IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ORRIN T. SKRETVEDT, Plaintiff, v. E. I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation; E.I. DUPONT DE NEMOURS AND COMPANY, Plan Administrator; PENSION AND RETIREMENT PLAN; HOSPITAL AND MEDICAL-SURGICAL PLAN; DENTAL ASSISTANCE PLAN; NON CONTRIBUTORY GROUP LIFE INSURANCE PLAN; CONTRIBUTORY GROUP LIFE INSURANCE PLAN; TOTAL AND PERMANENT DISABILITY INCOME PLAN; SAVINGS AND INVESTMENT PLAN; TAX REFORM ACT STOCK OWNERSHIP PLAN; and SHORT TERM DISABILITY PLAN Defendants.	:	Civil Action No. 98-61-MPT

MEMORANDUM

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Dated: November 13, 2002

Wilmington, Delaware

Thynge, U.S. Magistrate Judge

I. Introduction

Plaintiff, Orrin T. Skretvedt initially sued his former employer, E.I. DuPont De Nemours and Co. ("DuPont") for Long Term Disability ("LTD") and Incapability benefits. According to the record, plaintiff alleged that a job-induced mental illness left him disabled. In September 2000, this court granted summary judgment in favor of DuPont. Skretvedt filed a successful appeal to the Third Circuit, who instructed this court to enter summary judgment in favor Skretvedt upon remand. Subsequently, the DuPont Board of Benefits and Pensions granted plaintiff both LTD and Incapability benefits to Skretvedt with a retroactive start date of February 8, 1995. On April 1st of this year, Skretvedt filed a brief requesting additional compensation and seeking to supplement the record with new evidence. Specifically, Skretvedt claimed that he was entitled to Short Term Disability benefits ("STD"), prejudgment interest on delayed benefits, increased medical payments, compensation for the premature issuance of TRASOP[1] shares, and increased pension entitlements. On August 19, this court denied plaintiff's requests. Presently before the court is Skretvedt's motion for reconsideration of that decision.

II. Legal Standard

Although a familiar practice in federal courts, the Federal Rules for Civil Procedure do not specifically provide for motions for re-consideration. *Moore's Federal*

[1]TRASOP stands for the Tax Reform Act Stock Ownership Plan. According to Skretvedt, under TRASOP, shares of common stock are given to each employee based upon salary. When an employee retires, he or she may elect to have the TRASOP plan disburse the shares.

Practice Civil § 59.30 (2002). However, courts have treated motions for reconsideration as analogous to motions to alter or amend judgment under Rule 59(e). *Id.* Pursuant to that rule: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. Pro. 59(e).

In *Hand v. American Board of Surgery,* 2002 U.S. Dist. LEXIS 7237, *2 (E.D. Pa. April 24, 2002), the district court for the Eastern District of Pennsylvania, relying upon Third Circuit precedent, explained the requirements and standards applicable to motions for reconsideration.[2] Accordingly, such motions should be granted only if one of the following elements are present: "(1) new evidence becomes available; (2) there has been an intervening change in controlling law; or (3) a clear error of law or manifest injustice must be corrected." *Id at 2.* Motions which fail to meet one of these elements are improper and should be denied. Further, the court noted that litigants should not bring motions for reconsideration to re-litigate issues already decided by the court, and therefore, such motions should be sparingly granted. *Id. at 3.*

III. Discussion

A. Collateral Estoppel

In his motion for re-argument Skretvedt asserts collateral estoppel against DuPont, alleging that DuPont has previously "litigated to conclusion whether "STD" benefits . . . are appropriate to supplement an employee's salary up to 100%, whether there is an on-the-job injury or illness, or an off-the-job illness or injury." *D.I. 154 at 5.*

[2]The *Hand* court relied upon *inter alia*, *North River Ins. Co. v. Cigna Reinsurance Co.,* 52 F.3d 1194, 218 (3d Cir. 1995); *NL Indus. V. Commercial Union Ins. Co.,* 65 F.3d 314, 324 n. 8 (3d Cir. 1995); and *Continental Casualty Co. v. Diversified Indus., Inc.* 884 F. Supp. 937, 943 (E.D. Pa. 1995).

To support this claim Skretvedt relies upon testimony from *Skinner v. DuPont*, C.A. No. 92-147(SLR) (D.Del. 1992), another case decided in this court. First, SKRETVEDT cites deposition testimony from George Hollodick, the Manager of Pensions at DuPont, which he initially proffered in his motion to supplement the record. Since plaintiff's motion to supplement was denied, that testimony is not part of the record. Second, Skretvedt further relies upon the testimony of Jerry Brenner, a former member of DuPont's Board of Benefits and Pensions, from the *Skinner* trial.

