

Court Tosses Fifth Third Workers' Fees Claim Filed Shortly After Limitations Period Expired

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Fifth Third Bancorp employees are time-barred from pursuing their claim that the company and its top officials breached their fiduciary duties by "loading" the company's tax code Section 401(k) plan with several Fifth Third mutual funds that charged excessive and unreasonable fees, the U.S. District Court for the Southern District of Ohio held Sept. 30 (Shirk v. Fifth Third Bancorp, S.D. Ohio, No. 05-cv-049, 9/30/09).

Granting Fifth Third's motion to dismiss, Magistrate Judge Timothy S. Black found that the employees had filed their excessive fees-related claim just two weeks after the three-year statute of limitations had expired.

The court found that the employees had the requisite knowledge that triggered the running of the statute of limitations when Fifth Third in March 2004 revamped its Section 401(k) plan and added new Fifth Third mutual funds to the plan's investment offerings. When Fifth Third made these changes, it provided employees with plan documents setting out the new investment options and the statute of limitations began to run no later than the day the employees were provided with the documents, the court found.

"[B]ecause Plaintiffs' actual knowledge runs from the date the documents were provided, or made available, to Plan Participants disclosing the facts underlying the alleged breach of fiduciary duty, Plaintiffs cannot avoid the bar of [the Employee Retirement Income Security Act's] three year statute of limitations by merely claiming that they did not read the documents that form the basis for their claims," the court said.

Originates as Stock Drop Case

The lawsuit, as originally filed in 2005, was an employer "stock drop" case. The employees alleged in their original complaint that Fifth Third and its top executives breached their fiduciary duties by allowing employees to invest retirement plan money in Fifth Third stock during a period when the company was allegedly concealing its financial problems.

In April 2007, the district court denied the Fifth Third defendants' motion to dismiss the employer stock claims (70 PBD, 4/12/07; 34 BPR 920, 4/17/07; 40 EBC 2560). Later, however, the district court granted the motion to dismiss, ruling that the Fifth Third defendants did not breach their fiduciary duties by retaining Fifth Third stock as an investment option (39 PBD, 3/3/09; 36 BPR 568, 3/10/09; 46 EBC 2502).

Just prior to the district court's April 2007 decision denying the defendants' motion to dismiss, the employees on March 21, 2007, filed an amended complaint adding three new fiduciary breach claims. Specifically, the employees alleged that Fifth Third and the other defendants breached their ERISA fiduciary duties by: (1) imposing excessive fees and expenses on plan participants, (2) loading the plan with several Fifth Third mutual funds that charged excessive and unreasonable fees to the plan and its participants, and (3) engaging in undisclosed self-dealing by offering Fifth Third mutual funds in the plan in order to generate seed money that facilitated the marketing of Fifth Third's own proprietary funds.

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In September 2008, the district court denied Fifth Third's motion to dismiss the amended complaint. In that decision, the court said the employees had sufficiently alleged that the plan fees and expenses information was material and should have been disclosed to the employees (192 PBD, 10/3/08; 35 BPR 2296, 10/7/08; 44 EBC 2936).

Fees-Related Claims Are Time-Barred

In its most recent decision, the court granted Fifth Third's motion to dismiss all of the fees-related claims raised in the amended complaint. The court found that these claims were all time-barred by ERISA Section 413's three-year statute of limitations for fiduciary breach claims. The court said the record contained undisputable evidence showing that the employees first acquired "actual knowledge" of the alleged fiduciary breach at some point in time more than three years prior to when they filed their second amended complaint on March 21, 2007.

According to the court, the employees had actual knowledge of the alleged fiduciary breach when they received plan documents explaining that the Section 401(k) plan would include new Fifth Third mutual funds. These documents were given to employees in early March 2004, the court said.

The court rejected the employees' contention that the breach that triggered the running of the statute of limitations did not occur until March 22, 2004, when Fifth Third actually moved the money in the Section 401(k) plan to the new mutual funds. The court agreed with the defendants that the statute of limitations began to run before the plan money was actually moved to the allegedly high-cost mutual funds.

The court thus found that by no later than March 5, 2004, the employees had actual knowledge of the conduct giving rise to the alleged ERISA violations. The employees' amended complaint was not filed until March 21, 2007, which was two weeks past the March 5, 2007, expiration of the three-year statute of limitations, the court found.