15-3602-cv

United States Court of Appeals
For the Second Circuit

GEOFFREY OSBERG,
on behalf of himself and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

FOOT LOCKER, INC. and FOOT LOCKER RETIREMENT PLAN,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 07-CV-1358-KBF

**BRIEF FOR AARP AS AMICUS CURIAE
IN SUPPORT OF APPELLEE URGING AFFIRMANCE**

DARA S. SMITH*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
Telephone (202) 434-2060
*Counsel of Record
Attorney for Amicus Curiae AARP

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc. and Legal Counsel for the Elderly.

AARP has no parent corporation, nor has it issued shares or securities.

Dated: May 24, 2016

/s/ *Dara S. Smith*
Dara S. Smith

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

AARP is a nonpartisan, nonprofit membership organization dedicated to addressing the needs and interests of people age 50 and older. In its efforts to foster the economic security of individuals as they age and to ensure that they do not fall into poverty during retirement, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive.[2] One of AARP's main objectives is to ensure that participants receive those benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 et. seq. The quality of the lives of these workers in retirement depends substantially on their ability to obtain those benefits that they have been promised.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), AARP states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than AARP, its charitable Foundation, members, and counsel, contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of AARP's brief.

[2] Through its charitable affiliate AARP Foundation, AARP has participated as amicus curiae in numerous cases involving ERISA's civil enforcement and remedies provisions in the Supreme Court and in federal appellate courts. *See, e.g.*, *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. 651 (2016); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assocs*., 508 U.S. 248 (1993); *Amara v. CIGNA Corp*., 775 F.3d 510 (2d Cir. 2014).

If employees do not receive accurate, complete, and understandable information about the benefits their employer has promised in exchange for their services, it will be impossible for them to determine what, if any, actions they must take to protect their rights, or to make informed decisions concerning their benefits and employment. Indeed, mid-career and older participants have the most to lose if they receive inaccurate information because these individuals have little time to make up any potential benefit shortfall. When employers fail to provide accurate, complete and understandable information, Congress's carefully crafted reporting and disclosure scheme and the protections flowing from that scheme are effectively destroyed.

How this Court decides this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' ability to enforce their rights and obtain redress for violations of those rights. In light of the significance of the issues presented by this case, AARP respectfully submits this brief, as amicus curiae, to facilitate a full consideration by the Court on these issues.

SUMMARY OF ARGUMENT

Congress enacted ERISA because predecessor pension laws did not require accurate, complete, and understandable disclosures to employees about their benefits. Without such disclosures, employees could not protect their rights under those plans or make informed decisions about their employment and retirement. Congress believed that such transparency would help safeguard employee benefits.

Cash balance plans are inherently complex. This is especially true at the time of the conversion of a traditional defined benefit plan to a cash balance plan. Because of their complexity, it is easy for an unscrupulous employer to conceal benefit reductions from employees. For example, if an employer employs wearaway in a cash balance conversion by setting the employees' initial account balance at an amount less than the accrued benefit under the old plan, many employees will not earn any additional pension credits for a substantial period—even though they receive annual statements showing a growing account balance. Unless the employer tells employees that growth in their accounts does not necessarily equate to growth in their benefits, employees will mistakenly believe their benefits have increased.

In its conversion, Foot Locker knew that most employees would suffer wearaway for a substantial period, thereby not earning any additional pension benefits. Foot Locker chose to fraudulently misrepresent the impact of the conversion on employees' benefits and never told its employees that they were not earning any additional pension benefits.

Although Foot Locker admits that it never told employees about wearaway in the plan summaries it distributed to employees, it asserts that there were clues about wearaway in benefit calculations it showed some employees. The trial court found this to be untrue. Moreover, from a policy perspective, this argument misses the point of ERISA. ERISA requires employers to provide clear disclosures calculated to be understood by the average plan participant. It does not permit an employer merely to give employees scattered, cryptic pieces of information concerning complex actuarial concepts and then ask them to solve the puzzle of how their benefit plan works.

