

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

CIVIL ACTION
NO.

GERALD V. PASSARO II,)
)
Plaintiff,)
)
v.)
)
BAYER CORPORATION PENSION PLAN,)
BAYER CORPORATION, and)
BAYER CORPORATION ERISA REVIEW COMMITTEE,)
)
Defendants.)

COMPLAINT

Introduction and Nature of Action

1. This is a case about two things: (1) the federal statutory requirement under ERISA that a defined benefit plan must pay a qualified preretirement survivor annuity (QPSA) to the surviving spouse of a deceased vested participant in the plan who died prior to the annuity starting date; and (2) the preretirement survivor annuity (PRA) provided under the specific terms of a particular defined benefit plan.
2. The Plaintiff seeks to: (a) recover benefits due; (2) enforce rights; or (3) clarify rights to future benefits under the terms of the Bayer Corporation Pension Plan (“the Plan”) and/or to obtain equitable relief with respect to the Plan’s obligations to comply

with the terms of the Plan and the pertinent provisions of the ERISA statute pursuant to 29 U.S.C. § 1132(a). It seeks a determination that the Plaintiff is entitled to a QPSA or a PSA under the Plan as the result of the death of his spouse prior to his deceased vested spouse's annuity starting date.

Jurisdiction and Venue

3. This action arises under the laws of the United States. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

4. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) because this district is where the Plan is administered and/or where the breach took place and/or where a Defendant resides or may be found.

Parties

5. Plaintiff GERALD V. PASSARO II is a citizen of the State of Connecticut and resides in Milford, Connecticut.

6. Defendant BAYER CORPORATION PENSION PLAN is a defined benefit pension plan established and maintained by Bayer Corporation. The trustee of the Plan is Mellon Bank, N.A. The Plan is designed to provide benefits to certain Bayer Corporation employees and former employees and is intended to qualify under applicable federal tax and labor laws.

7. Defendant BAYER CORPORATION is a subsidiary of Bayer AG, a corporation incorporated under the laws of the Federal Republic of Germany. BAYER

CORPORATION has its headquarters in Pittsburgh, PA. BAYER CORPORATION has at all relevant times had business operations in the State of Connecticut.

8. BAYER CORPORATION is the plan administrator for the BAYER CORPORATION PENSION PLAN and is the Plan's agent for service of process.

9. Defendant BAYER CORPORATION ERISA REVIEW COMMITTEE is the entity within BAYER CORPORATION designated under Plan documents to review and decide appeals from the denial of claims for benefits under the BAYER CORPORATION PENSION PLAN, including, among other things, spousal survivor benefits.

Facts

10. Plaintiff Gerald V. Passaro II ("Jerry") met his future husband, Thomas M. Buckholz ("Tom") in 1995. They became a committed couple that same year.

11. At the time, Jerry was a full-time hairdresser working in a salon; and Tom was a chemist at the Bayer Corporation ("Bayer"), working in Connecticut.

12. At all times relevant to this complaint, Jerry and Tom resided in Milford, Connecticut.

13. Marriage for same-sex couples became available under the laws of the State of Connecticut on November 12, 2008.

14. Thus, after being in a committed relationship for 13 years, Jerry and Tom married in their home on November 26, 2008.

15. Tom ultimately was promoted to senior chemist at Bayer, having an established career with the company of more than 20 years.

16. Based upon his years of employment with Bayer, Tom was fully vested in the Bayer Corporation Pension Plan (“the Plan”).
17. According to a Salaried Plan Calculation Statement (“the Statement”) sent to Tom and dated April 3, 2007, Tom was entitled to a Single Life Annuity of \$1,169.01 per month if benefits commenced on February 1, 2026, the first day of the month following Tom’s 65th birthday.
18. The Statement also noted that the “normal form of payment for a married participant” would have Tom’s spouse receiving a 50% Joint and Survivor Annuity in the amount of \$510.80 per month “To Your Beneficiary” if benefits commenced on February 1, 2026, the first day of the month following Tom’s 65th birthday.
19. The Statement further noted Tom’s marital status as “Married” and noted Tom’s beneficiary’s birth date as “09-10-1965.”
20. Jerry’s birth date is “09-10-1965,” or September 10, 1965.
21. Under the terms of the Plan and based on his years of service, Tom was eligible to receive a benefit (amount unspecified) as early as February 1, 2016, the first day of the month following Tom’s 55th birthday.
22. Tom’s spouse would be eligible to receive the 50% Joint and Survivor Annuity as of that earlier February 1, 2016 date as well.
23. Tom named Jerry as his beneficiary under the Plan.
24. Tom died on January 7, 2009, just two weeks and two days shy of his 48th birthday.
25. Jerry and Tom remained married through the date of Tom’s death.
26. Jerry was and is Tom’s surviving spouse under Connecticut law.