In denying Skretvedt's motion to supplement the record, this court stated:

> The information Skretvedt seeks to add is not relevant to his eligibility for short term benefits. Even stretching the applicability of the evidence to its extreme, the evidence would be at best, tangentially relevant. However, the evidence is not sufficient to show that Skretvedt was treated differently than other employees in DuPont's administration of the STD plan, and is insufficient to credibly contradict the plain language of the plan itself.
>
> Even if the evidence were relevant, it would still be immaterial to the court's determination of STD. DuPont has overwhelmingly shown that Skretvedt is not an eligible employee for STD benefits. Under *Hozier, Abramowicz,* and *Sprague*, Aetna's letter to Skretvedt which erroneously described the administration of [sic] LTD plan, did not alter the plain language of the STD plan.[3] According to that language, Skretvedt is not eligible because he asserts an occupational injury. Thus, even if this court were to consider the new evidence, it would not affect the court's

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[3]This court explained previously: "In *Hozier v. Midwest Fasteners, Inc., et. al.,* 908 F.2d 1155, 1164 (3rd Cir. 1990) the Third Circuit held that oral and informal modifications to employee benefit plans were invalid. Last year in *Abramowicz v. Rohm and Hass Co.,* 2001 U.S. Dist. LEXIS 17693, 26 (E.D. Pa. 2001), the district court for the Eastern District of Pennsylvania addressed informal *written* modifications. Having found that the Third Circuit had not addressed the issue in the context of a written modification, the court applied a ruling set forth by the Sixth Circuit in *Sprague v. General Motors Corp.,* 133 F.3d 388 (6th Cir. 1998). *Abramowicz at 26.* In *Sprague*, the court held that an agreement signed in order to receive early retirement benefits which contained representations about an employee benefit plan could not be used to modify the terms in the actual benefit plan. *Id. at 403.* The court stated: 'For us to sanction informal 'plans' or plan 'amendments'– whether oral or written–would leave the law of employee benefits in a state of uncertainty and would create disincentives for employers to offer benefits in the first place. Such a result is not in the interests of employees generally, and is certainly not compatible with the goals of ERISA.' *Id.* This court believes the Third Circuit would reach a similar decision if faced with the issue." *D.I. 151 at 3.*

> determination on Skretvedt's eligibility for STD. Therefore, plaintiff's motion to supplement the record is denied.

D.I. 151 at 12, 13.

As stated, this court carefully considered plaintiff's request to admit the Hollodick deposition and found that it would not alter its decision. As a result, Hollodick's testimony is not adequate to substantively support plaintiff's motion for reconsideration.

Similarly, the trial testimony of Brenner does not support plaintiff's motion. Skretvedt argues that the testimony reveals that "as to short term disability, full pay is provided to the individual for a period of up to six months followed by the start of 'long term disability.'" Although Brenner testified in September 2000, Skretvedt never mentioned this testimony until this motion for reconsideration. Nor has plaintiff sought to add this evidence to the record. Even if he had, the Brenner testimony is not new evidence, since plaintiff knew of or could have discovered the testimony before filing his brief seeking costs.[4] Further, the testimony would not alter the court's decision on costs in light of DuPont's persuasive evidence regarding the contents of the plan and the case law concerning informal alterations of benefit plans. *See note 3* (discussing *Hozier, Abramowicz,* and *Sprague*). As a result, Brenner's testimony does not support SKRETVEDT's motion for reconsideration.[5]

B. Legal relief outside of ERISA

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[4]Moreover, the same attorney who represented Skinner represents Skretvedt.

[5]More importantly, Skinner's filed his complaint in 1992. The STD plan in the record is DuPont's 1993 STD plan. Therefore, Hollodick and Brenner's testimony is irrelevant since this case deals with the 1993 STD plan, which did not exist when Skinner's rights accrued, and thus is not applicable to his case. Further, no evidence of the terms of the STD Plan in operation prior to 1993 has been presented. As a result, the court is unaware whether the plan which existed before 1993, is the same as the plan implemented in 1993. Accordingly, there relevance of Hollodick and Brenner's testimony regarding a plan that is not applicable to Skretvedt is at best marginal.

