

NO. A07-2034

State of Minnesota
In Supreme Court

Patricia Ann Langston,

Appellant,

v.

Wilson-McShane Corporation, as Administrator
for the Twin Cities Carpenters and Joiners Pension Fund, and
the Twin Cities Carpenters and Joiners Pension Fund,

Respondents.

APPELLANT'S REPLY BRIEF

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Introduction

Respondents present three arguments in support of their position that federal courts have exclusive jurisdiction over whether a domestic relations order is “qualified”. First, Respondents argue that Patricia Ann Langston’s complaint fails because she is not a “participant” or a “beneficiary” seeking benefits under the terms of the Plan. Second, Respondents argue that Langston’s complaint ignores ERISA’s framework. Finally, Respondents argue that the many courts that have disagreed with Respondents have misinterpreted ERISA.

Langston has addressed some of the arguments advanced by Respondent in her initial brief. This reply brief will focus on Respondents’ newly minted argument that their decision not to qualify the 2005 order defeats Langston’s standing to bring a 1132(a)(1)(B) claim. This reply brief will also address Respondents’ misplaced reliance upon *Welter v. Welter*.

A. Langston's Claims Arise Under 29 U.S.C. § 1132(a)(1)(B).

Respondents' hallmark claim is that Langston's complaint fails because she is not a "participant" or a "beneficiary" seeking benefits under the terms of the Plan. Respondents' Brief, pp. 20-24. The Court should reject this argument because it is based on a misreading of Langston's complaint and faulty circular reasoning.

i. Langston Seeks Benefits Under The Plan.

First, Respondents' argue ". . . Langston's complaint does not state a claim for wrongful denial of benefits in contravention of the provisions of the plan document, nor for relief that can be awarded pursuant to the plan." *Id.*, at 22. This is inaccurate. Langston's complaint expressly states ". . . Plaintiff is entitled to judgment against Defendants for retroactive and ongoing survivor benefits, plus interest and reasonable attorneys' fees and costs, and a declaration that Plaintiff is entitled to benefits under the Plan." Respondents' Appendix 002, ¶ 17. Accordingly, Langston expressly sought benefits under the plan.¹ Further, the complaint, when read as a whole, rather obviously sets forth a claim for benefits from the plan. R.App. 001 -003.

Even if Respondents' semantical assertions were accurate, however, the phrasing of Langston's complaint does not deprive the courts of the State of Minnesota of jurisdiction

¹ Respondents make the unsupported claim that "Langston's Complaint sought a ruling that the plan administrator and plan were acting in violation of 29 U.S.C. §1056 and sought redress for such violations." Respondents' Brief, p. 33. In fact, Langston's Complaint makes no mention of 29 U.S.C. §1056.

over her claim for pension benefits. Rather, it is the nature of Langston's entitlement to benefits that dictates concurrent state court jurisdiction is appropriate.

Langston cannot, as Respondents argue, be said to seek benefits through enforcement of ERISA under section 1132(a)(3). "The QDRO provisions added to ERISA by REA [Retirement Equity Act] do not independently provide former spouses or dependents with rights to any retirement benefits. Rather, they constitute only an *exception* to the general anti-alienation rule of section 1056(d)(1), *allowing* plan administrators to make payments, under specified circumstances, to alternate payees *if ordered to do so* by a state court. To the extent former spouses and dependents have rights in a participant's retirement benefits, those rights derive not from ERISA, but from state domestic relations law. Thus, a former spouse . . . who seeks enforcement of a state court order giving her a right to a portion of the participant's plan benefits, is not seeking to enforce ERISA, but to obtain benefits she claims are due her under the terms of the plan and the state court order." *Oddino v. Oddino*, 939 P.2d 1266, 1272 (Cal. 1997).

This holding is directly on point and best summarizes the nature of Langston's claim. Langston's lawsuit, both through the express language of the complaint and through the stated source of Langston's entitlement to benefits (the QDRO and the plan), states a claim pursuant to 1132(a)(1)(B). Accordingly, the Courts of both Minnesota and the United States are vested with concurrent jurisdiction over Langston's lawsuit.

ii. Langston Has Standing To Bring An Action Pursuant To 29 U.S.C. § 1132(a)(1)(B).

