

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 07-CV-00644-WDM-KLM

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

QWEST GROUP LIFE INSURANCE PLAN, *et al.*,

Defendants.

**QWEST'S BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION TO ALTER OR AMEND JUDGMENT**

Defendants (collectively, "Qwest") respectfully submit this brief in opposition to Plaintiffs' Motion To Alter or Amend Judgment ("Motion," DN 162).

I. SUMMARY

In its August 25, 2009 Order on Motions for Summary Judgment ("Order," DN 159), this Court granted Qwest's motion for summary judgment on, *inter alia*, Plaintiffs' Second Claim for Relief, entitled "Breach of Fiduciary Duty—Material Misrepresentations." *See* Order at 22 & 32. Plaintiffs now ask this Court to alter or amend its judgment in Qwest's favor on that claim on the basis of the Third Circuit's recent decision in *In re Unisys Corporation Retiree Medical Benefits ERISA Litigation*, 2009 WL 2767000 (3rd Cir. Sept. 2, 2009) ("*Unisys*"). Plaintiffs' Motion should be denied for three reasons.

First, Plaintiffs' Motion is based entirely on an alleged change in "controlling law" after the Court issued its Order, but no such change has occurred. Tenth Circuit law controls this case, and the Tenth Circuit has issued no relevant decision since this Court

issued its Order. Although Plaintiffs argue there has been a change in Third Circuit law, that law is not controlling here.

Second, the Tenth Circuit not only *has not* adopted the Third Circuit's holding in *Unisys*; it *would not* adopt that holding. *Unisys* held that even though the retirees in that case had received summary plan descriptions ("SPDs") before they retired that unambiguously stated the company could change or terminate retiree medical benefits, *Unisys* breached its fiduciary duties under ERISA because its human resource staff members made oral statements to plaintiffs regarding the duration and cost of those benefits without reiterating the SPDs' written statements that those benefits could be reduced or eliminated. *Unisys* at *9. *Unisys* thus disregards unambiguous plan documents and SPDs based on unverifiable parole evidence, a result manifestly at odds with ERISA's written disclosure scheme and Tenth Circuit law upholding the primacy of that scheme.

Third, even if the Tenth Circuit were to adopt the holding of *Unisys*, that holding would not be controlling here, because the pertinent facts in *Unisys* are precisely the opposite of the facts in this case. The Third Circuit stressed in *Unisys* that the company told plaintiffs at the time of their retirement that they would have free or low-cost medical benefits throughout retirement *without* mentioning *Unisys*' right to amend or terminate the plan in the future. Here, by contrast, Qwest indisputably told Plaintiffs at the time of their retirement that Qwest had the right to amend or terminate the Life Plan in the future.

In sum, *Unisys* does not even remotely warrant amendment of this Court's judgment in Qwest's favor on Plaintiffs' Second Claim. Plaintiffs' Motion should therefore be denied.

II. ARGUMENT

A. The Motion Should Be Denied Because There Has Been No Change in Controlling Law.

Plaintiffs filed their Motion under Federal Rule of Civil Procedure 59(e). *See* Motion at 1. In its August 25, 2009 Order on Motion for Reconsideration, this Court stated:

A motion for amendment under Rule 59(e) is limited to a narrow set of circumstances: it is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. . . . Grounds warranting a motion to reconsider include (1) an intervening change in controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.

DN 158 at 2-3 (quotation marks and citations omitted). Plaintiffs base their Motion entirely on an alleged change in "controlling law," in the form of the Third Circuit's recent decision in *Unisys*. But Third Circuit law is not controlling in the Tenth Circuit. *See F.D.I.C. v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992) (decisions of another federal court of appeals "are not binding on this circuit"). And although the portion of the Court's Order addressing Plaintiffs' Second Claim does cite Third Circuit law, it also cites First, Second, Fourth, Sixth, Seventh, Eighth, and (of course) Tenth Circuit law. *See* Order at 14-20. Although the law of those other circuits is illuminating, none of it is controlling.

If a district court must entertain motions for amendment every time any court of appeals issues an opinion that allegedly supports a party's position on an adjudicated issue, few judgments will ever become final. This Court should accordingly decline to consider the substance of Plaintiffs' Motion, and instead deny that Motion on the ground that there has been no change in the controlling law. *See JPMorgan Chase Bank v. Cook*, 322 F. Supp. 2d 353, 355 (S.D.N.Y. 2004) (when cases supporting Rule 59(e) motion are not

controlling law, “under the standard of review applicable to motions for reconsideration, that fact should end the matter”).

