

6 JANET SHALWITZ,
7 Plaintiff, No. C-08-3672 PJH

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction or in the alternative for a more definite statement came on for hearing before this court on October 29, 2008. Plaintiff, Janet Shalwitz ("Shalwitz"), appeared through her counsel, Cary S. Kletter. Defendant, Health Initiatives for Youth ("HIFY"), appeared through its counsel, Kurt W. Melchior. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion to dismiss WITH LEAVE TO AMEND, for the reasons stated at the hearing, and as follows.

BACKGROUND

1 Shalwitz worked for HIFY as a pediatric physician from September 2001 through
2 September 2005. Shalwitz alleges that HIFY maintained a group benefits plan, which
3 included LTD benefits, for its employees. Shalwitz further alleges that HIFY informed her
4 when she was hired that she would be included in the group benefits plan upon the
5 commencement of her employment, and that she would be entitled to LTD benefits. While
6 employed by HIFY, she allegedly was repeatedly informed that she was a participant in
7 HIFY's group benefit plan and that she was covered under the LTD insurance policies.

8 On or about September 25, 2005, Shalwitz became totally disabled due to spinal
9 stenosis and failed back surgery. Shalwitz alleges that as a result, she suffers from severe
10 pain, near constant discomfort, inability to sit or stand in the same location for any
11 meaningful period of time, inability to lift objects that nondisabled persons can lift, as well
12 as other manifestations of total disability. As a result of her disabilities, Shalwitz became
13 unable to perform the duties of her position with HIFY. Shalwitz subsequently filed a claim
14 with Reliance and Unum seeking LTD benefits. Both insurers denied her claims.

15 HIFY moved to dismiss Shalwitz's complaint pursuant to Federal Rule of Civil
16 Procedure ("FRCP") 12(b)(1) for lack of subject matter jurisdiction, or in the alternative, for
17 a more definite statement pursuant to FRCP 12(e).

18 DISCUSSION

19 A. Legal Standard

20 In evaluating a motion to dismiss, all allegations of material fact are taken as true
21 and construed in the light most favorable to the nonmoving party. See, e.g., Burgert v.
22 Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000) (citations omitted).
23 In order to survive a dismissal motion, however, a plaintiff must allege facts that are
24 enough to raise his or her right to relief "above the speculative level." See Bell Atlantic
25 Corp. v. Twombly, --- U.S. ---, 127 S. Ct. 1955, 1964-65 (2007). While the complaint
26 "does not need detailed factual allegations," it is nonetheless "a plaintiff's obligation to
27 provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and

1 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id.
2 In short, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its
3 face,” not just conceivable. Twombly, 127 S. Ct. at 1974.

4 B. Defendant’s Motion to Dismiss

5 HIFY contends that Shalwitz is not a plan participant and therefore does not have
6 standing to bring a civil ERISA action.

7 Under ERISA’s civil enforcement provision, a plan participant, beneficiary, fiduciary,
8 or the Secretary of Labor may bring a civil action. 29 U.S.C. § 1132(a). Accordingly, the
9 Supreme Court has held that a federal court has no jurisdiction to hear a civil action under
10 ERISA that is brought by a person who is not a “participant, beneficiary, or fiduciary.”
11 Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27 (1983).
12 “Whether a person is a plan participant must be decided as of the time of the filing of the
13 lawsuit.” Harris, 26 F.3d at 933. In “order to be a plan participant, a former employee
14 must have “a reasonable expectation of returning to covered employment or a colorable
15 claim to vested benefits.” Firestone Tire & Rubber Co., 489 U.S. at 117; Harris, 26 F.3d at
16 933.

17 Thus, in order to have standing to bring an ERISA claim, Shalwitz must have been a
18 plan participant at the time she filed this lawsuit. Preliminarily, Shalwitz incorrectly argues
19 that the court must take as true her allegation that she was a plan participant. However,
20 the court must only take as true the complaint’s material *factual* allegations. See, e.g.,
21 Burgert, 200 F.3d at 663 (emphasis added). Therefore, whether Shalwitz was a plan
22 participant at the time of filing the lawsuit is a legal determination to be made by the court.

23 Turning to the question of whether Shalwitz was a plan participant when she filed the
24 lawsuit, her status as a former employee requires that she prove either that she has a
25 reasonable expectation of returning to covered employment, or that she has a colorable
26 claim to vested benefits. See Firestone Tire & Rubber Co., 489 U.S. at 117. Shalwitz does
27 not reasonably expect to return to covered employment, as her total disability caused her to
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1 stop working in the first place. Accordingly, the court must determine whether Shalwitz had
2 a colorable claim to vested benefits at the time the lawsuit was filed.