Next, Skretvedt argues that he is entitled to certain monetary damages despite Supreme Court precedent not allowing such relief under ERISA. He now asserts that this court has jurisdiction to award such relief under diversity jurisdiction.[6] Thus, Skretvedt contends, that since his damage request falls under diversity, the bar against legal relief applies only to claims brought under ERISA. Specifically, he argues:

> Since DuPont has relied on the Great West decision which the court has embraced to say that any money claims are automatically legal claims, SKRETVEDT would here assert that these legal claims, if they be so, can be addressed by the Court on. . . diversity jurisdiction. . . These are available claims, not only as supplemental jurisdictional claims, but as claims against DuPont Company as an employer and a commercial entity against which liability can be established outside ERISA.

D.I. 154 at 8.

In his original request for additional compensation, Skretvedt argued that he was entitled to damages under ERISA. This new theory, that he is entitled to damages outside of ERISA, was not presented to the court prior to this motion for reconsideration. Clearly through this new argument, Skretvedt is trying to avoid the court's prior unfavorable decision.

Plaintiff's bases for jurisdiction in both his original complaint and proposed amended complaint, which is found under paragraph 1, is 29 U.S.C. §1132(e)(1) (the statute dealing with jurisdiction under ERISA), 28 U.S.C. § 1331 (the statute providing for federal question jurisdiction) and pendant jurisdiction. Neither complaint even mentions jurisdiction pursuant to 28 U.S.C. §1332 (diversity jurisdiction). No where in either complaint is it alleged that the potential amount in controversy exceeds $75,000. In both the complaint and proposed amended complaint, plaintiff invokes the court's

[6]Skretvedt is domiciled in Virginia, while DuPont is located in Delaware.

jurisdiction under 29 U.S.C. §1132(1)(B) "to *recover* benefits due him, to *enforce* his rights under the *Pension Plan* and *other Related Defendant Plans* of the Company, and to *clarify* his rights for future benefits." *See, ¶33.* (emphasis added). This basis for jurisdiction and recovery is incorporated by reference in all counts, including Count XI of the proposed amended complaint. *See, ¶¶40, 47, 55, 64, 72* of the complaint and proposed amended complaint and ¶*94* of the proposed amended complaint.

Further, venue, according to paragraph 2 of the complaint and the proposed amended complaint is based on 29 U.S.C. §1132(e)(2) (venue under ERISA) and 28 U.S.C. §1391 (b) (when jurisdiction is founded outside of diversity).

In addition, the Plans involved in this litigation are described in ¶¶6 through 14 of both complaints, and are noted to be controlled by the provisions of ERISA, specifically 29 U.S.C. §1002. Within the paragraphs titled "common facts," the sole origin for plaintiff's claims arise from his prior employment with DuPont. Moreover, each count, where the bases for his claims under each Plan are alleged, is captioned by the name of the type of the plan benefits under ERISA, for example, "Count I Pension Benefits *under ERISA*." (emphasis added).

In every count, plaintiff asserts that he has exhausted the "required administrative remedies and otherwise met the requirements under 29 U.S.C. §1133 (ERISA Sec. 503)." *See, ¶¶35, 43, 51, 59, 71, 78, 85* and *93* of the complaint and proposed amended complaint. Any alleged wrongdoings or breaches in each count are founded upon violations of ERISA. *See,* complaint and proposed amended complaint *count I ¶¶34, 36-37: Count II ¶¶ 43* and *45; Count III ¶¶48* and *52; Count IV ¶¶55,56,60, 61; Count V¶¶ 65, 69-70; Count VI ¶¶73, 76-77; Count VII ¶¶80, 83-84; Count VIII ¶¶90-*

92; and, *Count IX* ¶¶*94, 99-100* (mistakenly numbered VIII) under the proposed amended complaint. Unquestionably, plaintiff pursued this action, and therefore, any recovery, entirely under ERISA, with no inkling of diversity jurisdiction nor the causes of action controlled by such jurisdiction. Since Skretvedt never previously asserted any cause of action nor requested relief outside of ERISA, it is inappropriate to consider such relief at this late juncture. *See D.I. 142* at 2, 3, 10. (Framing claims for relief in terms of compensation available under ERISA).

