# FEDERAL DISTRICT COURT DISMISSES FIDUCIARY BREACH LAWSUIT AGAINST WASHINGTON UNIVERSITY 403(B) RETIREMENT PLANS

*Hodgson Russ Employee Benefits Newsletter*
November 28, 2018

**Practices & Industries**

Employee Benefits

Participants in Washington University's 403(b) retirement plan brought a class action lawsuit in Missouri federal district court against the university and its board of trustees, alleging plan fiduciaries breached their duties to act with prudence and loyalty by causing the plan to pay excessive fees and invest in poorly performing funds. Plaintiffs alleged that: (i) fiduciaries paid too much for recordkeeping and administrative services; (ii) caused losses to plan participants by offering only retail class funds, when lower-cost institutional fund options were available; and (iii) failed to remove poorly performing funds.

The defendants moved to dismiss under a procedural rule which required the federal district court to accept as true the facts alleged in the complaint, and to draw reasonable inferences in favor of plaintiffs. Over plaintiffs' objections, the court took "judicial notice" of investment fund prospectuses and fact sheets as materials "necessarily embraced by the pleadings." The judge granted defendants' motion to dismiss all counts, finding that the university satisfied its duty to offer an acceptable array of investment funds with reasonable fees, and that no facts indicated that the fiduciaries failed to use a prudent process in selecting plan investment options.

Dismissing plaintiffs' first fiduciary breach claim regarding excessive fees, the court stated that the plan offered a diverse array of choices with fees ranging from 0.04% to 0.85%. Citing *Hecker v. Deere & Co*., 556 F.3d 575, 585 (7th Cir. 2009), the court held that merely because lower expense ratios existed in the market did not create cognizable claims because ERISA does not require the plan fiduciaries to "scour the market" to find the cheapest possible funds. The court similarly dismissed the allegation of excessive recordkeeping and administrative fees because plan fiduciaries have discretion to pay such expenses through revenue sharing, and to consider factors other than cost when selecting plan service providers.

Giving deference to the plan administrator's investment decisions, the court disallowed plaintiffs' claims that two of the nearly 100 funds underperformed relative to selected benchmark investments. The court refused to view any particular investment fund in "isolation," stating that applicable law required the funds to be considered in the context of the whole portfolio. Further, the court noted the existence of an underperforming fund at a point in time does not indicate the process for including the fund in the lineup was imprudent at the outset. The court rejected the claim that offering a guaranteed fixed annuity fund with inherent distribution restrictions was imprudent, because it was reasonable to offer such an investment to plan participants who value a guaranteed return at the expense of liquidity.

Rejecting plaintiffs' claims wholesale, the Missouri district court joins several other federal courts that have dismissed nearly identical claims brought against other university 403(b) plans nationwide. Despite the outcome, 403(b) plan fiduciaries should ensure that they have established a process to regularly review investment performance and fees, as cases proceeding beyond this stage of early dismissal will require evidence regarding the prudent process used to select and monitor investments. *Davis v. Washington University in St. Louis* (E.D. Mo. 2018).