B. The Motion Should Be Denied Because the Tenth Circuit Has Not Adopted, and Would Not Adopt, the Third Circuit’s Holding in *Unisys*.

The Tenth Circuit not only *has not* adopted the holding of *Unisys*; it *would not* adopt that holding. The Third Circuit held in *Unisys* that the company’s failure to disclose at the time plaintiffs retired “its ability to modify or wholly eliminate the plaintiffs’ medical benefits at any point in the future, despite its unambiguous reservation of rights clause contained in the summary plan description, resulted in an inadequate disclosure of information.” *Unisys* * 9. The Tenth Circuit, by contrast, has repeatedly held that “[w]here the written language of the plan is clear, as here, any representation that is contrary to the written language of an ERISA plan can be viewed only as a purported modification of the plan and, hence, preempted by ERISA.” *Averhart v. US West Mgmt. Pension Plan*, 46 F.3d 1480, 1485 (10th Cir. 1994) (citation and brackets omitted). *Accord Straub v. Western Union Telegraph*, 851 F.2d 1262 (10th Cir. 1988) (“no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan”); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (same).

In *Frahm v. Equitable Life Assurance Society*, 137 F. 3d 955, 960 (7th Cir. 1998), Judge Easterbrook described why, as the Tenth Circuit has held, oral representations contrary to the clear written language of ERISA plans are not actionable:

Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants would not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position If it is hard now to administer plans that apply to all participants, it is impossible

to see how any employer could administer a plan that meant something different to each participant, where the difference was not committed to writing. . . . We do not think § 1104(a)(1)(B) takes back with the left hand the primacy of the written word that ERISA establishes with the right hand.

Unisys' extraordinary expansion of fiduciary duty is also unwise because "[b]inding the plan's sponsor to the oral advice of its benefit staff might lead the employer to discontinue giving advice, telling participants to read the documents and draw their own conclusions. That step would protect employers, but it very likely would increase the level of misunderstanding among participants." *Id.* at 960. For all these reasons, the Tenth Circuit would continue to follow the rule it enunciated in *Averhart* rather than the rule announced by the Third Circuit in *Unisys*.

C. **The Motion Should Be Denied Because Plaintiffs Have Failed To Establish a Disputed Issue of Material Fact Even Under the Third Circuit's Holding in *Unisys*.**

Finally, even if the Tenth Circuit were to adopt the holding of *Unisys*, that holding would not be controlling here, because the pertinent facts in *Unisys* are contrary to the undisputed facts in this case. In *Unisys*, the Third Circuit stressed that "the message that Unisys communicated to its employees in the course of counseling them about retirement was at best a half-truth *because there was no mention of Unisys' right to amend or terminate the plan at any point in the future.*" *Unisys* at *8 (emphasis added). The Court accordingly held that "Unisys' arguments that it disclosed its reservation of rights in the summary plan descriptions and other documentation is unavailing *because Unisys did not present this information when it was counseling its employees on their retirement decisions.*" *Id.* at *9 (emphasis added).

Here, by contrast, Qwest indisputably did what Unisys did *not* do: Qwest told its employees when it was counseling them about their retirement decision that Qwest had the right to amend or terminate the Life Plan in the future. For example, Qwest gave employees considering retirement an Insurance Plan Description that began with the following sentence in bold: “While the plans listed below are the plans currently provided to eligible employees upon retirement, *the Company reserves the right to amend or terminate any or all provisions in the future for any reason.*” Order at 3 (emphasis added). And Qwest made a Video Conference available for viewing by those employees that included a colloquy in which the Director of Human Resources stated that the reservation of rights provision quoted above was “intended to give the company the ability to modify the plans as circumstances and conditions change in the future.” *Id.* at 3-4 (emphasis added). As this Court found in its Order, “no document expresses or suggests an intent to continue the Life Plan with no reduction *without also including an express reservation of rights clause.*” *Id.* at 16. Because the undisputed facts of this case are directly contrary to the facts on which the Third Circuit based its holding in *Unisys*, that case does not even remotely warrant amendment of this Court’s judgment in Qwest’s favor on Plaintiffs’ Second Claim.

III. CONCLUSION

For the reasons set forth above, Plaintiffs’ Motion should be denied.

DATED: September 25, 2009.

s/ Christopher J. Koenigs

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, I electronically filed the foregoing **Qwest's Brief in Opposition to Plaintiffs' Motion to Alter or Amend Judgment** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/Patricia Eckman

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