IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD BAUER, VAUGHN FRYE,
JOE DELFOSSE AND DANIEL MCGILL,
on behalf of themselves and all persons similarly situated,

OPINION AND ORDER

Plaintiffs,

11-cv-15-bbc

v.

KRAFT FOODS GLOBAL, INC.,

Defendant.

- -

Plaintiffs in this class action suit are retired hourly employees of the Oscar Mayer Foods meat processing plant in Madison, Wisconsin, which is owned by defendant Kraft Foods Global, Inc. Plaintiffs contend that defendant violated the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, and the Labor Management Relations Act, 29 U.S.C. § 185, by reducing their health insurance benefits. In an order dated February 15, 2012, dkt. #36, I certified the following class under Fed. R. Civ. P. 23:

> Former hourly employees employed at Kraft Foods Global, Inc.'s Oscar Mayer Foods Divison, Madison, Wisconsin plant whose retirement began on January 1, 2001, through and including retirements beginning on March 1, 2004 and retirees who retired between August 1, 2000 and December 1, 2000 who chose coverage under the Kraft Choice Retiree Medical Plan.

Defendant has filed a motion for summary judgment, which is ready for decision.

Dkt. #41. The question presented by the summary judgment motion is whether the relevant health benefits plan or the parties' collective bargaining agreement prohibited defendant from increasing plaintiffs' co-pays for prescription drugs or eliminating Dean Care as an option for a health maintenance organization. Because I conclude that neither document restricted defendant from making these changes, I am granting defendant's motion for summary judgment.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiffs Richard Bauer, Vaughn Frye, Joe Delfosse and Daniel McGill are retired hourly employees who worked at defendant Kraft Food Global Inc.'s Oscar Mayer meat processing plant in Madison, Wisconsin and retired between August 2, 2000 and March 1, 2004. Plaintiffs were represented by the United Foods and Commerce Workers Local Union 538 during their active employment.

In the spring of 2000, defendant and the union negotiated a new collective bargaining agreement for 2000 to 2004. During the negotiations, defendant proposed converting all existing medical coverage into the Kraft Choice Plan and gave the union the existing summary plan description for that plan. The summary describes different coverage options and the various out of pocket expenses that accompany each option. Dkt. #44-8 at 9. In a separate section titled "Your Contribution," the summary states, "You pay part of the cost

of the coverage, and Kraft pays the balance. The amount of your monthly contribution depends on your annual base pay as of July 31 of the preceding year, as well as the coverage option you elect." The union agreed that, effective January 1, 2001, the Kraft Choice Plan would be the only medical coverage option offered to its active employees and any employee who chose to retire during the term of the 2000-04 agreement.

On June 27, 2000, defendant and the union formalized their negotiations in a "Memorandum of Agreement," which was signed by all members of defendant's and the union's bargaining committees. In accordance with its usual practice, the union gave every member a copy of the memorandum. At the union meeting for the ratification vote, the union president explained the memorandum to the members point by point, including a section entitled "Health and Welfare Medical," which described the union's and defendant's agreement on health benefits. It included the following provisions:

- Effective no earlier than 01/01/01, the current Medical Plan will be converted to the Kraft Choice Plan with the following monthly contribution levels which will replace the current benefits contribution:

	Employee	Employee/Spouse	Employee/Children	Family
Network 80	5.00	6.00	5.50	6.00
Network 90	6.00	7.00	6.50	7.00
HMO	6.00	7.00	6.50	7.00

* * *

- For employees who retire during the term of the agreement and on or before 01/01/04, Retiree Medical Premiums for health insurance will remain at the active employee rate which is in effect at the date of retirement.

Dkt. #44-4 at 6. The members voted to approve the memorandum as the new labor agreement.