Finally, employees do not need to prove individualized detrimental reliance on Foot Locker's misrepresentations in order to obtain reformation of the plan. The law is clear that a defendant's inequitable conduct of deception is enough to support reformation when combined with its superior knowledge of the subject of that mistake. When Foot Locker knowingly, intentionally, and purposefully withheld information from participants, the harm to participants was the loss of two rights protected under ERISA. One was the right to accurate, complete, and understandable information about their benefits and rights under their pension plan. The second was the right "to receive [their] expected agreement," *i.e.*, the retirement benefits that Foot Locker represented they would receive if they continued working. *Amara v. CIGNA Corp.*, 775 F.3d 510, 525 n.12 (2d Cir. 2014).

Therefore, this Court should affirm the district court's decision and order that judgment be entered for the class.

ARGUMENT

I. CONGRESS DESIGNED ERISA'S NOTICE REQUIREMENTS TO INFORM PARTICIPANTS AND BENEFICIARIES OF THE BENEFITS THEY SHOULD EXPECT – OR NOT – FROM A PLAN.

In many ways, this is a simple case. Plaintiff Mr. Osberg challenges the failure of Foot Locker to provide to employees accurate, complete, and understandable notices of changes to Foot Locker's pension plan. In this case, the changes happen to be a conversion from a traditional defined benefit plan to a cash balance plan. This failure to provide accurate, complete, and understandable notices to employees was an intentional misrepresentation of the pension benefits employees were earning for their services. Foot Locker's intentional misrepresentation flies in the face of the reasons Congress enacted ERISA.

A. ERISA And Its Predecessor Statute Protected Pensions Because They Are Deferred Wages.

In enacting the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), ERISA's predecessor statute regulating pensions, Congress recognized that "the benefits the employers provide are a form of compensation." S. Rep. No. 85-1440, at 3 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 4137, 4139. Senator Javits, the chief sponsor and architect of the legislation, explained how employees exchange their work for a pension:

> [T]he private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary and when he does not get it or some reasonable portion of it, he is angry, frustrated, and ultimately convinced that he has been robbed of a material recognition that was due him.

2 Legislative History of the Employee Retirement Income Security Act of 1974 ("Legislative History"), 94th Cong., 1609 (Comm. Print 1976). Quite simply, pensions are a form of deferred compensation, and their protection is crucial to employees' retirement security. *See, e.g.*, S. Rep. No. 93-127, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4839 (ERISA's legislative history describing pensions as "deferred wages"); *accord*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 893-94 (1999) ("[a]mong the … legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees [and] paying deferred compensation").

B. Congress Realized ERISA's Predecessor Was Deficient In The Type And Content Of Disclosures That It Required Plans To Furnish To Employees.

The WPPDA required plan descriptions and annual financial reports to be available to employees on written request. Pub. L. No. 85-836, 72 Stat. 997 (1958), *amended by* Pub. L. No. 87-420, 76 Stat. 35 (1962). However, the WPPDA did not regulate the form or contents of employee booklets, such as requiring a comprehensive description of benefit rights or circumstances that can cause benefits to be lost.

Congress understood that ERISA's predecessor legislation was "weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards." H.R. Rep. No. 93-533, at 4 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4642; S. Rep. No. 93-127, at 4, 1974 U.S.C.C.A.N. at 4841. Indeed, the reports of the House Education & Labor and the Senate Labor & Public Welfare Committees concluded:

> It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if the conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan's provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

H.R. Rep. No. 93-533, at 8, 1974 U.S.C.C.A.N. at 4646; S. Rep. No. 93-127, at 11, 1974 U.S.C.C.A.N. at 4847, *reprinted in* 2 Legislative History at 2348. The reports also found that when employees sought legal redress, "[c]ourts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording." H.R. Rep. No. 93-533, at 5, 1974 U.S.C.C.A.N. at 4643; S. Rep. No. 93-127, at 5, 1974 U.S.C.C.A.N. at 4842.