27. Following Tom's death, Jerry made a request that Bayer provide him benefits as Tom's surviving spouse and the beneficiary of Tom's pension rights under the Plan.

28. Jerry was informed that he would not receive any benefit under the Plan because of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7.

29. Jerry also contacted Vanguard, which has no authority to grant or deny benefits under the Plan but which is identified in the Plan's Summary Plan Description as the entity that would assist a beneficiary under the Plan to apply for any benefits due based upon the death of a vested participant in the Plan.

30. Vanguard also advised Jerry that no benefits would be payable to him under the Plan because of DOMA.

31. Vanguard attempted to explain to Jerry how DOMA supposedly operated to prohibit a pension plan from treating "a participant in a same-sex marriage as 'married' for purposes of the QJSA [Qualified Joint and Survivor Annuity] rules. It must treat the participant as not married for that purpose."

32. On January 12, 2010, Vanguard sent Jerry an Employee Benefits Claim Review Request form, advising Jerry of his right to have the Bayer Corporation ERISA Review Committee ("ERISA Review Committee") review his claim for benefits.

33. Jerry filled out the appeal request form; signed it; dated it February 2, 2010; and sent it to the ERISA Review Committee.

34. Jerry sent a subsequent letter, dated March 23, 2010, to Bayer appealing the denial of his late spouse's pension.

35. The ERISA Review Committee acknowledged receipt of Jerry's appeal by letter dated March 26, 2010.

36. The ERISA Review Committee advised Jerry that it was extending its period of review for an additional 60 days such that Jerry could expect a decision within 120 days or July 26, 2010.

37. By letter dated May 14, 2010, the ERISA Review Committee informed Jerry that the Committee had met on May 12, 2010 and upheld the denial of his request for spousal survivor benefits under the Plan.

38. In support of its decision, the ERISA Review Committee stated that the Bayer Plan is governed by federal law, including DOMA, and that, as a result, “same-sex marriage is not recognized under the Plan.”

39. Pursuant to an offer in the ERISA Review Committee’s May 14, 2010 letter, Jerry requested copies of all information relevant to his claim.

40. The ERISA Review Committee provided that material to Jerry in July 2010.

41. The claims material provided to Jerry states a single reason for the denial of pension benefits to Jerry, and that single reason was DOMA.

42. In its May 14, 2010 letter, the ERISA Review Committee advised Jerry: “If you wish to pursue your claim further, you have a right to bring an action against the Plan under Section 502(a) [29 U.S.C. § 1132(a)] of the Employee Retirement Income Security Act of 1974, as amended.”

43. In November 2010, the Plaintiff, along with a number of other individuals, brought suit in the United States District Court for the District of Connecticut challenging the constitutionality of DOMA, 1 U.S.C. § 7. *Pedersen et al. v. Office of Personnel Management et al.*, Civil Action No. 3:10-cv-1750 (VLB) (“the *Pedersen* action”).

44. For his part, as a plaintiff in the *Pedersen* action, Jerry sued the Secretary of the Treasury and the Secretary of Labor and alleged that he had been denied a QPSA under the Bayer Corporation Pension Plan solely on the basis of DOMA, 1 U.S.C. § 7, and that DOMA, 1 U.S.C. § 7, was unconstitutional and void as applied to deny a QPSA to him and all other surviving spouses legally recognized as spouses under Connecticut law.

45. In the *Pedersen* action, the relief sought by Jerry included: (1) a declaration that DOMA, 1 U.S.C. § 7, was unconstitutional as applied to him; (2) a declaration that DOMA, 1 U.S.C. § 7, was unconstitutional and void as applied to deny a QPSA to him and all other surviving spouses legally recognized as spouses under Connecticut law; and (3) an order that the Secretary of the Treasury and the Secretary of Labor refrain from administering and enforcing ERISA in a way that denies a QPSA to Jerry and other surviving spouses under Connecticut law.

46. On July 31, 2012, the district court (Vanessa L. Bryant, J.) in the *Pedersen* action held that DOMA, 1 U.S.C. § 7, violated the equal protection principles contained in the Fifth Amendment to the United States Constitution and granted the plaintiffs' motion for summary judgment on all of the plaintiffs' claims, including those asserted by Jerry. (Memorandum of Decision Granting Plaintiffs' Motion for Summary Judgment [Dkt. #60] and Denying Intervenor-Defendant's Motion to Dismiss [Dkt. #80], Docket No. 116, Filed 07-31-12; 881 F. Supp. 2d 294 (D. Conn. 2012)).

47. On August 2, 2012, Judgment was entered in favor of all the plaintiffs in the *Pedersen* action. (Judgment, Docket No. 118, Filed 08/02/12).

48. Two separate notices of appeal were filed from the Judgment in the *Pedersen* case in the United States Court of Appeals for the Second Circuit on August 17, 2012 (No. 12-3273) and on September 26, 2012 (No. 12-3872).

49. While those *Pedersen* appeals were pending in the Second Circuit, both the *Pedersen* plaintiffs and the United States filed Petitions for Certiorari Before Judgment in the United States Supreme Court (Nos. 12-231 and 12-302).

50. Ultimately, the Supreme Court granted certiorari in another case challenging DOMA, 1 U.S.C. § 7, *Windsor v. United States of America*, that had also been pending in the United States Court of Appeals for the Second Circuit (No. 12-2335) and in which the Second Circuit issued a decision on October 18, 2012, declaring DOMA, 1 U.S.C. § 7, unconstitutional.

51. On June 26, 2013, in its decision in *United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013), the United States Supreme Court upheld the Second Circuit and declared DOMA, 1 U.S.C. § 7, unconstitutional.

52. On June 27, 2013, the United States Supreme Court denied the certiorari petitions in the *Pedersen* case.

53. On July 19, 2013, all parties to the *Pedersen* appeals in the Second Circuit jointly stipulated to the dismissal of those appeals in light of the Supreme Court's *Windsor* decision.

54. The Second Circuit issued its mandate ordering the *Pedersen* appeals dismissed, in accordance with the parties' stipulation, on July 23, 2013.

55. As a result, the Judgment issued in the *Pedersen* case in favor of all the *Pedersen* plaintiffs, including Jerry, became final and enforceable.

56. Subsequent to the *Windsor* decision, the *Pedersen* judgment and the demise of DOMA, 1 U.S.C. § 7, and in light of those decisions and events, Jerry requested of Bayer whether it would now grant him spousal survivor benefits under the Plan.

57. In early 2014, Jerry was invited to formally apply again for spousal survivor benefits but was told – at that same time – that any new formal application would not lead to a grant of spousal survivor benefits.

58. Jerry was advised by Bayer in February 2014 that the Plan would not voluntarily extend spousal survivor benefits to Jerry.

59. As a result, any new, formal request for spousal survivor benefits by Jerry would have been futile.

60. In pursuance of the invitation contained in the May 14, 2010 letter from the ERISA Review Committee and in the wake of the decision in *Windsor* and the Judgment in *Pedersen* and in response to Bayer's determination in 2014 that it would not voluntarily extend to Jerry spousal survivor benefits, Jerry has commenced the present timely action against the Defendants.

Claim

61. Plaintiff repeats and realleges the allegations set forth in Paragraphs 5 and 10-60 as if fully set forth herein.

62. The Bayer Corporation Pension Plan (“the Plan”), in which Thomas Buckholz was a vested Participant, is a defined benefit plan that intended to and does qualify under Section 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a).

63. The Plan is subject to ERISA.

64. As a qualified defined benefit plan, the Plan is obligated to provide: (a) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant in the form of a qualified joint and survivor annuity; and (b) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity to the surviving spouse of the annuitant. 29 U.S.C. §§ 1055(a) and (b)(1)(A); 26 U.S.C. § 401(a)(11).

65. Identical definitions of the obligatory “qualified preretirement survivor annuity” (QPSA) are set forth in 29 U.S.C. § 1055(e) and 26 U.S.C. § 417(c).

66. Bayer’s Plan offers a Preretirement Survivor Annuity (PSA) to a Participant with a vested, nonforfeitable right to an accrued benefit in the form of an annuity payable to the Participant’s surviving spouse in an amount “equal [to] the amounts which would have been payable as a survivor annuity under the Qualified Joint and Survivor Annuity under the Plan” (Plan, §§ 5.6(a)-(b)).

67. Under the Plan, the Qualified Joint and Survivor Annuity “shall be 50% of the amount of the annuity which is payable during the joint lives of the Participant and the spouse.” (Plan, §6.1(d)).

68. Under the Plan, payment of the PSA to a surviving spouse can commence no earlier than the date on which a deceased Participant would have attained his earliest retirement age and no later than the Participant’s normal retirement age. (Plan, §5.6(c)).

69. The date of Tom Buckholz’s earliest retirement age would have been February 1, 2016; and the date of his normal retirement age would have been February 1, 2026.

70. Any PSA benefits are thus not yet currently payable under the Plan.

71. To date, the Plan has made no payments to anyone in any form based upon Tom's vested interest as a Participant in the Plan.