After ratification of the June 27, 2000 memorandum, defendant and the union incorporated the new provisions into the collective bargaining agreement, in accordance with standard practice. The 2000 agreement stated "Effective January 1, 2001, the current medical plan will be converted to the Kraft Choice Plan." Dkt. #44-2 at 113. The only other reference to health care benefits in the collective bargaining agreement is the statement that "Health Care Benefits are found in a separate document." Id. at 134.

The union filed a grievance in December 2000 in which it alleged that defendant violated the memorandum by imposing a "spousal surcharge" on premiums paid by an employee who wanted to cover his or her spouse under the Kraft Choice Plan, if that spouse had alternative health coverage available to him or her through another employer. The union also grieved the issue of vision coverage after some retirees complained about its absence from the retiree plan.

In May 2001 defendant and the union reached a settlement regarding the retirees' vision coverage grievance that they formalized with another "Memorandum of Agreement." (The spousal surcharge issue was resolved in the union's favor through arbitration.) The May 2001 memorandum allowed recent retirees a "do over" opportunity to choose a plan and it set out three health plan design options to be offered to "employees whose retirement begins on 1/1/01, through and including retirements beginning on 3/1/04." Dkt. #44-11 at 1. The May 2001 memorandum stated that the various plan design choices were "subject to the provisions of each plan." Id. In addition, the memorandum stated that the "contribution rate at retirement remains in effect throughout retirement." Id. With respect

to HMO choices available under the Kraft Choice Plan, the May 2001 memorandum stated that the "2001 options may include (per zip code eligibility): Dean Care Choice HMO, Physicians Plus Choice HMO, or Choice Network Options including the UHO PPO." Id.

Before January 1, 2011, retiree medical and prescription drug coverage were provided under Kraft's Group Benefits Plan. In anticipation of a change in administration of the plan, defendant consolidated 227 separate retiree medical plan designs into 84, consolidated 59 separate retiree prescription drug designs into 14 and consolidated 30 separate retiree dental designs into 8. Defendant sent written communications to retirees in November 2010 explaining the changes. The consolidation eliminated the "Dean Care HMO" option for retirees from the Madison plant. Any retirees under the Dean Care plan design were directed to select from the Physician's Plus Choice HMO plan or to receive benefits through the existing PPO design. Additionally, the out-of-pocket co-pay for prescription drugs increased from $1 to $3 for a 30-day supply from a pharmacy and from $0 to $5 for a 90-day supply through a mail-order service. The monthly premiums paid by retirees did not change as a result of the 2011 changes.

OPINION

Plaintiffs are challenging two changes that defendant made to their health insurance benefits in 2011: (1) increasing the co-pay for prescription drugs; and (2) eliminating Dean Care as an HMO option. I will address each issue in turn.

A. Co-pays

The parties devote much of their briefs to the question whether plaintiffs' health insurance benefits are vested and to the standard for making that determination, but this seems to be a red herring. For the purpose of its motion, defendant does not dispute that it was required to maintain the same "contribution rate" for plaintiffs. Dft.'s Br., dkt. #42, at 17 ("[T]he rate being paid by that [retired] employee as of that retirement date would be frozen for continued coverage."). That is the provision plaintiffs are relying on, so the real question is whether plaintiffs' co-pays for prescription drugs are part of the plaintiffs' "contribution rate" as that term is used in the May 2001 memorandum agreement.

Defendant's position is that the term "contribution rate" is synonymous with premiums, so it does not extend to co-pays, co-insurance, deductibles or lifetime maximums. Plaintiffs say that the term extends to any out of pocket expense to a plan participant. (Plaintiffs did not bring a claim regarding out of pocket expenses other than co-pays, but their interpretation of "contribution rate" would not be so limited.) Because plaintiffs brought their claims under ERISA and the LMRA, interpretation of the agreement is governed by federal common law. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456-57 (1957); GCIU Employer Retirement Fund v. Chicago Tribune Co., 66 F.3d 862, 864-65 (7th Cir. 1995).