C. Congress Enacted ERISA To Ensure That Employees Received Adequate Disclosures About Their Pension Benefits So They Could Make Informed Decisions About Their Employment And Retirement.

In response to these concerns, Congress enacted ERISA as a comprehensive response "to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives." S. Rep. No. 93-127, at 1, 1974 U.S.C.C.A.N. at 4838. After nearly a decade of study, Congress found, among other problems, that "owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable …. disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans." ERISA § 2(a), 29 U.S.C. § 1001(a).

To protect employee benefits, Congress concluded that such safeguards should include "requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect" to these plans, "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," and "providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b); *see also* 3 Legislative History at 4668 (stating that the "availability of this information will enable both participants and the Federal Government to monitor the plans' operations").

In particular, Congress established standards for "adequate communication to participants," to "which all private pension plans must conform if the private pension promise is to become real rather than illusory." H.R. Rep. No. 93-533, at 5, 10, 1974 U.S.C.C.A.N. at 4643, 4648.

D. Because Congress Believed Transparency Would Help Safeguard Employee Benefits, ERISA Requires Accurate, Complete, and Understandable Notices To Participants.

Congress sought to protect "employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). Before employees can have definite expectations at all – and plan their retirement accordingly – a plan must tell its employees the current terms of the plan, and inform them when future benefit accruals will significantly decrease. Congress designed these rules to require employers to "arm plan participants with specific knowledge of their rights and remedies with respect to employee benefit plan" in order to protect themselves. *Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 143 (2d Cir. 1997).

Thus, ERISA bars plan administrators from using deception in order to gain bargaining power over compensation with employees who believe they are receiving a benefit that does not, in fact, exist. *See, e.g.*, ERISA § 2(a), 29 U.S.C. § 1001(a); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) (a purpose of ERISA is to ensure "if a worker has been promised a defined benefit upon retirement . . . he actually receives it"); *Lockheed Corp.*, 517 U.S. at 887 (a purpose of ERISA is "to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits"); *see also Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-75 (1980) (purpose of ERISA was to prevent the "great personal tragedy" suffered by employees whose retirement benefits were not paid). Despite the varying uses of benefit plans as personnel devices (such as restructuring of the workforce), plan sponsors do not have a completely unfettered right to amend their employee benefit plans: no substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's procedures for adopting an amendment must be followed including appropriate and complete disclosures. *See, e.g.,* ERISA §§ 102(b), 204(h), 29 U.S.C. §§ 1022(b), 1054(h); 29 C.F.R. § 2520.102-3 (detailing specific form and contents of summary plan description). In enacting these provisions, Congress balanced employers' needs to change plans for financial and management reasons with the impact on individual employees.

Accurate, complete, and understandable disclosures work. Such disclosures can equip participants with the information they need to make informed decisions concerning their benefits and employment, including protesting for changes in benefit plans and improved compensation, looking for new employment, saving more, or working longer. Taken together, ERISA's notice and fiduciary requirements “ensur[e] that ‘the individual participant knows exactly where he stands with respect to the plan.’” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (quoting H.R. Rep. No. 93-533, at 11, 1974 U.S.C.C.A.N. at 4649). The disclosures allow a participant to know what benefits he may presently expect from the plan, and, if there is an amendment, to know if he should expect the future accrual of benefits to decrease and to plan accordingly.

When employees fail to receive accurate, complete, and understandable required information, whether through omission or affirmative misrepresentation, Congress’ carefully crafted disclosure scheme and the protections that flow from that scheme are effectively destroyed. *See generally Musmeci v. Schwegmann Giant Super Mkts.*, 159 F. Supp. 2d 329, 349 (E.D. La. 2001), *aff’d in part & vacated in part*, 332 F.3d 339 (5th Cir. 2003) (“the employer's failure to pay pension benefits at retirement . . . can wreak financial havoc upon the retiree and his family by destroying a lifetime of planning for the retirement years”).