72. If Tom has a surviving spouse, the surviving spouse would be eligible to begin receiving the PSA under the Plan as of February 1, 2016 and could defer the PSA start date up to February 1, 2026.

73. Consistently throughout the process of handling Jerry's claim for spousal survivor benefits through May 14, 2010, Jerry was advised – whether by Bayer employees, Vanguard and/or the Bayer ERISA Review Committee – that he was ineligible for spousal survivor benefits because of DOMA, 1 U.S.C. § 7.

74. On June 26, 2013, the United States Supreme Court decided *United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013), and declared DOMA, 1 U.S.C. § 7, unconstitutional.

75. As a result, federal law operates as if DOMA, 1 U.S.C. § 7, was never enacted.

76. Jerry also has a Judgment via the *Pedersen* action that DOMA, 1 U.S.C. § 7, was unconstitutionally applied to him when he was denied a QPSA under the Plan.

77. Prior to *Windsor*, Jerry made a request for spousal survivor benefits and was denied.

78. As set forth in Paragraphs 56 through 58, above, subsequent to the decision in *Windsor* and the Judgment he received in *Pedersen*, Jerry made a request for spousal survivor benefits and was denied.

79. The denial of spousal survivor benefits prior to *Windsor* was based solely on DOMA, 1 U.S.C. § 7.

80. The denial of spousal survivor benefits subsequent to *Windsor* was not based on any formal statement of reasons by any of the Defendants.
81. Jerry was legally married to Tom on the date of Tom's death.
82. Jerry qualifies as a spouse within the plain meaning of the terms of the Plan.
83. Jerry qualifies as a spouse within the meaning of the relevant sections of Titles 26 and 29 of the United States Code, including 26 U.S.C. §§ 401(a)(11); 417(b) and (c); and 29 U.S.C. §§ 1055(a); (b)(1)(A); and 1055(d)(1) and (e).
84. As the result of the *Windsor* decision, Jerry qualified and qualifies as such a spouse at any and all times relevant to the question of his entitlement to a mandatory QPSA under the Plan.
85. As the result of the Judgment in *Pedersen*, Jerry qualified and qualifies as such a spouse at any and all times relevant to the question of his entitlement to a mandatory QPSA under the Plan.
86. The Plan, by and through the Bayer ERISA Review Committee, has denied Jerry a QPSA in violation of governing federal law.
87. The Plan has otherwise subsequently denied Jerry a QPSA in violation of governing federal law.
88. The Plan is legally obligated to extend – and has no discretion to deny – a QPSA to Jerry because Jerry is a surviving spouse within the meaning of governing federal law and, as a surviving spouse, is entitled to a QPSA, which was never waived by Tom with Jerry's consent.
89. The Plan, by and through the Bayer ERISA Review Committee, has denied Jerry a PSA under the Plan in violation of the express terms of the Plan.

90. The Plan is legally obligated to extend a PSA to Jerry in accordance with the express terms of the Plan.

91. Jerry is entitled to future benefits under the Plan and, more particularly, is entitled to receive a 50% joint and survivor annuity - the amount of which is determined based upon the retirement annuity amount that would have been available to Tom.

92. Jerry has been and is harmed by the denial of the 50% joint and survivor annuity.

Prayer for Relief

WHEREFORE, the Plaintiff prays that this Court:

1. Order that the Bayer Corporation ERISA Review Committee reverse any and all decisions denying spousal survivor benefits to the Plaintiff.
2. Order that the Defendants reverse their decision, made after the decision in *United States v. Windsor* and after the Judgment in *Pedersen v. OPM*, denying spousal survivor benefits to the Plaintiff.
3. Order that Bayer Corporation Pension Plan extend spousal survivor benefits to the Plaintiff based upon the vested service of his deceased spouse, Thomas Buckholz.
4. Order that Bayer Corporation, as Plan Administrator, do everything necessary to effectuate the calculation and extension of spousal survivor benefits to the Plaintiff.
5. Enjoin the Defendants from continuing to act in contradiction to the requirements of federal law by denying to the Plaintiff a Qualified Preretirement Survivor Annuity under the Bayer Corporation Pension Plan.

6. Enjoin the Defendants from continuing to act in contradiction to the terms of the Bayer Corporation Pension Plan by denying to the Plaintiff a Preretirement Survivor Annuity under the Bayer Corporation Pension Plan.
7. Award attorney's fees and cost to the Plaintiff pursuant to 29 U.S.C. § 1132(g)(1) or any other applicable statutory provision.
8. Grant such other relief as is just and appropriate.

GERALD V. PASSARO II

By his attorneys,

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DATED: May 12, 2014

Certificate of Service

I hereby certify that on May 12, 2014, a copy of foregoing Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Gary D. Buseck

Gary D. Buseck