3 In Curtis v. Nevada Bonding Corporation, 53 F.3d 1023, 1025-26 (9th Cir. 1995), the
4 plaintiff filed a claim against his employer alleging that the defendant had promised to
5 provide insurance coverage but failed to do so, leaving the plaintiff uninsured when he was
6 diagnosed with cancer. The defendant's group insurance policy, governed by ERISA,
7 provided that new employees were not eligible for benefits until the first day of the month
8 following the first ninety days of employment. Id. at 1025. Because the plaintiff's cancer
9 diagnosis occurred before the ninety-day period expired, the court held that he "never
10 became *eligible* to receive benefits under the ERISA plan prior to his diagnosis with cancer
11 and so does not have a colorable claim that he will prevail in a suit for benefits under
12 ERISA." Id. at 1029 (emphasis in text).

13 Although Shalwitz has alleged that HIFY failed to properly secure the LTD benefits
14 which it promised to provide, Shalwitz's complaint suggests that she may not have been a
15 beneficiary of an ERISA plan. See First Am. Compl ¶¶ 32, 34 (alleging that HIFY "may not
16 have properly secured LTD benefits for [Shalwitz]" and that "HIFY breached that agreement
17 by failing to provide Dr. Shalwitz with LTD benefits."). Thus, as in Curtis, there is a
18 possibility that Shalwitz never became eligible to receive benefits, and was never a plan
19 participant.

20 However, this case is less clear than Curtis because there are no additional
21 circumstances, such as a ninety-day eligibility period, which make certain that Shalwitz was
22 not and could not have been a plan participant. Indeed, the complaint is contradictory on
23 this point. On the one hand, it alleges that HIFY told Shalwitz when she was hired that she
24 would be included in the group benefits plan once her employment began, and that among
25 other benefits, she would be entitled to long term disability benefits. First Am. Compl. ¶ 11.
26 Moreover, the complaint alleges that during Shalwitz's employment, HIFY "repeatedly
27 informed [her] that she was a participant in HIFY's group benefit plan and that she was
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1 covered under the LTD insurance policies.” First Am. Compl. ¶ 12. If taken as true, these
2 factual allegations suggest that Shalwitz was under the impression that she was, and may
3 have actually been, a plan participant.

4 On the other hand, as noted above, Shalwitz alleges that HIFY “may not have
5 properly secured LTD benefits for her,” *id.* at ¶ 32, implying that she may not have been a
6 plan participant at the time of filing the suit and therefore may not have had a colorable
7 claim to vested benefits at that time. If so, then the court has no jurisdiction to hear the
8 case because “whatever the reason,” she was not a plan participant. Harris, 26 F.3d at
9 933 (holding that even though plaintiff’s nonparticipation in plan was due to fraud, the court
10 still had no jurisdiction because he was not a plan participant).

11 At the hearing, Shalwitz’s counsel acknowledged the ambiguity in the complaint and
12 recognized that an amendment is necessary. Thus, if Shalwitz’s intent is, as counsel
13 indicated at the hearing, to allege that she was a plan participant at the time of filing the
14 suit, the complaint must be amended to clearly reflect this position. Although Shalwitz’s
15 opposition brief claims that she was included in the benefit plan, the complaint alone does
16 not clearly allege this point and must be amended.

17 Shalwitz’s counsel also suggested at the hearing that supplemental jurisdiction
18 exists over a state law breach of contract claim. However, if Shalwitz intends to allege that
19 HIFY failed to include her in the plan after promising to do so and thereby breached a
20 contract, Shalwitz must make clear that she was not a plan participant. Additionally,
21 Shalwitz did not allege a breach of contract claim in the first amended complaint. Thus, in
22 order for the court to exercise supplemental jurisdiction over any state law claim, Shalwitz
23 must first amend the complaint to allege a state law claim.

24 Accordingly, Shalwitz must file an amended complaint electing to allege either that
25 Shalwitz was a plan participant, or that she was not a plan participant and that HIFY
26 breached a contract by failing to include her in the plan.

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1 C. Conclusion

2 For the foregoing reasons, and as stated above, the court GRANTS defendant's
3 motion to dismiss WITH LEAVE TO AMEND. Shalwitz must amend the complaint within
4 two weeks from the date of the hearing. Defendants Reliance and Unum may file an
5 amended answer, and defendant HIFY may file either an answer or another motion to
6 dismiss within twenty days thereafter. The court anticipates that the question whether
7 plaintiff was or was not a plan participant or beneficiary will be determined early in this
8 litigation by summary judgment motion. Notwithstanding the unsettled pleadings, the case
9 management conference scheduled for November 13, 2008, will go forward as the court is
10 interested in addressing all of the parties.

11 **IT IS SO ORDERED.**

12 Dated: October 31, 2008



13 PHYLLIS J. HAMILTON
14 United States District Judge

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