II. BECAUSE OF THE INHERENT COMPLEXITY OF CASH BALANCE PLANS, EMPLOYERS MUST BE DILIGENT IN PROVIDING UNDERSTANDABLE DISCLOSURES TO EXPLAIN THE IMPACT OF A CONVERSION TO EMPLOYEES.

A. A Short Primer on How Cash Balance Plans Work.

When Congress enacted ERISA, it classified retirement plans into only two types: defined contribution plans and defined benefit plans. ERISA § 3(34)-(35), 29 U.S.C. § 1002(34)-(35). Accordingly, a retirement plan had to fit into one of those categories. Cash balance plans are defined benefit plans repackaged to look like defined contribution plans. *See* Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX. REV. 683, 686 n.7, 693 (2000). They achieve that repackaging by defining the benefit from a cash balance plan as a lump sum account (similar to a defined contribution plan) when explaining the cash balance plan to participants. *Id*.

Under a cash balance plan, benefits are determined by reference to a hypothetical account balance.[3] The employee's hypothetical account balance is determined by two factors. The first factor is a hypothetical annual allocation to the account known as a compensation or pay credit, which frequently is designated as a certain percentage of the employee's annual cash compensation. Employees only receive pay credits when they are working for the employer. The second factor is an annual allocation of hypothetical earnings on the account known as an interest credit. If the employee terminates employment and defers her account distribution, she will continue to receive interest credits on her account. *See* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., TECHNICAL EXPLANATION OF H.R. 4, THE "PENSION PROTECTION ACT OF 2006" (Pub. L. No. 109-280) 150-51 (Comm. Print 2006), http://www.jct.gov/x-38-06.pdf.

[3] Cash balance accounts are bookkeeping entries and, thus, considered hypothetical accounts. Unlike 401(k) accounts, participants do not own the assets in their accounts. Indeed, there are no actual accounts with assets in them.

B. Many Employees Will Not Earn Any Additional Pension Credits If An Employer Uses Wearaway In A Cash Balance Conversion.

"Wearaway" refers to a period of time when participants are not earning pension benefits. Wearaway occurs when the opening account balance at the time of conversion is set at less than the "actuarial present value" of the participant's accrued benefits under the old plan. Wearaway tends to last longer for older, longer service participants because they generally accrue larger benefits before conversion. Wearaway can mean that these participants stop accruing benefits completely during their final years of service.[4] U.S. GOV'T ACCOUNTABILITY OFF.,[5] GAO-HEHS-00-185, PRIVATE PENSIONS: IMPLICATIONS OF CONVERSIONS TO CASH BALANCE PLANS 28-29 (2000). The lower the opening account balance is in comparison to the prior accrued benefit, the longer wearaway lasts, and thus the longer it takes employees to begin accruing new pension benefits.

Wearaway is not a required feature of a conversion to a cash balance plan. "Plan sponsors determine whether to create wearaway at conversion." U.S. GOV'T ACCOUNTABILITY OFF., GAO-HEHS-00-207, CASH BALANCE PLANS: IMPLICATIONS FOR RETIREMENT INCOME 29 (2000). Most cash balance conversions

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[4] Benefits already earned under an old plan may not be reduced. See 26 U.S.C. § 411(d)(6)(A) (2000); 29 U.S.C. § 1054(g). These parallel provisions mean that employees' pension entitlements do not grow until their pension benefits, as calculated under the new cash balance system, equal their actual accrued benefits under the old system. *See generally* Zelinsky, 19 VA. TAX REV. at 695-99, 702-04.

[5] Prior to 2004, the agency was called the General Accounting Office.

avoid wearaway at conversion by establishing opening account balances at the same level as the prior accrued benefit. *Id*. at 30; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-HEHS-06-42, PRIVATE PENSIONS: INFORMATION ON CASH BALANCE PENSION PLANS 5-6 (2005) ("Most conversions set participants' opening account balances equal to the present value of their accrued benefits under the previous plan . . ."); Lawrence J. Sher, *Survey of Cash Balance Conversions*, BENEFITS Q., 1st Quar. 2001, at 20 ("wearaway is not common practice").