Next, Respondents argue that because Langston neglected to obtain a QDRO before Langston's death or prior to his retirement, she isn't a beneficiary or a participant and, therefore, has no available claim under 1132(a)(1)(B). Respondents' Brief, p. 24. This Court should reject this circular argument for two reasons. First, it is contrary to law because Respondents' failure to qualify the 2005 QDRO was erroneous. Second, Respondents' argument is circular and places the Congressional mandate of concurrent jurisdiction in the hands of the benefit plans that ERISA seeks to regulate.

Section 1132(a)(1)(B) provides that a civil action may be brought by a plan beneficiary "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." 29 U.S.C. §1132(a)(1)(B). In this case, Langston did obtain a QDRO. Respondents thereafter failed to qualify the QDRO because it was not served on Respondents prior to Gary Langston's retirement. Respondent's Brief, p. 24. Respondents' refusal to qualify the 2005 QDRO and remit benefit payments to Langston is the source of Langston's lawsuit.²

² Respondents make the bizarre statement that Langston could have addressed their refusal to qualify the 2005 domestic relations order by simply obtaining an amended DRO from Anoka County District Court, but instead chose to sue. Respondents neglect to mention that the amended DRO requested by Respondents would have entitled Langston to exactly two months of benefit payments and no more.

Respondents argue that their decision not to qualify the 2005 QDRO deprives Langston of standing to bring an (a)(1)(B) claim. Respondents' failure to qualify the 2005 order, however, was erroneous.³

In 2007, the United States Department of Labor ("Department of Labor") promulgated 29 C.F.R. § 2530.206. That regulation specifically provides that "... a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued." 29 C.F.R. § 2530.206, (c)(1). The examples provided as part of the regulation make clear that a domestic relations order issued after death, divorce and/or annuity starting date may all be qualified. Accordingly, Respondents' denial of benefits to Langston based on the late service of the August 2005 order is without merit.

Further, the relevant case law, which predates the clarifying 2007 regulation of the Department of Labor, unanimously supports Langston's position. The United States Court of Appeals for the Ninth Circuit addressed a scenario similar to Langston's in *Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.2d 415 (9th Cir. 2000) and held that a QDRO is valid even if served after benefits payments have commenced.

The *Tise* court explained:

Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be

³ Langston presents her argument with respect to Respondents' failure to qualify the 2005 order only because Respondents now rely on that decision to defeat state court jurisdiction.

obtained before the plan participant's benefits become payable on account of his retirement or death. Several features of the statute's language and structure confirm that ERISA erects no such requirement.

First, for all the detail of the QDRO requirements, ERISA nowhere specifies that a QDRO must be in hand before benefits become payable.

Second and more significantly, the statute specifically provides for situations in which no valid QDRO issues until after benefits become payable. Once the pension plan is on notice that a domestic relations order has issued that may be a QDRO, the plan may take a reasonable period to determine whether the order is a QDRO and therefore creates obligations for the pension plan. 29 U.S.C. § 1056(d)(3)(G)(II).

While the plan is making this determination, it must segregate the benefits that would be due to the alternate payee under the terms of the DRO during the first 18 months that those benefits would be payable if the DRO is ultimately deemed a QDRO. 29 U.S.C. § 1056(d)(3)(H)(v). This benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO.

Third, Congress expressly contemplated that further state court proceedings might ensue during the 18-month QDRO-determination period, through which the alternate payee could attempt to cure any defects in the original DRO and obtain an enforceable QDRO.

Id. at 421-22. This position has been adopted by the United States Court of Appeals for the Eighth Circuit as well. See *Hogan v. Raytheon Co.*, 302 F. 3d 854 (8th Cir. 2002).

In this case, Respondents claim that Langston is not entitled to any retirement benefit payments because Gary Langston had already retired at the time the QDRO was served. While it is true that in certain situations, a QDRO can be served too late to protect an

alternate payee's right to retirement benefits, (see *Rivers v. Central and South West Corporation, et al.*, 186 F.3d 681 (5th Cir. 1999)), those cases occur when the alternate payee's right to receive the benefits does not exist at the time the plan participant retires or dies. *Id.* at 682.

Here, Langston's entitlement to retirement benefits was created in 1993. The QDRO now at issue is merely a vehicle for enforcing Langston's interest in the benefit payments. Accordingly, the fact that Respondents had already commenced benefit payments to Gary Langston at the time the QDRO was served in August 2005 does not divest Langston of her entitlement.

Langston obtained a court-ordered entitlement to a portion of Gary Langston's survivor benefits more than a decade before Gary Langston's retirement - and served the July 2005 QDRO on Respondents approximately two months before Gary Langston's death. As such, this case falls squarely within the decisions of the Third, Eighth, Ninth and Tenth Circuits, as well as the United States District Court for the District of Vermont,⁴ the Supreme Court of Hawaii,⁵ and the United States District Court for the Eastern District of Michigan.⁶

⁴ *IBM Sav. Plan v. Price*, 349 F. Supp. 2d 854 (D. Vt. 2004).

⁵ *Torres v. Torres*, 60 P.3d 798, 819-824 (Haw. 2003).

⁶ *Payne v. GM/UAW Pension Plan*, 1996 WL 943424 (E.D. Mich. May 7, 1996).

Each of these courts has held that state courts may enter QDROs after a participant has died or the right to benefits has otherwise been transferred or expired. See *Hogan v. Raytheon Co.*, 302 F.3d 854, 857 (8th Cir. 2002); *Tise*, 234 F.3d at 421, as amended upon denial of reh'g, 255 F.3d 661 (9th Cir. 2000); and *Patton v. Denver Post Corp.*, 326 F.3d 1148, 1153-1154 (10th Cir. 2003).

In *Tise*, as set forth above, the Ninth Circuit held that the participant's death does not preclude the entry of a QDRO. The *Tise* Court ruled that a state court domestic relations order that is not a QDRO nonetheless transfers an interest in the pension from the participant to the claimant. 234 F.3d at 421. The absence of a QDRO, the Ninth Circuit asserted, "merely prevent[s] [the claimant] from enforcing that interest until the QDRO is obtained." *Id.* "Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before . . . death." *Id.* The Eighth Circuit's decision in *Hogan* is to the same effect, see, 302 F.3d at 857 (following *Tise*), as is the Third Circuit's decision in *Exxonmobil Pension Plan v. Files*, 428 F.3d 478 (3rd Cir. 2005).

In *Patton*, the Tenth Circuit went so far as to uphold a *nunc pro tunc* DRO issued eleven years after a divorce decree pertaining to plan benefits not known about at the time of the divorce. The Tenth Circuit declined to infer that the plan must have been notified of the interest prior to the death of the participant. *Patton*, 326 F.3d at 1153-1154.

Two cases wherein the court disqualified the surviving former spouse from benefits are *Rivers v. Central and Southwest Corp.*, 186 F.3d 681 (5th Cir. 1999) and *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997). These cases actually support Langston's claim for benefits.

In *Rivers*, "a community property settlement agreement was entered into between Rivers and Franklin on the day of their divorce. The agreement did not address Franklin's pension benefits in SWEPCO." 186 F.3d at 681 (Emphasis added). After Franklin had retired and died, Rivers sought and obtained an order purporting to confer upon Rivers an entitlement to Franklin's benefits. The court refused to recognize Rivers' proposed QDRO. The time line of events in the *Rivers* case is instructive:

1. Rivers and Franklin marry 1946
2. Rivers and Franklin divorce and the divorce decree makes no mention of Rivers' right to benefit payments 1972
3. Franklin remarries 1972
4. Franklin retires and begins receiving benefit payments 1983
5. Franklin dies 1987
6. Rivers files suit seeking QDRO and benefit payments 1997

Id. at 681.

In the case presently before this Court, Langston's divorce decree states:

Petitioner shall be awarded a one-half interest in the marital share of all future pension payment received by Respondent. This shall include one-half of all payments made to Respondent pursuant to a plan that Respondent is currently participating in, even if Respondent is not currently fully vested in said plan.

(Appellant's Appendix, pp. 008-009). Accordingly, the determinative fact in *Rivers* - the ex-spouse's failure to address the pension benefits in the divorce decree - is not present here. For this reason, any reliance on *Rivers* is misplaced.

In *Hopkins*, Vera Hopkins and her former husband had been divorced for eight years before Vera Hopkins sought a QDRO. At the time of the divorce, "Mr. Hopkins's pension was deemed a marital asset; nevertheless, Vera Hopkins was not awarded a portion of the pension in the equitable distribution of the marital assets." *Hopkins*, 105 F.3d at 154. After Mr. Hopkins retired, Vera Hopkins obtained a judgment against the participant for unpaid alimony. *Id.* at 155. Vera Hopkins then sought to satisfy this post-retirement judgment via a QDRO. Again, as in *Rivers*, Hopkins' divorce settlement made no mention of the participant's pension benefits. On these particular facts, the United States Court of Appeals for the Fifth Circuit held that the participant's second spouse could not be divested of her survivor benefit payments.⁷

