

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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REBECCA WALBRIDGE :  
 : CASE NO. 1:02 CV 474  
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 : Plaintiff :  
 :  
 : -vs- :  
 : MEMORANDUM OF OPINION AND  
 : ORDER DISMISSING THIS CASE FOR  
 : LACK OF SUBJECT MATTER  
 : JURISDICTION  
 :  
 : U.S. BANK, NATIONAL ASSOCIATION :  
 :  
 : Defendant :  
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UNITED STATES DISTRICT JUDGE LESLEY WELLS

The issue before the Court is whether it has subject matter jurisdiction over plaintiff Rebecca Walbridge's claim against defendant U.S. Bank, National Association ("US Bank"). On 13 March 2003, Ms. Walbridge filed a one-count amended complaint against US Bank alleging that she had been unlawfully retaliated against for receiving benefits under defendant's health care and short-term disability benefits plan, in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. (Docket #15). Ms. Walbridge asserted that this Court has diversity and federal question jurisdiction over her ERISA claim as well as jurisdiction under ERISA itself. (Docket #15, at ¶ 1).

Though US Bank denied Ms. Walbridge's jurisdictional allegations in its answer (Docket #27, at ¶ 1), the issue of whether this case was properly before the Court was

not initially raised by the parties. After completion of discovery and after US Bank's motion for summary judgment on the merits of Ms. Walbridge's claim was fully briefed (Docket #44, #46, #47, and #52), US Bank argued that this Court lacked subject matter jurisdiction in a motion for leave to file a response to plaintiff's sur-reply or, in the alternative, for the court to hold an evidentiary hearing (Docket #53). Specifically, US Bank contended that "the short-term disability benefits plan at issue is not governed by ERISA, thereby depriving this Court of subject-matter jurisdiction over the claims in this case." (Docket #53, at 1). To determine whether the plan at issue was governed by ERISA, the Court set a briefing scheduling and an evidentiary hearing date. (Docket #54). On 16 April 2004, the parties filed their briefs on the issue of subject matter jurisdiction (Docket #59 and #61) and the hearing took place on 27 April 2004 (Docket #64).

For the reasons set forth below, the Court finds that ERISA does not apply to the short-term benefits plan in this case and therefore that it lacks subject matter jurisdiction over Ms. Walbridge's claim.

## **I. BACKGROUND**

On 11 December 2000, plaintiff Rebecca Walbridge began working for Firststar Bank ("Firststar").<sup>1</sup> (Docket #63, at ¶ 1). Ms. Walbridge took short-term disability leave from 17 July 2001 through 30 July 2001, receiving benefits from Firststar's short-term

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<sup>1</sup> Firststar merged into US Bank in February 2001. (Hearing Tr. at 13).

disability benefits plan. (Docket #15, at ¶ 8, and #63, at ¶ 2 and 4; Hearing at 23).<sup>2</sup> Firststar's Disability Plan provided for short-term disability benefits in the form of salary continuation. (Docket #63, at ¶ 4; Joint Ex. 1, at 13-14). Ms. Walbridge's employment with Firststar ceased on 2 August 2001. (Docket #6, at Docket #63, at ¶ 1).

Because the crux of the issue before the Court is the proper characterization of Firststar's short-term disability benefits plan, the Court must examine the source of funding for the plan, which, in turn, requires the elaboration of a merger and subsequent plan changes. Firststar and Mercantile Bank ("Mercantile") merged in September 1999 but maintained separate disability plans until 31 December 2000. (Hearing Tr. at 8-9). Originally, Firststar had one disability plan which provided for both short-term and long-term disability benefits out of a single Firststar Disability Trust. (Hearing Tr. at 8-9). Mercantile, on the other hand, had separate short-term and long-term disability plans funded by two separate trusts. (Hearing Tr. at 9). On 31 December 2000, the two plans merged and all claims for short-term disability benefits made on or after 1 January 2001 were paid out of the general assets of the Bank. (Hearing Tr. at 10-11, 18-19). The Mercantile plan remained in existence but only to pay claims of former Mercantile employees asserted on or before 31 December 2000. (Hearing Tr. at 10 and 19).<sup>3</sup>

Thus, all short-term benefits claims made after 31 December 2000 by both former

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<sup>2</sup> Ms. Walbridge did not seek, apply for, or attempt to receive benefits under Firststar's long-term disability plan at any time. (Docket #63, at ¶ 3).