Plaintiffs cite lay dictionary definitions of the words "contribution" and "rate" to support their interpretation, but reliance on the meaning of these words in isolation is misplaced for multiple reasons. First, employee "contributions" in the insurance context are

defined consistently as meaning the employee's contribution to the insurance premiums rather than any out of pocket expense. New York State Court Officers Ass'n v. Hite, — F. Supp. 2d —, 2012 WL 899387, *1 (S.D.N.Y. 2012) (equating "insurance premium costs" with "contribution rates"); Trustees of Unite Here National Health Fund v. American Wiper and Supply Co., 2010 WL 6580630, *2 (S.D.N.Y. 2010) (equating "health insurance premium per employee" with "the contribution rate required by the collective bargaining agreement"); Crosby v. Electronic Data Systems Corp. Health Benefits Plan, 2008 WL 5244437, *2 (W.D.N.C. 2008) (using "contribution rates" interchangeably with "premium rates"); Boston Teachers Union, Local 66 AFT, AFL-CIO v. City of Boston, 694 N.E.2d 33, 37 (Mass. Ct. App. 1998) (equating "premiums" with "employee contribution rate"). See also Tackett v. M & G Polymers USA, LLC, — F. Supp. 2d —, 2012 WL 553010, *19 (S.D. Ohio 2012); Professional Engineers in California Government v. Schwarzenegger, 239 P.3d 1186, 1202 (Cal. 2010); United Paperworkers International Union, AFL-CIO, CLC v. Jefferson Smurfit Corp., 771 F. Supp. 992, 994 (E.D. Mo. 1991); Dft.'s Br., dkt. #50, at 6 n.2 (citing Glossary of Insurance Terms, 57 (6th ed. 2000) defining "contribution" as "the amount of premium for group insurance or a pension plan paid by the employee").

Second, courts may not interpret plan provisions in isolation, but must view them in the context of the agreement as a whole. Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 565 (7th Cir. 1995). The parties agree that the summary plan description, the 2000 memorandum agreement and the 2001 memorandum agreement are all relevant to the proper interpretation because each document refers to the others and each is necessary to

provide a full understanding of the parties agreement regarding health benefits. Temme v. Bemis Co., Inc., 622 F.3d 730, 734 (7th Cir. 2010) (under federal common law, "related documents are read together").

Both the 2000 memorandum agreement and the summary plan description make it clear that the contribution rate does not extend to co-pays and other out of pocket expenses. The summary plan description describes a participant's "contribution" as the amount that is deducted from the participant's paycheck each month and it describes separately various out of pocket expenses, such as deductibles, co-payments and co-insurance. Dkt. #44-8 at 11. An employee's contribution depends on the participant's "annual base pay as of July 31 of the preceding year, as well as the coverage option and coverage category" the participants elected. Nothing in the plan suggests that the deducted amount will vary depending on any co-pays incurred during the month, assuming it even would be feasible to treat co-pays in that manner.

The 2000 agreement sets forth the participants' "monthly contribution levels" and then refers to the contribution levels as "these rates." These provisions are followed by another in the same section stating that "Premiums for health insurance will remain at the active employee rate which is in effect at the date of retirement." Taken together, these provisions show that the 2000 agreement equated a participant's "contribution" with his or her monthly premium. If the participant's "monthly contribution level" was meant to include co-pays or other out of pocket expenses incurred over the course of a month, defendant would not have been able to determine that amount in advance as it did in the

2000 agreement.

I see no reason to interpret the 2001 agreement any differently. After all, the 2001 agreement was adopted to address a problem with vision coverage; it had nothing to do with co-pays or any other out of pocket expense. Plaintiffs identify no reason to believe that the promise in the 2000 agreement to keep the premiums at the same rate was expanded dramatically in the 2001 agreement to include co-pays. In fact, plaintiffs state repeatedly that the 2001 agreement "confirmed" the level of benefits provided in the 2000 agreement. Plts.' Br., dkt. #47, at 13, 16. In context, plaintiffs' interpretation simply makes no sense.