Further, Skretvedt acknowledged that ERISA was the basis for the Third Circuit's finding in his favor in his opening brief.[7] However, he still argues an entitlement to damages, even though ERISA prohibits the damages he seeks. He now belatedly asserts that the diversity of the parties, which would have given the court jurisdiction in the absence of a federal question, entitles him to the very damages which are unavailable under ERISA. Diversity is a basis for jurisdiction, not a secondary argument for damages when the relevant federal statute limits a plaintiff's recovery. Furthermore, since the Third Circuit found for plaintiff on his ERISA claims only, and Skretvedt chose to pursue his action only under ERISA, his damages are limited to remedies provided by the statute. As a result, SKRETVEDT's claims for legal relief outside of ERISA are denied.[8]

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[7]"Plaintiff. . . sought benefits under the Incapability provision of Defendant DuPont's Pension and Retirement Plan and under the Total and Permanent Disability Income Plan through court action filed in the District of Delaware. . . As a result of his appeal to the Third Circuit from a denial of his claims in District Court, SKRETVEDT was directly awarded Incapability benefits from the P & R Plan by the Third Circuit panel." *D.I.142 at 1.*

[8]Diversity jurisdiction usually involves state (non-federal) breach of contract or tort claims. Absent the fact that no notice has been provided for what the basis of plaintiff's claims are outside of ERISA, any attempt to now allege another cause of action (in essence, re-amending his complaint) would require an evaluation under Fed. R. Civ. P. 15(c) and the concomitant statute of limitations.

C. Judicial Estoppel

Finally Skretvedt asserts that judicial estoppel[9] applies preventing DuPont from arguing statute of limitations. According to Skretvedt, in the settlement agreement,[10] DuPont agreed to allow him to pursue disability benefits without regard to time constraints. Therefore, according to plaintiff, the court should apply judicial estoppel because DuPont has taken two inconsistent positions: that Skretvedt could file his claims without regard to timing and that his STD claims are time barred. Further, he argues that DuPont acted in bad faith by not previously asserting the statute of limitations argument, and that DuPont should be prevented from doing so now.[11]

Skretvedt's contentions are misplaced for two reasons: (1) the language in the settlement agreement does not support his contentions, and (2) he should have been aware of DuPont's statute of limitations defense.

In the settlement agreement between Skretvedt and DuPont, DuPont agreed that plaintiff could "apply for benefits without regard to applicable time limits, provided for by the *incapability provision of the DuPont Pension Plan and the DuPont Total and*

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[9]Skretved asserts that the elements of judicial estoppel are "(1) the party to be estopped (here DuPont) must have taken two positions that are irreconcilably inconsistent; (2) judicial estoppel is warranted unless the party changed its position in bad faith, i.e., with an intent to play fast and loose with the court, and (3) a district court may not employ judicial estoppel unless it is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct." *D.I. 154 at 11.*

[10]With neither his original motion for supplemental compensation nor his present motion for reconsideration did Skretvedt attach a copy of the settlement agreement upon which he relies. Nor did he direct the court to any cite in the prior record. Rather, he left it to the court to dig through the reams of documents that were filed by the parties in support of their respective motions for summary judgment to locate this agreement. Therefore, the court's reference to this document is from the record filed on the cross motions for summary judgment.

[11]According to Skretvedt to allow DuPont to argue a statute of limitations defense would constitute a waste of judicial resources.

Permanent Disability Income Plan." *D.I. 103 at 653* (emphasis added). The settlement does not mention STD benefits, which are contained in a different plan, entitled "Short-term Disability Plan." *Id.* The agreement further provides that "SKRETVEDT agrees to release DuPont . . . from all claims or demands SKRETVEDT may have based on his employment with DuPont or the termination of that employment." From the clear language of the settlement agreement, a document upon which SKRETVEDT so heavily relies, the benefits reserved were those found under the DuPont Pension Plan and the DuPont Total and Permanent Disability Income Plan. Neither plan addresses the STD benefits. Obviously, plaintiff's STD claims "are based on his employment," since only DuPont employees are eligible for such under the STD plan. If Skretvedt had not been an employee of DuPont, he would have no right to seek STD benefits. As a result, Skretvedt is not entitled to STD since he waived this right by entering into the settlement agreement with DuPont.[12]

Second, Skretvedt had more that adequate notice of DuPont's statute of limitation defense.[13] Count VIII of plaintiff's complaint (¶¶ 83-92) sets forth his claim for STD. *D.I. 103 at 647-48.*[14] In its answer, DuPont asserted statute of limitations as its

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[12]At the time Skretvedt executed the settlement agreement, he was represented by counsel, but not Mr. Stull, his present attorney.

[13]SKRETVEDT's implicit assertion that he was unable to dispute DuPont's position regarding STD, because the court did not allow him to file a reply brief, are without merit. As discussed below, the record is clear that he had more than adequate notice that DuPont disputed his STD arguments and had raised statute of limitations as an affirmative defense.