Accordingly, as set forth in both *Rivers* and *Hopkins*, when the ex-spouse fails to obtain any right to benefit payments prior to divorce, he or she may be divested of any right

⁷ While *Hopkins* is so factually distinct that it should not be applied to the instant matter, Plaintiff does note that the reasoning of the *Hopkins* court is fundamentally flawed. For a detailed criticism of *Hopkins* see *Torres v. Torres*, 60 P.3d 798 (Haw. 2003). ("Based on the foregoing, we do not find the conclusion in *Hopkins* that surviving spouse benefits vest in the participant's current spouse at the time of retirement to be persuasive.")

in those payments. In this case, Langston's divorce decree does entitle her to receive a portion of her spouse's benefit payments.

Based upon ERISA, interpretive regulations and overwhelming authority from those courts that have addressed the issue, the 2005 QDRO was sufficiently timely and Langston is, as a matter of law, entitled to the benefits awarded her in the 1993 Judgment and Decree. Accordingly, this Court should not permit Respondents to rely upon their wrongful failure to qualify the 2005 order to defeat the concurrent jurisdictional scheme intended by Congress.

In sum, if this Court were to adopt Respondents' argument, a defined benefit plan administrator could defeat state court jurisdiction over an alternate payee's claim for benefits simply by refusing to recognize the alternate payee's claim. This sort of circular reasoning, advanced by Respondents for the first time in this forum, should be rejected.

Langston is a former spouse of a plan participant claiming that she is a beneficiary that should be receiving payments from the Plan pursuant to a QDRO. This is precisely the sort of claim that Congress, through the Retirement Equity Act of 1984 and the language of 1132(a)(1)(B), intended could be brought in either state or federal court.

B. Respondents' Reliance Upon *Welter v. Welter* Is Misplaced.

In response to the overwhelming body of case law unanimously holding that state courts and federal courts have concurrent jurisdiction over whether a DRO is "qualified",

Respondents cite to *dicta* from a single unreported, and inapposite, Minnesota Court of Appeals decision - *Welter v. Welter*.

In *Welter*, the Court of Appeals did not address the propriety of state court jurisdiction over whether a domestic relations order is “qualified”. The only issue in *Welter* was whether the deceased’s survivor benefit should pass to her ex-husband or her child. R. App., p. 186. On appeal, the ex-husband argued that the order was not a QDRO. The *Welter* court, however, refused to address this argument because it was not raised in the trial court. R. App., p. 187. In *dicta*, the court stated “. . . we note that whether a document is a QDRO is a matter relevant to ERISA, determinable by the plan administrator, and reviewable by a federal court.” *Id.*

Langston concedes that whether a document is a QDRO is reviewable by a federal court. It is also, however, reviewable by a state court. Moreover, the single sentence relied upon by Respondents is pure *dicta* because the *Welter* Court expressly stated that it was not addressing the husband’s QDRO-related argument. R. App., p. 187. “Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are *obiter dicta*, and lack the force of an adjudication.” *Wandersee v. Brellenthin Chevrolet Co., Selective Ins. Co., Intervenor*, 102 N.W.2d 514 (Minn. 1960) (citation omitted).

Moreover, and probably most critically, the *Welter dicta* expressly provides that “. . . except for actions under section 1132(a)(1)(B), federal courts shall have exclusive

jurisdiction of civil actions under this subchapter brought by participant or beneficiary.” R.App., p. 188. As set forth herein, Langston’s claim for benefits is brought pursuant to 1132(a)(1)(B). Accordingly, the *Welter* decision does not support Respondents’ argument that Minnesota state courts lack jurisdiction over whether a domestic relations order is “qualified.”

Conclusion

Patricia Ann Langston is seeking benefits pursuant to the terms of a domestic relations order. Respondents wrongfully refused to qualify that order. Congress intended that such claims could be brought in either state or federal court. Neither Respondents assertion that they may invoke the provisions of ERISA to defend themselves from Langston’s claims nor Respondents’ newest suggestion that Langston be confined to administrative proceedings defeats concurrent state court jurisdiction.

For all of the foregoing reasons, Appellant Patricia Ann Langston respectfully requests that this Court vacate the judgment of the Minnesota Court of Appeals and remand this civil action to the district court for further proceedings.

Dated: June 8, 2009.

Respectfully submitted,

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,635 words. This brief was prepared using WordPerfect 10.

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