Plaintiffs rely heavily on the depositions of Michael Rice, president and lead negotiator for the union, and Joseph Jerzewski, representative for the union, in an attempt to show that the parties intended to freeze the amount of co-pays, Rice Dep., dkt. #48, at 87-98; Jerzewski Dep., dkt. #49, at 67-69, but this testimony cannot carry the day for two reasons. First, parties may not rely on extrinsic evidence under federal common law unless the agreement at issue is ambiguous. Bidlack, 993 F.2d at 608. In other words, a party may not use extrinsic evidence to "artificially create ambiguity where none exists," but only as a means to resolve inherent ambiguity. Hammond v. Fidelity and Guarantee Life Insurance Co., 965 F.2d 428 (7th Cir. 1992); Keystone Steel & Wire Co., 61 F.3d at 565. This rule makes sense. Without it, a party could attempt to avoid the effect of any provision it later found unfavorable simply by testifying that it intended a different meaning from that required by the plain meaning of the contract. Because I have concluded under traditional principles of contract interpretation that the phrase "contribution rate" in the 2001

agreement does not include co-pays, I may not consider the testimony plaintiffs cite.

Second, even if I could consider the testimony, it would not be sufficient to prove plaintiffs' claim. Rice answered "yes" when asked whether he believed the 2001 agreement "locked in" co-pays, but he was unable to provide any specifics to support his belief. He simply made conclusory assertions that "we agreed that this is what it means" and "[t]hat's what we negotiated." He does not point to a particular conversation, document or any other piece of evidence. In re Kmart Corp., 434 F.3d 536, 542 (7th Cir. 2006) (rejecting party's request "to disregard the language of the contract and go by [that party's] subjective belief" in part because party "does not offer any concrete, objective evidence . . . ; its brief emphasizes the feelings, thoughts, and suppositions of its negotiators, not any objectively demonstrable exchanges"). What Rice may have thought the agreement meant is not relevant. Id. at 540. See also Uniek, Inc. v. Dollar General Corp., 500 F. Supp. 2d 1158, 1166 (W.D. Wis. 2007) ("[C]ontracts cannot be modified through telepathy; it is the parties' intent as manifested by their conduct that controls, not their secret thoughts."). Jerzewski's cited testimony is even less helpful. He testified that he believed the "contribution rate" includes co-pays, but he provided no basis for that belief.

Because the unambiguous language of the parties' agreements shows that a participant's "contribution rate" does not include co-pays, I am granting defendant's motion for summary judgment as to this claim.

B. Elimination of Dean Care Option

Plaintiffs scarcely mention in their brief their claim that defendant was prohibited from eliminating Dean Care from the list of available HMOs. They simply cite Rice's testimony that "[i]t was negotiated into the contract." Rice Dep., dkt. #48, at 88. However, plaintiffs do not identify any particular provision in any agreement that limited defendant's discretion on this issue and they have adduced no specific evidence to support Rice's belief. Bland v. Fiatallis North America, Inc., 401 F.3d 779, 784 (7th Cir. 2005)("[T]he intention to vest [health benefits] must be found in clear and express language in plan documents.") (internal quotations omitted). Accordingly, I conclude that plaintiffs have waived this claim by failing to develop any argument in support of it.

In their proposed findings of fact, plaintiffs cite a provision in the 2001 memorandum agreement that included Dean Care as an option, subject only to zip code availability. However, this simply establishes that Dean Care was an option at one point; again, plaintiffs cite no language in the agreement that required defendant to keep those options the same. To the extent plaintiffs mean to argue that the agreement to maintain the contribution rate somehow extends to the list of available HMOs, that argument is frivolous.

ORDER

IT IS ORDERED that defendant Kraft Foods Global, Inc.'s motion for summary judgment, dkt. #41, is GRANTED. The clerk of court is directed to enter judgment in favor

of defendant and close this case.

Entered this 7th day of August, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge