

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term 2008
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9 Submitted: September 18, 2008 Decided: April 27, 2009

10 Docket No. 07-2658-cv, 07-2887-cv
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15 JOSEPH J. GIORDANO,

16
17 Plaintiff-Appellant-Cross-Appellee,

18 - against -
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20
21 JOHN B. THOMSON, JR., THOMSON INDUSTRIES, INC., and DANAHER
22 CORPORATION,

23
24 Defendants-Appellees-Cross-Appellants.
25

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28 Before: FEINBERG, WALKER, and LIVINGSTON, Circuit
29 Judges.

30
31 WILLIAM DAN BOONE and Ngozi Evelyn Bolin, Bolin &
32 Boone, New York, New York, for plaintiff-
33 appellant-cross-appellee.
34

35 JOHN T. MORIN and Jennifer L. Marlborough,
36 Wormser, Kiely, Galef & Jacobs LLP, New
37 York, New York, for defendants-appellees-
38 cross-appellants.
39

40 FEINBERG, Circuit Judge:

41 Plaintiff Joseph J. Giordano worked as the Chief Financial
42 Officer (CFO) of Thomson Industries, Inc. (hereafter "TII" or
43 "the company") from September 2000 to October 2002. During that

1 period, while TII was in the process of selling itself to
2 defendant Danaher Corporation ("Danaher"), Giordano made some
3 inquiries as to whether he would receive some sort of payment for
4 his role in the sale. Some at TII perceived his behavior as
5 counterproductive, and his employment was terminated. A little
6 over a year later, Giordano brought this suit in the United
7 States District Court for the Eastern District of New York.
8 After a bench trial before Judge Joanna Seybert, the judge ruled
9 in favor of TII and the two other defendants. We affirm.

10 I. BACKGROUND

11 TII manufactured a number of products, including ball
12 bearings. The company was founded by the father of defendant
13 John Thomson, Jr.; at the time of the sale to Danaher, Thomson
14 was TII's sole shareholder.

15 Giordano started working on TII matters while he was a
16 partner at Coopers & Lybrand. In 1993, Giordano left that firm
17 and began working for TII as a part-time consultant.

18 By 1999, it had become clear that TII was struggling
19 financially. In early 2000, the company began discussions with
20 investment bankers to consider options for turning the company
21 around, since there were worries that the company would break
22 some of the covenants in its lending agreements. The options
23 included a sale of the company, a recapitalization and a

1 restructuring of its debt. TII eventually selected JPMorgan
2 Chase ("JPMorgan") to represent it in these matters.

3 In 1999, as part of its turnaround efforts, the company
4 hired Dr. Alex Beavers as its new CEO. Beavers, in turn,
5 terminated Bartlett Polster, who was then the company's CFO.
6 Polster had worked full time and was paid roughly \$170,000 per
7 year. In May 2000, Giordano was given the duties and title of
8 the "acting CFO." In August 2000, Beavers asked Giordano to
9 become the CFO, in part because (as Senior Corporate Vice
10 President of Human Resources Patrick Mazzeo testified) it would
11 look better to the people involved in the effort to sell or
12 recapitalize the company to have an employee as CFO (as acting
13 CFO, Giordano was technically still a consultant). Giordano told
14 Beavers he would accept, but only if the role was part time and
15 temporary. On this basis, Giordano became the company's CFO on
16 September 1. He was paid a yearly salary of \$250,000.

17 As indicated above, defendant Thomson eventually decided to
18 sell the company to Danaher. Giordano assisted in the
19 transaction by helping TII negotiate with its lenders. The
20 company had defaulted on a loan payment and on a loan covenant.

21 When the company defaulted, the lenders had the right to obtain
22 a variety of extra payments. Giordano, working with Bruce Treen
23 from JPMorgan, persuaded the lenders to waive their rights to
24 those additional payments. This work was done mainly through

1 conference calls; Giordano testified that these took place
2 roughly once a week (sometimes more, sometimes less). Giordano
3 also initially fielded requests for due diligence information,
4 but eventually he delegated this duty to a subordinate. Although
5 Giordano claims that his work with the lenders went beyond what
6 a CFO would normally be expected to do, Treen and Anthony Garvin
7 (another JPMorgan banker) disagreed, opining that such work would
8 be within the normal scope of a CFO's duties.

9 At trial, the deal participants disagreed regarding whether
10 Giordano was, in general, a competent CFO. Treen testified that
11 Giordano generally "fulfilled the role of CFO." By contrast, one
12 Danaher employee testified that Giordano was essentially not
13 doing his job and "not proficient in the financial matters of the
14 business other than at the very basic level." Similarly, Richard
15 Cummins, an advisor to defendant John Thomson, testified that
16 Giordano "didn't function as a CFO" and failed to "straighten out
17 the accounting department." Garvin stated that Giordano did all
18 the work normally expected from a CFO but that he was "somewhat
19 less involved than we would have liked to have seen for a company
20 in its circumstances."

21 Defendants also note that, according to their calculations,
22 Giordano worked roughly 6.2 days per month between December 2000
23 and October 2002. In addition, about one month before the
24 transaction closed, Giordano was away on vacation.

1 At some point, Giordano became aware that Danaher was not
2 planning on keeping him as an employee after the purchase.
3 Thereafter, he made several inquiries regarding whether he would
4 receive an additional payment, beyond his salary, for his role in
5 the sale of the company. Some transaction participants thought
6 he was threatening to block the sale if he was not paid the
7 additional money; at trial Giordano denied making such threats.
8 This process culminated in a dinner between Cummins and Giordano
9 that took place on October 14, 2002, shortly before the
10 transaction documents were signed. As Cummins remembered it,
11 Giordano asked for \$1 million or more, and Cummins said that
12 Thomson would never approve a payment in that range. Cummins
13 also testified that Giordano threatened to "torpedo the closing"
14 by refusing to sign necessary documents if he was not paid.
15 Cummins also testified that he then called the law firm working
16 on TII's behalf to tell it that TII was going to have to fire
17 Giordano. Giordano testified that he did not threaten to block
18 the deal, and that Cummins agreed to recommend a payment of
19 \$600,000.

20 On October 16, 2002, Giordano went to a "pre-closing," at
21 which various participants were signing papers for the sale to
22 Danaher. While there, Giordano signed all of the documents put
23 in front of him except a document under which he would have
24 released all of his claims against Thomson, TII and Danaher.

1 Under the release, Giordano would receive a \$15,230 severance
2 payment. By the next day, he still had not signed the release.

3 On October 17, Thomson heard that Giordano had not signed
4 the release. Thomson then decided that he had to terminate
5 Giordano because the transaction could not be completed without
6 a release and "in light of [Giordano's] prior actions and
7 statements . . . he was going to torpedo the transaction."
8 Thomson terminated Giordano that day via a faxed letter from
9 Mazzeo. The parties to the sale then re-executed all of the
10 documents previously signed by Giordano, negotiated a provision
11 under which Thomson would indemnify Danaher for any claims made
12 against it by Giordano and completed the sale.

13 In November 2003, Giordano brought this suit against
14 defendants Danaher, Thomson and TII in the Eastern District
15 claiming that (1) he is owed money under TII's severance plan,
16 (2) he was fired in violation of the anti-retaliation provision
17 of the Employee Retirement Income Security Act ("ERISA"), see
18 ERISA § 510, 29 U.S.C. § 1140, and (3) his work during the deal
19 unjustly enriched Thomson and TII.¹ In September 2005, after

¹Giordano's other claims in the district court are not before us on appeal. With respect to the third claim on appeal, that Giordano was unjustly denied compensation for the "extra" tasks he allegedly performed beyond his normal CFO duties, we note that Giordano left ambiguous in his brief whether he was appealing the dismissal of his unjust enrichment claim alone or the dismissal of his contract-based claims as well. However, unjust enrichment is the only legal basis Giordano explicitly articulates when arguing the third point in his brief.

1 defendants moved for summary judgment and Giordano moved for
2 partial summary judgment on his ERISA claim, the district court
3 held that TII's severance plan constituted an "employee welfare
4 benefit plan" subject to ERISA but denied the remainder of both
5 motions, finding that there existed material issues of dispute
6 for trial. *Giordano v. Thomson*, 438 F. Supp. 2d 35, 40-43
7 (E.D.N.Y. 2005). Then, in October 2006, the court held a bench
8 trial. In May 2007, it dismissed all of Giordano's claims.
9 *Giordano v. Thomson*, No. 03-cv-5672, 2007 U.S. Dist. LEXIS 39117
10 (E.D.N.Y. May 29, 2007). Specifically, the district court found
11 that (1) Giordano's termination was not causally connected to
12 any exercise of his rights under ERISA, (2) TII's denial of
13 severance payments to Giordano was not "arbitrary and capricious"
14 and (3) TII had not been unjustly enriched by Giordano's
15 employment during the Danaher sale. *Id.*

16 Giordano then appealed, arguing that Judge Seybert should
17 not have dismissed certain of his claims. Meanwhile, in a cross-

Moreover, TII expressly alleges in its brief that Giordano
appeals only the unjust enrichment issue, and Giordano does not
contest this characterization in his reply brief. Because
Giordano fails to fully argue for reinstating his contract-based
claims, we treat his third point on appeal as an argument for
compensation based on unjust enrichment. See *Norton v. Sam's
Club*, 145 F.3d 114, 117 (2d Cir. 1998).