C. An Unscrupulous Employer Can Easily Conceal Benefit Reductions Resulting From Cash Balance Conversions From Employees.

Benefit reductions from wearaway can easily be hidden from employees behind the illusion of a new form of benefits. A 1999 Wall Street Journal article broke the story of consulting actuaries joking about how cash balance conversions "masked" benefit reductions because "[t]here is very little comparison that can be done between the two plans" (*i.e.*, the prior plan and the new cash balance plan). Ellen E. Schultz, *Actuaries Become Red-Faced Over Recorded Pension Talk*, WALL ST. J., May 5, 1999, http://www.wsj.com/articles/SB925861143946245788. The article quotes actuaries discussing the employees' confusion. Amy Viener, then an actuary at Mercer Inc. (the consulting firm that assisted Foot Locker with its cash balance conversion), noted that: "You switch to a cash balance plan where the people are probably getting smaller benefits, at least the older longer service people; but they are really happy, and they think you are great for doing it." *Id*.

In contrast to this crass exploitation of employees' difficulty in understanding complicated actuarial concepts, GAO found that many plans provided accurate and understandable disclosures surrounding the transition to a cash balance plan. These plans provided extensive educational materials including examples and calculators to explain the consequences that the conversion had on individual employees' pension benefits. Some plans even engaged in an ongoing dialogue with their employees about these changes to ensure that employees understood the impact on their retirement security. The GAO found that wearaway and other difficult concepts could be explained in understandable terms, if a plan so desires. GAO-HEHS-00-185 at 6, 35-38.

The ease with which companies like Foot Locker can mask substantial benefit reductions via wearaway demonstrates the wisdom in ERISA's requirements that plans make accurate, complete, and understandable disclosure of significant changes in pension benefits.

III. FOOT LOCKER KNEW THE NEGATIVE IMPACT OF ITS CASH BALANCE CONVERSION ON EMPLOYEES' PENSION BENEFITS AND INTENTIONALLY MISREPRESENTED THE CONSEQUENCES OF THESE CHANGES TO THE EMPLOYEES.

During the conversion of its traditional defined benefit plan to a cash balance plan, Foot Locker intentionally reduced benefits that negatively affected the retirement benefits of its employees. The Court found that:

- Foot Locker knew that the cash balance conversion would result in a significant reduction in the rate of future benefit accrual for all employees. See *Osberg v. Foot Locker, Inc.*, 2015 U.S. Dist. LEXIS 132054, at *23 (S.D.N.Y. Sept. 29, 2015).

- Foot Locker used actuarial assumptions to calculate initial account balances that mathematically guaranteed that all employees would experience wearaway for a period of time. It could take several years for an employee just to catch back up to the pension benefit she had already earned as of the date of the cash balance conversion. In fact, most employees never caught back up. For example, Plaintiff Osberg worked almost 7 more years after the conversion and still never caught back up to what he already earned on December 31, 1995. *Id*. at *8-9, *10.

- Foot Locker intentionally structured the cash balance conversion so that almost all employees would experience substantial wearaway of between 2 to 5 years. *Id.* at *5, *6, *8-9, *11, *17, *20-21, *25-26.

- Foot Locker knew that the elimination of the early retirement benefit subsidy would adversely affect the pension benefits of older workers. *Id.* at *11-12, describing the early retirement subsidy.

The Court found that Foot Locker, with the help of its consultant Mercer Consulting,[6] took the following actions in communicating the plan changes to all of its employees:

- Intentionally provided affirmatively and materially misleading notices and information about the conversion. *Id.* at *22-26.

- Intentionally failed to inform employees about the benefit reductions. *Id.* at *22-26, *32.

- Intentionally failed to clearly describe differences in employees' accrued benefit between the old and new plan. *Id.* at *22.