<sup>3</sup> Paying only short-term disability claims of former Mercantile employees made before 1 January 2001, the Mercantile short-term disability trust made its final payments in July 2001. (Hearing Tr. 19, 21-23, Ex. J).

Mercantile and Firststar employees were paid out of the Bank's general assets. (Hearing Tr. at 12 and 23). Since Ms. Walbridge filed her claim for short-term disability benefits in July 2001, her benefits were paid out of the Bank's general assets. (Hearing Tr. at 12 and 23).<sup>4</sup>

## II. SUBJECT MATTER JURISDICTION STANDARD

When subject matter jurisdiction is challenged pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the party asserting jurisdiction bears the burden of establishing that subject matter jurisdiction exists. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). Rule 12(b)(1) motions to dismiss based upon subject matter jurisdiction generally consist of two types. Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990). Facial attacks to subject matter jurisdiction merely question the sufficiency of the pleadings, and courts should apply the Rule 12(b)(6) standard in considering them. Id. In such a case, courts should accept the allegations in the complaint as true and construe them in a light most favorable to the nonmoving party. U.S. v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994) (citing Scheuer v. Rhodes, 416 U.S. 232, 235-37 (1974)).

Factual attacks, the second type of challenge to the court's subject matter jurisdiction, do not really question the sufficiency of the pleading's allegations, but rather

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<sup>4</sup> In February 2001, Firststar merged with U.S. Bank. (Hearing Tr. at 13). While the Bank eventually utilized the US Bank disability plan, Ms. Walbridge's claims were paid out of the Firststar disability plan prior to the merger of the plans. (Hearing Tr. at 12-13)

contest the factual predicate for subject matter jurisdiction. Id. In such a case, no presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. Id.; Moir, 895 F.2d at 269. Defendant US Bank raises a factual attack against this Court's subject matter jurisdiction because it challenges the factual predicate for subject matter jurisdiction; namely, that Firststar's short-term disability plan is governed by ERISA.

### III. LAW AND ANALYSIS

US Bank contends that the Firststar short-term disability plan (the "Plan") is exempt from ERISA as a payroll practice because it provides for salary continuation and is paid directly from the Bank's general assets and that the Court is thus deprived of subject matter jurisdiction. (Docket #61, at 1). Ms. Walbridge's response is two-fold. First, she argues that the Plan was in fact funded, at least in part, by a trust and not from the Bank's general assets and is therefore an ERISA plan. (Docket #59, at 2). In the alternative, she contends that US Bank should be estopped from arguing that the Firststar short-term disability plan is not an ERISA plan because of representations made to the Bank's employees and the federal government that its short-term disability plan was governed by ERISA. (Docket #59, at 5; Hearing Tr. at 4).

The existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding circumstances and facts from the point of view of a reasonable person. Thompson v. American Home Assur. Co., 95 F.3d 429, 434 (6th Cir. 1996).

ERISA defines "employee benefit plans" to include both "employee pension benefit plans"

and “employee welfare benefit plans.” 29 U.S.C. § 1002(3); Williams v. WCI Steel Co., Inc., 170 F.3d 598, 602 (6th Cir. 1999). An “employee welfare benefit plan” is defined as:

any plan, fund, or program which . . . is . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death . . .

29 U.S.C. § 1002(1). Despite falling within the literal definition of “welfare benefit plans,” certain “payroll practices” are specifically exempted from the definition by regulations promulgated by the Department of Labor, including:

(2) Payment of an employee’s normal compensation, out of the employer’s general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment). . .

29 C.F.R. § 2510.3-1(b)(2). Courts, applying this regulation, have uniformly held that a plan that paid salary continuation benefits to disabled employees out of the employer’s general assets constitutes an exempted payroll practice rather than an employee welfare benefit plan covered by ERISA. Stern v. International Business Machines Corp., 326 F.3d 1367, 1371-74 (11th Cir. 2003); Alaska Airlines, Inc. v. Oregon Bureau of Labor, 122 F.3d 812, 815 (9th Cir. 1997); Capriccioso v. Henry Ford Health Sys., 2000 WL 1033030, at \*2 (6th Cir. 2000); Hart v. Reynolds & Reynolds Co., 1993 WL 243797, at

\*3 (6th Cir. 1993). In McMahon v. Digital Equip. Corp., a case relied on heavily by Ms. Walbridge, the First Circuit held that a program that paid an employee's salary while he was disabled was an ERISA plan, but only because it was partially funded from sources outside of the employer's general assets, because the employer filed documents with the Department of Labor and the IRS consistent with the plan's ERISA status, and because it informed employees that the plan is subject to ERISA regulations. 162 F.3d 28, 37-38 (1998).