1 appeal, the defendants contend that Judge Seybert erred in her
2 conclusion that TII's severance plan is covered by ERISA.²

3 II. ANALYSIS

4 We conclude that Giordano was not entitled to receive
5 payments under TII's severance plan, that he was not terminated
6 in violation of ERISA's anti-retaliation provision and that his
7 unjust enrichment claim has no merit. Thus, we need not (and do
8 not) decide whether the district judge was correct in her
9 determination that TII's severance plan was an ERISA plan.

10 A. Standard of Review

11 After a bench trial, this Court reviews a district court's
12 factual findings for clear error and its legal conclusions de
13 novo. See, e.g., *Grace v. Corbis-Sygma*, 487 F.3d 113, 118 (2d
14 Cir. 2007).

15 B. Giordano Is Not Entitled to Benefits Under 16 Thomson's Severance Plan.

17 ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides
18 that a person to whom benefits are owed under an ERISA plan may
19 bring a civil action to recover them. To prevail under § 502, a
20 plaintiff must show that (1) the plan is covered by ERISA, see
21 *Guilbert v. Gardner*, 480 F.3d 140, 145-46 (2d Cir. 2007), (2)
22 plaintiff is a participant or beneficiary of the plan, see *Rocco*

²Giordano argues that defendants' cross-appeal is frivolous and that the defendants "arrogated" to themselves a filing extension. These arguments are without merit.

1 v. N.Y. State Teamsters Conference Pension & Ret. Fund, 281 F.3d
2 62, 70-71 (2d Cir. 2002), and (3) plaintiff was wrongfully
3 denied severance pay owed under the plan, see *Feifer v.*
4 *Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1208 (2d Cir. 2002).
5 Where an ERISA plan gives an administrator discretionary
6 authority to "determine eligibility for benefits or to construe
7 the terms of the plan" we review the administrator's decisions
8 under the arbitrary and capricious standard. *Paneccasio v.*
9 *Unisource Worldwide, Inc.*, 532 F.3d 101, 108 (2d Cir. 2008)
10 (internal quotation marks omitted). Where no such discretion is
11 conferred, we review the administrator's decision de novo. See
12 *id.*

13 The parties disagree regarding which standard of review
14 should apply here, but we need not resolve the issue because
15 Giordano's claim would fail under either standard. Judge Seybert
16 confirmed the propriety of TII's decision to deny severance
17 benefits to Giordano. See *Giordano*, 2007 U.S. Dist. LEXIS 39117,
18 at *3-5. She cited three reasons for this conclusion. First,
19 TII's deteriorating financial situation made it understandably
20 reluctant to pay severance benefits. See *id.* at *4-5. Second,
21 Giordano's predecessor received only eight weeks of severance
22 payments even though he was a full-time employee (Giordano worked
23 part time) and had worked at the company for 20 years (Giordano
24 had been an employee for less than three years). See *id.* at *5.

1 Finally, the judge determined that the company offered severance
2 benefits only to employees who were not terminated for cause;
3 Giordano, she found, was terminated for cause--specifically, his
4 attempt to "torpedo" the Danaher sale. See *id.* at *4, *6.
5 After reviewing the record, we agree with Judge Seybert: Giordano
6 was not entitled to severance payments.³

7 C. Giordano's Retaliation Claim

8
9 ERISA § 510 provides that it is illegal to "discharge, fine,
10 suspend, expel, discipline, or discriminate against a participant
11 or beneficiary for exercising any right to which he is entitled
12 under the provisions of an employee benefit plan, this subchapter,
13 section 1201 of this title, or the Welfare and Pension Plans
14 Disclosure Act, or for the purpose of interfering with the
15 attainment of [such rights]" 29 U.S.C. § 1140 (internal
16 citation omitted). To make out a *prima facie* case of retaliation
17 under § 510, Giordano must show that (1) he was engaged in a
18 protected activity, (2) TII was aware of that activity, (3) he
19 suffered from an adverse employment decision and (4) there was a
20 causal connection between the protected activity and the adverse

³Giordano also argues that TII violated ERISA's requirement that an ERISA plan participant whose claim has been denied be afforded a "full and fair review." 29 U.S.C. § 1133(2). We need not reach this claim since "the typical remedy" for violations of this provision is "remand for further administrative review," but remand is unnecessary where it would be futile. *Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008). Remand would be futile here.