- Intentionally misled employees to believe that there were no reductions and that the new cash balance benefits were comparable to their old benefits. *Id.* at *22-23, *24, *27, *32.

- Intentionally told employees that the cash balance conversion would provide benefit growth. *Id.* at *24-26, *31-32, *39-46.

- Intentionally did not inform employees about the freeze of benefits. *Id.* at *4, *27, *31-33.

- Intentionally did not tell employees about wearaway, the duration of the wearaway, and what that meant for their benefits. *Id.* at *5, *22, *25-26.

- Made these misrepresentations not only in its initial communications to employees, but also in the summary plan descriptions and other employee communications. Foot Locker sent these communications to all employees covered by the pension plan. *Id.* at *34-38.

- Intentionally made these misstatements to employees year after year, knowing that they were wrong. *Id*. at *34.

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[6] Mercer Consulting was also the benefit consultant for CIGNA, *Amara v. CIGNA Corp*. (*Amara I*), 534 F. Supp. 2d 288, 300 (D. Conn. 2008), and, of course, Mercer employed Ms. Viener. See Brief Section II.C., *supra* at 14-15.

Foot Locker intentionally made widespread and uniform misrepresentations and omissions about the impact of the conversion on employee's pension benefits, never disclosing that almost all employees experienced wearaway, a freezing of benefits, and a decrease in their compensation. *Id.* at *18; *see generally* Brief Section I.B., *supra* at 12-14. As a result, employees never knew about the wearaway and other benefit reductions. Without this knowledge, they could not make an informed decision whether to remain employed at Foot Locker. Given the low unemployment rate at the time of the conversion[7] and the low wages of Foot Locker employees, it would be reasonable to expect that many employees could have found different employment at the same compensation.[8] *See id.* at *19 (cash

[7] On January 1, 1996 (the effective date of the conversion), the unemployment rate was 5.6%; it consistently dropped until it reached under 4% in December 2000. U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey, Databases, Tables & Calculators*, Unemployment Rate from 1996-2001, http://www.bls.gov/data/ (last visited May 2, 2016).

[8] Compare the lack of response from Foot Locker employers to Foot Locker's cash balance conversion with the backlash from IBM employees when IBM converted its traditional pension plan to a cash balance plan. Employee protests about benefit losses or requests for additional compensation can be effective to get the employer to change its decision. *E.g.*, Ellen E. Schultz & William M. Bulkeley, *IBM Pension-Plan Changes Are Ruled Discriminatory*, WALL ST. J. (Aug. 1, 2003), http://online.wsj.com/article/SB105968406937956700.html ("IBM's conversion to a cash-balance plan in 1999 led to a fire storm of protest from longtime employees, who estimated their pensions would fall by 20% to 40% or more. In response, the company relented and allowed people older than 40 with 10 years of service to remain in the prior plan if they wished.").

balance obscured effective benefit freeze, without negative publicity, loss of morale and decreased ability to hire and retain workers).

Whether this Court labels Foot Locker's actions as lies, intentional misrepresentations, equitable fraud, or something else, the result is the same. It would be inequitable and unconscionable for Foot Locker to receive the benefit of a contract for employees' services that it has obtained through misrepresentation. *See Hammond v. Pennock*, 61 N.Y. 145, 152 (1874) ("It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made").

IV. ACCOUNT STATEMENTS AND BENEFIT ESTIMATES DO NOT CURE DEFICIENT PLAN SUMMARIES.

Foot Locker argues that even if the plan summaries that it gave employees did not disclose wearaway, certain other communications that Foot Locker sent to some employees contained enough technical clues that these employees should have been able to figure out that wearaway was occurring. This argument fails on the law and the facts.

Section 102 of ERISA requires that Summary Plan Descriptions (SPDs) be "sufficiently accurate and comprehensive to reasonably apprise . . . participants and beneficiaries of their rights and obligations under the plan" and that they "be written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a). Thus, the SPD must provide understandable notice of, among other things, "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for non-forfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." *Id.* § 1022(b).

