

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA, an individual,

Plaintiff,

-against-

LAWRENCE BECKER, as plan administrator of the
Xerox Corporation Retirement Income Guarantee
Plan, and XEROX CORPORATION RETIREMENT
INCOME GUARANTEE PLAN, an Employee
Pension Benefit Plan,

Defendants.

Civil Action No.: 10-cv-06229

**DECLARATION OF
LAWRENCE M. BECKER**

Lawrence M. Becker, under penalties of perjury, states as follows:

1. I am a member of the Committee that is the current Plan Administrator for the Xerox Retirement Income Guarantee Plan (“RIGP” or the “Plan”). I am also a named Defendant in this action. I make this Declaration based upon personal knowledge and/or upon the relevant documents constituting the RIGP and/or otherwise prepared and maintained in the ordinary course of business. I make this declaration in opposition to Plaintiff Robert Testa’s motion for entry of summary judgment and in support of Defendants’ cross-motion for summary judgment.

2. I previously submitted a Declaration in this matter in support of Defendants’ motion to dismiss the Complaint, which was filed on May 21, 2010 (“2010 Declaration”). (Dkt. No. 22). I attached to my 2010 Declaration a copy of the 1998 Summary Plan Description (“SPD”) and a copy of the 1998 Restatement of the RIGP. (*See id.*).

3. I have reviewed Plaintiff’s motion for entry of summary judgment filed on July 26, 2016. Plaintiff’s attorney, John A. Strain, Esq., attached to his Declaration in support of Plaintiff’s motion for entry of summary judgment, dated July 25, 2016 (“Strain Declaration”),

copies of some correspondence between Mr. Testa and the RIGP Plan Administrator, which are part of the administrative record in this matter, however, he did not attach all documents in the administrative record. (*See* Dkt. No. 49-3, Exs. B, C, D, E, and F). Specifically, Mr. Testa does not include with his motion the Plan Administrator's response to his appeal, which was submitted by way of a letter on July 28, 2009 ("July 28, 2009 appeal"), from Mr. Strain addressed to me, which appeal is attached as Exhibit F to the Strain Declaration.

4. To provide some context for the Court, I provide a brief summary below of the administrative process regarding Mr. Testa's claim for benefits. I also attach hereto copies of the same letters that are attached to Mr. Testa's motion, for ease of reference for the Court.

5. The Plan first received correspondence from Mr. Strain on behalf of Mr. Testa in a letter dated October 3, 2008 ("Strain October 3, 2008 letter"). Mr. Strain stated that Mr. Testa had received a RIGP Pension Calculation Statement dated July 24, 2008, that reflected "some sort of reduction 'by the present value of the prior distribution.'" Mr. Strain then requested "a complete calculation of the benefit to which Mr. Testa is entitled, including all factors used to determine any 'reduction' and to convert the annuity benefit into a lump sum." Mr. Strain went on to state that "[T]he Second and Ninth Circuit Courts of Appeal have both ruled that the 'phantom account' reduction previously applied by the RIGP is illegal" and that he 'hoped' that the Plan is "not still applying the illegal phantom account method." A correct copy of the Strain October 3, 2008 letter is attached hereto as **Exhibit A**. (*See also* Strain Decl., Ex. B).

6. The Strain October 3, 2008 letter was not properly submitted to the Plan in accordance with the Plan's claims procedure, therefore the RIGP did not issue a response to the Strain October 3, 2008 letter.

7. The Plan then received a letter from Mr. Strain on behalf of Mr. Testa that was dated January 30, 2009. In this letter, Mr. Strain references that he was informed that the October 3, 2008 letter did not follow the Plan's claims procedure. The Strain then requested that the Plan "immediately process and pay to Mr. Testa (in the lump-sum form reflected in his benefit election) that amount that you determine to be payable to him under the RIGP." Mr. Strain went on in the letter to say

Unless you modify your benefit calculations in a way that complies with *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008), please treat this current letter as a formal claim, under the RIGP Claims and Appeals Procedure, for the excess of the appropriate benefit over the amount you are new[sic] going to pay."

A correct copy of Mr. Strain's letter to the Plan dated January 30, 2009 is attached hereto as **Exhibit B**. (See also Strain Decl., Ex. C).

8. In response to Mr. Strain's letter to the Plan of January 30, 2009, a lump sum amount of \$309,842.46 was distributed to Mr. Testa from the RIGP on or about February 4, 2009. (See Complaint, ¶ 70; Answer, ¶ 70).

9. Thereafter, the Plan received a letter from Mr. Strain dated May 26, 2009 regarding Mr. Testa. In this letter, Mr. Strain stated:

Pursuant to the Claims Procedure set forth in the Summary Plan Description for the Xerox Corporation Retirement Income Guarantee Plan, we are hereby submitting this Appeal of the "denial" of the benefit claim submitted by us on January 30, 2009 on behalf of Robert Testa.

The claim involves contentions Xerox has unsuccessfully defended in litigation for over ten years. Therefore, this matter is undoubtedly clear to you. The Xerox Benefits Center has simply ignored that benefit claim.

Mr. Strain then requested all a copy of all documents, records and other information relevant to the claim. A correct copy of Mr. Strain's letter to the Plan dated May 26, 2009 is attached hereto as **Exhibit C**. (*See also* Strain Decl., Ex. D).

10. On June 2, 2009, Arlyn Kaster, then Manager Pension and Life Insurance Benefits for the RIGP, responded to Mr. Strain's letter of May 26, 2009. In the letter response, Ms. Kaster informed Mr. Strain that the January 30, 2009 letter did not constitute a claim under the Plan because it did not follow the procedure set forth in the Plan. Ms. Kaster then stated that the Plan would treat Mr. Strain's January 30, 2009 and May 26, 2009 together as a claim under the RIGP but explained that Mr. Testa's claim was denied for two reasons: (1) it was time-barred because he had notice of the offset calculation in the Plan since 1998; and (2) Mr. Testa was not a plaintiff in the cases *Layaou v. Xerox Corporation* and *Frommert v. Conkright*, thus he was not entitled to a benefit calculation that did not include the offset calculation, as the plaintiffs in those cases were. A correct copy of Ms. Kaster's June 2, 2009 letter on behalf of the Plan to Mr. Strain is attached hereto as **Exhibit D**. (*See also* Strain Decl., Ex. E).

11. Mr. Strain then submitted to the Plan an appeal of the denial of his claim in a letter to the Plan Administrator, Lawrence Becker, dated July 28, 2009. Mr. Testa claimed in his July 28, 2009 appeal that the denial of his claim for "proper benefits" under the RIGP benefit was erroneous on the basis of three court cases: *Miller v. Xerox Corporation Retirement Income Guarantee Plan*, 464 F. 3d 871 (9th Cir. 2006); *Frommert v. Conkright*, 433 F. 3d 254 (2nd Cir. 2006); and *Layaou v. Xerox Corporation*, 238 F.3d 205 (2nd Cir. 2001). A correct copy of Mr. Testa's July 28, 2009 appeal is attached hereto as **Exhibit E**. (*See also* Strain Decl., Ex. F).

12. In my capacity as Plan Administrator, I timely responded to Mr. Testa's July 28, 2009 appeal in a letter to Mr. Strain dated August 4, 2009; a correct copy of my August 4, 2009

letter to Mr. Strain responding to Mr. Testa's July 28, 2009 appeal is attached hereto as **Exhibit F**. I informed Mr. Strain that Mr. Testa's appeal that I "concluded that Mr. Testa's RIGP benefit is being calculated correctly and according to the terms of the Plan." In pertinent part, the basis for the denial is set forth in the third paragraph of the letter, which states:

In your letter, you cite the Miller, Frommert and Layaou decisions as precedent which allegedly compels a different calculation of Mr. Testa's RIGP benefits. As you know, the courts in Frommert and Miller have not yet rendered a final decision as to the appropriate alternative calculation of benefits. Moreover, Mr. Testa is not a plaintiff in any of the foregoing actions and is not necessarily entitled to the same relief when such final decisions are rendered. In fact, as stated in the initial denial letter, the court in Frommert held that the SPD has fully described the offset provision since 1998, putting all participants, including Mr. Testa, on notice at least since that time.

(See Exhibit A). In short, Mr. Testa's July 28, 2009 appeal was denied because he was not entitled to a different calculation based on the *Miller*, *Frommert*, and *Layaou* matters – since he was not a party to them – and his claim was time-barred because, according to Court's decision in the *Frommert* matter, all plan participants, including Mr. Testa, had notice of the offset provision in the RIGP since 1998.

13. At no point during the administrative process for Mr. Testa's appeal did Mr. Testa claim that he was similarly situated to the plaintiffs in the *Miller*, *Frommert*, or *Layaou* cases or that he did not receive notice of the offset formula provided in the RIGP for prior Plan distributions, which was properly set forth in the 1998 SPD.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of September 2016 in Rochester, New York.

/s/Lawrence M. Becker

Lawrence M. Becker

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