1 employment action. See *Manoharan v. Columbia Univ. Coll. of*
2 *Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988).
3 Moreover, Giordano must prove that TII had the specific intent to
4 retaliate against him. See *Kouvchinov v. Parametric Tech. Corp.*,
5 537 F.3d 62, 66-67 (1st Cir. 2008); *Dister v. Cont'l Group, Inc.*,
6 859 F.2d 1108, 1111 (2d Cir. 1988). Specific intent is determined
7 under the burden-shifting framework outlined in *McDonnell Douglas*
8 *Corp. v. Green*, 411 U.S. 792, 802-05 (1973). See *Dister*, 859 F.2d
9 at 1111-13.

10 1. Giordano Was Not Fired for Refusing to Forfeit
11 Severance Benefits Under the Plan
12

13 Giordano's first argument regarding retaliation is that he
14 was terminated for failing to waive his claim for ERISA benefits
15 when he declined to sign the release. Judge Seybert rejected this
16 claim, finding that Giordano was terminated because his behavior
17 during the Danaher deal was determined to be counterproductive.
18 *Giordano*, 2007 U.S. Dist. LEXIS 39117, at *6-7. This finding is
19 a reasonable one, particularly given our determination that
20 Giordano was not, in fact, entitled to any severance benefits
21 under the plan. We find no error (clear or otherwise) in the
22 district court's findings on this issue.

23 2. ERISA § 510 Does Not Create a Cause of Action
24 for Enforcing the Older Workers Benefit
25 Protection Act
26
27

1 Giordano's second, and less conventional, argument appears
2 to be related to the amount of time he was given to review the
3 waiver of his claims against defendants and to 29 U.S.C. § 626(f),
4 a provision of the Older Workers Benefit Protection Act (OWBPA).
5 That provision provides that "[a]n individual may not waive any
6 right or claim under [the Age Discrimination in Employment Act of
7 1967 (ADEA)] unless the waiver is knowing and voluntary." 29
8 U.S.C. § 626(f)(1). It then states that a waiver is not "knowing
9 and voluntary" unless, among other things, the individual is given
10 21 days to review the waiver (a 45-day period applies in some
11 cases). Id. § 626(f)(1)(F). Giordano appears to argue that TII
12 is liable under ERISA § 510 for retaliating against him in
13 response to his exercise of his OWBPA right to review the release
14 for 21 days.

15 This argument is mistaken. ERISA § 510 does not create a
16 cause of action for violations of OWBPA. ERISA § 510 prohibits
17 only retaliation against a plaintiff who exercises a right derived
18 from: (1) an employee benefits plan, (2) "this subchapter," (3)
19 29 U.S.C. § 1201 or (4) the Welfare and Pension Plans Disclosure
20 Act. Id. § 1140. Because the OWBPA right to a 21-day review
21 period under 29 U.S.C. § 626(f) does not fall within any of these
22 four categories, there is no ERISA § 510 cause of action for a
23 violation of § 626(f).
24
25

1 D. Giordano's Unjust Enrichment Claims Are Without
2 Merit

3 "Under New York law, a plaintiff asserting a claim of unjust
4 enrichment must show that the defendant was enriched at the
5 plaintiff's expense and that equity and good conscience require
6 the plaintiff to recover the enrichment from the defendant."
7 *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 203 n.8 (2d Cir. 2004).
8 Recovery on such a claim is "limited to the reasonable value of
9 the services rendered by the plaintiff." *Collins Tuttle & Co. v.*
10 *Leucadia, Inc.*, 544 N.Y.S.2d 604, 605 (App. Div. 1989).

11 Here, it is clear that the reasonable value of the services
12 provided by Giordano was not more than the actual amount he was
13 paid. Giordano was paid \$250,000 per year for part-time work,
14 whereas his predecessor, who worked full time, was paid only
15 \$170,000. Moreover, according to some (but not all) deal
16 participants, Giordano's performance as a CFO was somewhat
17 disappointing. And while Giordano claims the work he did with
18 TII's lenders was beyond the normal scope of a CFO's duties, none
19 of the other deal participants who testified on the matter agreed.
20 We cannot say that the judge erred in believing the latter group.
21 Thus, Giordano's unjust enrichment claim is without merit.

22 III. CONCLUSION

23 For the reasons stated above, we AFFIRM the district court's
24 dismissal of Giordano's claims. Defendants' cross-appeal is

1 DISMISSED as moot; as noted, we express no opinion on whether
2 TII's severance plan was an ERISA plan.