The Department of Labor's interpretive regulations buttress the SPD's role of disclosing employees' rights and remedies, mandating that the SPD "must not have the effect [of] misleading, misinforming or failing to inform participants" and that "[a]ny description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized." 29 C.F.R. § 2520.102-2(b). These disclosure requirements make clear that employers and plans must provide specific information to employees when there are benefit reductions so that "the individual participant knows exactly where he stands with respect to the plan." *Firestone Tire*, 489 U.S. at 118 (quoting H.R. Rep. No. 93-533, at 11, 1974 U.S.C.C.A.N. at 4649). Foot Locker failed to do that.

Foot Locker asserts that employees could have figured out wearaway when they received benefit estimates from the pension plan. However, the calculations:

- were silent about the existence of wearaway;
- were silent on how the initial account balance was determined;
- were silent that the initial account balance was lower than the employee's accrued benefit;
- did not explain the calculations;
- did not explain the formula; and
- did not explain the methodology of the formula.

See Brief of Foot Locker at 16-17. Instead, an employee would merely see from her estimate that her account balance was growing and that she might get an even larger amount upon distribution. *Id.* An employee would rationally assume that her pension benefit had grown. There is nothing in the estimate that indicates that wearaway occurred and that the employee's benefits had not grown. Instead, these estimates are consistent with Foot Locker's widespread and uniform misrepresentations and omissions about the impact of the conversion on employee's pension benefits.

CIGNA made the same arguments in *Amara v. CIGNA Corp.* Like Foot Locker and most employers, CIGNA communicated with employees about plan changes in many ways other than via formal SPDs. Cigna argued that its less formal individual communications with employees – similar to Foot Locker's – cured CIGNA's misleading SPDs. The *Amara* district court rejected this argument, explaining that the touchstone of ERISA's plain language disclosure standards is quality, not quantity. *Amara v. CIGNA Corp*. (*Amara I*), 534 F. Supp. 2d 288, 341 (D. Conn. 2008) ("the problem lies not with the volume of information CIGNA chose to provide, but rather with some of the statements made in CIGNA's disclosures, which the Court finds were not written in a manner calculated to be understood by the average plan participant"). Without simple, comprehensible statements informing participants of wearaway, disclosure of a minimum lump sum or detailed information about the setup and content of the opening account balances did not counteract the favorable messages in the official summaries of continued, uninterrupted pension growth without wearaway. *Id.*

In this case, the cryptic pieces of information Foot Locker provided did not cure its failure to notify its employees through accurate, complete, and understandable disclosure of the wearaway and significant reduction in benefits that Foot Locker perpetrated upon its employees. This is especially the case where a complex actuarial concept is involved. *See Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 816 (7th Cir. 2010) (mere payment of lump sum benefit was not a "red flag" that participant was underpaid); *see also Thompson v. Ret. Plan for Emp. of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 602, 605 (7th Cir. 2011) (rejecting argument that a "collection of hints" put plaintiffs on notice of their claims, particularly where the issue (wearaway) is obscure).

It would defeat the whole purpose of ERISA's participant disclosure standards if a plan sponsor could issue intentionally misleading plan summaries, but then escape responsibility by arguing that employees should have figured out the misrepresentations from other communications that even an actuarially sophisticated participant would not necessarily have understood. Such a holding would totally undermine ERISA's requirement for clear disclosures calculated to be understood by the average plan participant, 29 U.S.C. § 1022(a), and the rationale for Congress' enactment of the disclosure requirements. *See generally* Brief Section I.C., *supra* at 8-9.

Foot Locker's disingenuous argument demonstrates the wisdom in ERISA's requirements that plans make accurate, complete, and understandable disclosure of significant changes in pension benefits. *See generally* Brief Section I.B-D., *supra* at 6-11.

V. FOOT LOCKER EMPLOYEES DO NOT NEED TO PROVE INDIVIDUALIZED DETRIMENTAL RELIANCE ON FOOT LOCKER'S MISREPRESENTATIONS IN ORDER TO OBTAIN REFORMATION OF THE PLAN.

According to Foot Locker and its amici, there is only one way to prove a fiduciary intentional misrepresentation claim under ERISA § 404 (as opposed to ERISA § 102)[9] to obtain reformation: each plaintiff must prove that she detrimentally relied on Foot Locker's widespread, uniform, consistent, and repeated intentional misrepresentations. This argument is incorrect and irrelevant. The district court's reformation award was independently supported by its determination that Foot Locker's misrepresentations violated ERISA § 102. Significantly, Foot Locker concedes that the class' fiduciary intentional misrepresentation claim under ERISA § 102 does not require a showing of

[9] Section § 102 establishes the specific form and content of information to be provided in summary plan descriptions and summary material modifications. 29 U.S.C. § 1022. Section 404 sets forth the fiduciary's obligations of prudence, loyalty, care, and impartiality. 29 U.S.C. § 1104.

detrimental reliance. *See Osberg*, 2015 U.S. Dist. LEXIS 132054, at *109; *accord, Amara v. CIGNA Corp.* (*Amara V*), 775 F.3d 510, 528-29 (2d Cir. 2014) (affirming reformation award based on a violation of ERISA § 102, without a showing of reliance).

In any event, the Supreme Court and this Court (in this case) have previously made clear that a plaintiff seeking the remedy of equitable plan reformation for an ERISA misrepresentation violation need not prove detrimental reliance. *CIGNA Corp. v. Amara* (*Amara III*), 563 U.S. 421, 425 (2011); *Osberg v. Foot Locker, Inc.*, 555 F. App'x 77, 80 (2d Cir. 2014); *Frommert v. Conkright*, 738 F.3d 522, 534 (2d Cir. 2013). Neither Foot Locker nor its amici have provided a compelling reason for this Court to deviate from its prior ruling. *See United States v. Bennett*, 2003 U.S. App. LEXIS 19394, at *12 (2d Cir. Sept. 18, 2003) (quoting *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967)) ("The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end").

The Supreme Court in *Amara III* explained that "[i]nformation-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous 'detrimental reliance' standard when equity imposed no such strict requirement." 563 U.S. at 445.

> It is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees

> even if they did not themselves act in reliance on summary documents--which they might not themselves have seen--for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief.

Id. at 444.

As this Court explained in *Amara V*, a defendant's "inequitable conduct" is enough to support reformation when combined with the plaintiff's mistake. 775 F.3d at 525-26 ("A contract may be reformed due to the mutual mistake of both parties, or where one party is mistaken and the other commits fraud or engages in inequitable conduct"); *see also Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 435 (1892) (same); *Tokio Marine & Fire Ins. Co. v. Nat'l Union Fire Ins. Co*., 91 F.2d 964, 966 (2d Cir. 1937) ("[m]istake was implicit . . . in the silent acceptance of the altered agreement under the circumstances which prevailed").

When Foot Locker knowingly, intentionally, and purposefully deceived participants about the pension benefits they were earning in exchange for their labor, it cost its employees the loss of two rights protected under ERISA. One was the right to accurate, complete, and understandable information about their benefits and rights under their pension plan. The second was the right "to receive [their] expected agreement," *i.e.*, the retirement benefits that Foot Locker represented they would receive if they continued working. *Amara V*, 775 F.3d at 525 n.12.

Foot Locker caused tremendous harm to the class through its intentional widespread and uniform misrepresentations to all of its employees. Equity does not require proof of detrimental reliance in such a case.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision and order that judgment be entered for the class.

Dated: May 24, 2016

Respectfully submitted,

/s/ *Dara S. Smith*

Dara S. Smith
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Tel: (202) 434-2060
Attorney for Amicus Curiae AARP

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5929, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 24, 2016

/s/ Dara S. Smith
Dara S. Smith

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system on May 24, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Dara S. Smith
Dara S. Smith