched, plaintiff's claims are all claims of breach of fiduciary duty: defendant breached its duty to her by failing to process her claim properly and by initiating

state criminal charges against her. Moreover, plaintiff is asserting her common law claims in connection with her claim for past due and future benefits. Deciding her common law claims would require an analysis of the basis of defendant's belief that plaintiff was falsifying her claim for disability benefits. Deciding her ERISA claim would involve the same inquiry.

If defendant's belief was inaccurate, defendant terminated plaintiff's benefits improperly, thereby breaching its duties under ERISA to process plaintiff's claim properly. On such a finding, plaintiff would be entitled to past due benefits and a clarification of her rights to future benefits. 29 U.S.C. § 1132(a). She cannot recover money damages for any injuries she suffered because of defendant's filing of a complaint with the county. This result may seem unfair, but it is the inevitable consequence of Congress's deliberate balancing of "the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." Pilot Life, 481 U.S. at 54. Congress has made policy choices that are "reflected in the inclusion of certain remedies and the exclusion of others." Id.

Plaintiff argues that defendant has not cited any cases holding that ERISA preempts a suit for malicious prosecution. In the absence of any such cases, it is necessary to extrapolate from other kinds of cases arising under ERISA to determine the guiding principles for deciding plaintiff's case. The closest case is Nill v. Essex Group, 844 F. Supp. 1313, 1320 (N.D. Ind. 1994), in which the district court held that ERISA did not preempt

an action for malicious prosecution filed by a pension plan beneficiary against his plan administrator. In Nill, however, the court took pains to point out that the plaintiff's claim could not be recharacterized as a federal claim of breach of fiduciary duty under ERISA because the state courts had previously determined all of the issues related to the plaintiff's ERISA claim and the remaining issue did not involve any benefits allegedly due, any clarification of the plaintiff's right to future benefits or any claim of mismanagement on the part of the defendant in the administration of the plan. Id. at 1319. To follow this point, it is necessary to understand the facts of the case, which are complex. In short, the plaintiff started a company and set up a pension plan for the employees, including himself. Some years later, he sold the company to Essex Group, which took over the sponsorship of the pension plan. When the plaintiff retired, he did not receive all of the funds to which he believed he was entitled under the pension plan. In ensuing litigation, he claimed entitlement to the funds both under ERISA and on the ground that the drafter of the trust agreement had erroneously omitted a provision that would have authorized the payment of all the funds claimed by the plaintiff. The plaintiff lost on the first ground but prevailed on the second. Essex Group then sued the plaintiff for failing to disclose at the time of the sale the mistake in the trust agreement that led to its eventual reformation. When this suit was thrown out by the state court, the plaintiff sued Essex for having brought the second suit; Essex removed the case to federal court; and it was at this point that the district court found

no ERISA issue requiring preemption.

Nill supports the conclusion that ERISA preempts all of plaintiff's claims. In Nill, the suit that formed the basis for the plaintiff's malicious prosecution action was not related to the administrator's decision to deny benefits; the plaintiff's federal suit escaped preemption because his claims did not involve an ERISA claim or one of breach of fiduciary duty. Plaintiff's claims do involve an ERISA benefit and breach of fiduciary duty.

Darcangelo, 292 F.3d 181, provides support for preemption, again by negative implication. In Darcangelo, the court found that the lower court had acted improperly by granting a motion to dismiss on the ground of preemption. The lower court erred in failing to recognize that ERISA would not preempt an invasion of privacy claim by a beneficiary if she could prove her allegations that the defendant had obtained and disseminated her private medical information solely at the behest of her employer and solely to assist the employer in its effort to find a reason to fire her. Of importance to plaintiff's case is the court's observation that ERISA would preempt the plaintiff's claims if at a later stage of the proceedings, the facts disclosed that the disclosure had occurred in connection with the processing of a benefits claim or the performance of some other plan duty. In that instance, the beneficiary's common law claims of violation of privacy, negligence and unfair trade practices would have to be recharacterized as claims for breach of fiduciary duty. Id. at 195.