[14]Plaintiff filed a motion to amend the complaint, which was denied, in part, because of this court's findings on summary judgment. Although the Third Circuit reversed this court's decision by finding judgment in favor of plaintiff, it did not address the denial of plaintiff's motion to amend. Since the basis of that denial was in part due to the granting of judgment in favor of DuPont, obviously a denial on that basis is no longer valid. However, this court has never re-examined its denial. Therefore, the motion to amend is still outstanding. This court, in both its prior decision on plaintiff's motion for additional compensation

Second Affirmative Defense. *D.I. 26 at 5.* Neither plaintiff's claims for STD benefits nor DuPont's defenses were addressed previously on summary judgment. Thus, Skretvedt's STD claim, and the defenses thereto remained part of this case.

Skretvedt filed his brief requesting additional compensation on April 1, 2002. Prior to the filing of plaintiff's brief, this court held both in-chambers and telephonic conferences to discuss the remaining issues that needed to be addressed. In December 2001, Skretvedt was aware that DuPont disputed his entitlement to STD. During the December conference, Skretvedt's attorney raised the STD issue with the court.[15] Attorney for DuPont indicated that Skretvedt's situation was different, because he was fired. At that time, both parties should have been aware that SKRETVEDT's STD claim was both a viable and contested issue in this case.

Moreover, during the telephonic conference in March 2002, the STD issue was discussed in more detail. Counsel for DuPont stated very plainly that Skretvedt's entitlement to STD was vehemently disputed. Counsel made it especially clear that under no circumstances would DuPont agree that plaintiff was entitled to STD. *D.I. 139 at 7.* As a result, Skretvedt should have known that DuPont disputed his eligibility for

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and in this decision, has referenced to the amended complaint. Since the contents of plaintiff's complaint and amended complaint regarding STD benefits are the same, except for Count IX (misnumbered VIII), it is presumed that DuPont's answers to those paragraphs and its affirmative defenses would also be the same, as further evidenced by the conferences with counsel after the Third Circuit decision. *See, D.I. 103 A557-589* and *A620-651.*

[15]Mr. Stull, said: "There is also something in the complaint, but I'm not sure how to handle it, because I don't have any dollars in front of me. Normally, when a person is disabled, he's suppose to get six months' short-term disability – three months' short-term disability which is, in fact, his full salary. . . I do have clients that are on six months' short-term full salary basis and their pension particularly doesn't start until the end of that six-month period. . . .This is the typical way it's handled. As a matter of fact, that's what Danny Skinner [another client of Mr. Stull] ended up with, six months, and then his job ended." *Transcript, 12/12/01 at 7.*

STD, and would utilize the affirmative defenses as set forth in its answer.

Further, in its prior opinion the court addressed the substance of Skretvedt's disability claims in addition to DuPont's statute of limitations arguments. This court found that Skretvedt's claims for relief were not properly supported with the necessary evidence. *D.I. 151 at 2,13.* Therefore, even if this court were to assume that Skretvedt succeeded in challenging the propriety of DuPont's statute of limitations arguments, he still failed to substantively prove his requests for other monetary damages.

Finally, Skretvedt challenges the court's decision prohibiting a reply brief. To allow reply briefing is within the discretion of the court. When determining that reply briefs were not necessary, the court emphasized to the parties that they should include *all* of their arguments in their *initial briefs*.[16] Skretvedt was aware of the STD dispute and the defenses raised by DuPont.[17] Thus, the absence of a reply brief does not excuse Skretvedt's failure to discuss relevant arguments.

More importantly, Skretvedt fails to adequately show that he is entitled to STD based on the record made in this case. Making a record within the parameters set by the court is Skretvedt's responsibility, and not the court's obligation. When a party is aware or should be aware of relevant issues and fails to raise, address or submit supporting evidence on those issues, the cure is not the obligation of the court. Even though he prevailed on summary judgment, it remains plaintiff's burden to show

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[16]SKRETVEDT was aware of this directive, and quotes the court's direction in his brief: "[t]he Court, at page 10, states that Plaintiff should 'get all your argument in on your opening, and Ms. Bender, you get all your argument in on your answering. . . recognizing that I am eliminating any reply or surreply.'" *D.I. 154 at 8.*

[17]See Section D below.

entitlement to such relief.

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ORDER

At Wilmington, Delaware, this **13th** day of **November, 2002**, a Memorandum Opinion dated November 13, 2002, having been issued and entered, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that in light of the findings contained therein, plaintiff's Motion for Reconsideration (D.I. 154) is DENIED.

Mary Pat Thynge
UNITED STATES MAGISTRATE JUDGE