In this case, it is undisputed that all short-term disability benefit claims made by employees after 31 December 2000 were paid out of the Bank's general assets. While former Mercantile employees who filed claims prior to 1 January 2001 received short-term disability benefits out of a trust, this does not transform the Plan into an ERISA plan. The First Circuit statement, in McMahon, that "the question of funding must pertain to the plan as a whole, not to the source of funding for any particular employee" is actually consistent with designating Firststar's short-term disability plan as a payroll practice. 162 F.3d at 37. In McMahon, benefits paid under a single plan were partially funded by sources outside the employer's general assets. Id. at 38. By contrast, in this case, there were, for claims made prior to 1 January 2001, two separate short-term disability plans, one which was entirely funded by the employer's general assets and the other which was completely funded by a trust. Because these were separate and distinct plans with no commingling of funds, there is no obstacle to defining one plan to be a payroll practice and the other an ERISA plan. In any event, the existence of a short-term disability plan which paid benefits out of a trust for claims made prior to 1

January 2001 is irrelevant because, by the time Ms. Walbridge filed her claim for benefits, all short-term disability benefits were funded out of the Bank's general assets.<sup>5</sup> Thus, Firststar's short-term disability plan which provided short-term disability benefits, in the form of salary continuation, out of its general assets is, by definition, a payroll practice under 29 C.F.R. § 2510.3-1(b)(2).

Ms. Walbridge's second argument is, notwithstanding the literal application of the "payroll practice" exemption given the source of funding for the Plan, defendant, because of its previous representations that Firststar's short-term disability plan was an ERISA plan, is estopped from now arguing to the contrary. Again, she relies extensively on the First Circuit opinion in McMahon where the court suggested in dicta that a company may be estopped from arguing that its plan is not an ERISA plan:

[T]here is another reason to reject the application of the payroll practice rule to Plan 502: Digital's treatment of the Plan as an ERISA plan. Digital held the Plan out to its employees as an ERISA plan and filed documents with the Department of Labor and the IRS acknowledging the Plan's status as an ERISA plan. [T]hese facts alone provide a strong reason to find ERISA coverage.

162 F.3d at 38. Despite this sweeping language, the court qualified this statement by explicitly stating that it was not holding that "an employer's mere labeling of a plan determines whether a plan is an ERISA plan, since this also could lead to a form of

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<sup>5</sup> While defendant admitted that former Mercantile employees who submitted claims for short-term disability benefits prior to 1 January 2001 were paid out of a trust, it is not entirely clear from the record whether Firststar employees who made claims prior to 1 January 2001 continued to receive payments from a trust rather than the bank's general assets. Though the record seems to suggest they did not, this fact has little bearing on the Court's ultimate conclusion since no employees who filed claims after 31 December 2000 were paid out of a trust.

‘regulation shopping.’” Id. at 38.<sup>6</sup> Rather it found that, when the employer partially funded its plan from sources outside of its general assets, representations like these further supported a finding that it was an ERISA plan and not an exempted payroll practice. Id. at 38. In an unpublished decision, the Sixth Circuit implicitly rejected an employee’s claim that her employer’s representations to her that the plan was funded by an insurance contract should govern when, as matter of fact, the plan was funded out of the employer’s general assets. Hart, 1993 WL 243797, at \*3. As such, Hart appears to suggest that it is the actual source of funding, and not the employer’s representations about the funding source, which determine whether a short-term disability benefits plan is an ERISA plan or an exempted payroll practice.

In any case, Ms. Walbridge’s reliance on McMahon to support her jurisdiction by estoppel argument is unavailing as the two cases involved very different circumstances. Ms. Walbridge asserts that defendant held the Plan out to its employees as an ERISA plan by language in its Plan (Docket #63, Joint Ex. 1, at 1 and 17-18) and Summary Plan Description (Docket #63, Joint Ex. 2, at 11-12).<sup>7</sup> In the introduction of the Plan, it is stated that “the disability benefits are intended to be provided under a plan subject to the Employee Retirement Security Act of 1974.” (Docket #63, Joint Ex. 1, at 1). Moreover,

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<sup>6</sup> The Eleventh Circuit was even more explicit in Stern in concluding that “even if IBM has treated the Program as an ERISA plan with respect to government filings, its mere labeling of the plan should not determine whether ERISA applies.” 326 F.3d at 1374.

<sup>7</sup> Ms. Walbridge also points to a document which describes the merger of various plans and which, she suggests, demonstrates that the short-term disability fund would be paid through a trust even after 31 December 2000. (Docket #59, at 4, Ex. 1). This document does not appear to have been provided to employees and so its relevance goes to the actual source of funding for short-term benefits plan, which has already been established, and not to defendant’s representations to its employees or the government.

the Summary Plan Description provides that “[s]hort-term disability benefits and administrative expenses are funded in whole or in part through trusts. . . .” (Docket #63, Joint Ex. 2, at 11-12). US Bank explained that these documents were produced in the early 1990's when the short-term disability plan was funded through a trust and were not revised on 31 December 2000, with the merger of the Firststar and Mercantile plans and the funding change, because the plan design was staying mostly intact and because updating the plan descriptions did not make sense given the pending merger with U.S. Bank. (Hearing Tr. at 12-13). Nevertheless, defendant sent out several mailing and informational packets to its employees informing them about the changes and indicating that short-term disability benefits would now be paid through the Bank’s payroll. (Hearing Tr. at 11). Unlike McMahon, this case involved a change in plan funding after the merger of two separate plans with the defendant informing its employees of that change. Though its failure to revise the language of the Plan and its Summary Description may have caused some confusion, defendant did not continue to hold out its Plan as an ERISA plan.

In arguing that defendant represented to the government that Firststar’s short-term disability plan was funded by a trust and not general assets, Ms. Walbridge points to three Form 5500s (“Annual Return/Report of Employee Benefit Plan”) which were filed by defendant for 2000, 2001, and 2002. (Docket #59, at 5, and #63, Joint Exs. 3-5). Defendant filed Form 5500s with the Internal Revenue Service for all benefit plans governed by ERISA, but not for plans funded by the Bank’s general assets. (Hearing Tr. at 13-14). While the Form 5500 for 2000 was filed in conjunction with the Firststar

disability plan, covering a time period when that plan was indeed funded by a trust, this time period is irrelevant to Ms. Walbridge's benefit claim which was filed in 2001. The other two Form 5500s relate only to the Mercantile plan. (Hearing Tr. at 14). Because the Firststar short-term disability benefits plan was funded entirely out of the Bank's general assets starting in 1 January 2001, no Form 5500's were filed in 2001 or 2002 in reference to it. (Hearing Tr. at 14).

In short, Ms. Walbridge's case is quite unlike McMahon. In McMahon, the employer partially funded a plan from sources outside of its general assets, filed documents with the Department of Labor and the IRS consistent with the plan's ERISA status, and informed employees that the plan is subject to ERISA regulation. 162 F.3d at 38. In this case, while out-dated descriptions of the Firststar Disability plan refer to ERISA, defendant informed the employees of the changes, did not represent to the government that the Firststar short-term disability plan after 31 December 2000 was an ERISA plan, and paid all short-term disability benefits for claims after 31 December 2000 out of its general assets.

The Court does not foreclose the possible relevance of an employer's representations regarding its disability plan to a determination of the applicability of ERISA. However, when a short-term disability plan is funded entirely out of employer's general assets, Stern, Hart, and even McMahon compel the conclusion that it is not an ERISA plan regardless of contrary characterizations of the plan by the employer. The failure of defendant to conform the language of its Plan and Summary Description to the new realities of the Plan's funding source is not enough to convert Firststar's short-term

disability plan, paid entirely out of the employer's general assets, from an exempted "payroll practice" into an ERISA plan. Because the Firststar short-term disability plan upon which Ms. Walbridge bases her claim is not an ERISA plan, this Court lacks subject matter jurisdiction over her claim.<sup>8</sup>

#### **IV. CONCLUSION**

For the reasons set forth above, plaintiff Rebecca Walbridge's claim against defendant US Bank is dismissed due to lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/ Lesley Wells  
UNITED STATES DISTRICT JUDGE

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<sup>8</sup> Given that Firststar's short-term disability plan which paid benefits to Ms. Walbridge is not an ERISA plan, this Court lacks subject matter jurisdiction on the basis of ERISA or the presentation of a federal question. At the evidentiary hearing, neither party advanced any arguments regarding Ms. Walbridge's assertion that this Court had diversity jurisdiction over her claim. However, since her sole claim is predicated on ERISA and the Court has determined that the plan at issue is not an ERISA plan, diversity jurisdiction is a moot issue because Ms. Walbridge's amended complaint now lacks a viable claim.