The Court of Appeals for the Seventh Circuit applied a similar analysis in Trustees

of AFTRA Health Fund, 303 F.3d 765, in which the question was not whether a participant or beneficiary could pursue a common law fraud claim against the fund but whether the trustees could pursue such a claim against Biondi for allegedly misrepresenting to the fund that he was still married to his ex-wife, in order to cause the fund to continue to provide her with dependent health care coverage and benefits. Biondi argued that the trustees' claim was preempted by ERISA; the court of appeals held that there was no preemption because the maintenance of the suit did not thwart the statutory purposes of ERISA. Rather, the action was "consistent with the Trustees' fiduciary obligations under ERISA." Id. at 775. What the plaintiff did in Trustees is similar to defendant's actions in this case. Both were intended to protect the plan from improper claims. Allowing plaintiff to assert a state common law claim for this decision would interfere with defendant's fiduciary duties.

I conclude that however plaintiff frames her common law claims, they are claims for the breach of a fiduciary duty. Therefore, they are preempted as an effort to pursue an alternative enforcement mechanism to ERISA. Defendant's motion to dismiss plaintiff's claims for malicious prosecution and abuse of process will be granted.

B. Defendant's Motion to Limit the Scope of Discovery

Although decisions of ERISA plan administrators presumptively receive de novo review, review is "deferential" when the plan gives the administrator discretionary authority.

Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 980 (7th Cir. 1999). The parties agree that defendant's plan establishes discretionary authority and that the standard of review is deferential. Generally, under deferential review, the district court may not allow further discovery and must limit the scope of its review to the administrative record. Id. at 982.

Plaintiff opposes the limitation of discovery to the administrative record on two grounds. First, she asserts that "recent revelations by the television show '60 Minutes' relating to [defendant's] methodology for handling disability claims raises serious questions regarding its handling of [her] claim." Plt.'s Br., dkt #15 at 8. Second, she contends that, "[a]lthough the file which [defendant] submitted to the court as its 'administrative file' contains a letter notifying her of its decision and her right to appeal that was purportedly addressed to plaintiff, she never received any letter notifying her of her right to appeal the determination made by [defendant] terminating her benefits." Plt.'s Br., dkt #15 at 8. Because of these facts, plaintiff argues, "she is entitled to undertake discovery of the claims processes employed by [defendant]." Plt.'s Br., dkt #15 at 8.

Plaintiff has pointed to no authority that would permit judicial consideration of the "60 Minutes" episode. Even if it were admissible evidence, it would not entitle plaintiff to additional discovery. Under Perlman, 195 F.3d 975, a district court cannot permit discovery for the sole purpose of showing bias. Rather, discovery is appropriate only to show that the

administrator did not give the application "a genuine evaluation." Id. at 982. In this case, it cannot be disputed that defendant evaluated plaintiff's claim. After initially granting plaintiff's request for benefits, it denied her claim only after conducting an investigation and writing a report. The missing notice letter and television show do not support a conclusion that defendant did not evaluate plaintiff's application on its merits. Whether the investigation and report provide adequate support for the decision to deny benefits is a different question, to be decided after the parties have had an opportunity to brief their arguments on the legitimacy of defendant's decision to discontinue the plaintiff's disability benefits. Accordingly, I will grant defendant's motion to limit discovery.

ORDER

IT IS ORDERED that

1. Defendant UNUM Life Insurance Company of America's motion to dismiss plaintiff's common law claims is GRANTED;

2. Defendant's motion to limit discovery to the administrative record is GRANTED; and

3. The parties are to observe the following briefing schedule on plaintiff's ERISA claim. Plaintiff may have until April 22, 2003, in which to file and serve a brief in support of her claim of entitlement to past due and future benefits; defendant may have until May

6, 2003, in which to file and serve its brief in opposition; and plaintiff may have until May 16, 2003, in which to file and serve a reply brief.

Entered this 1st day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge