

1 PAMELA E. COGAN (SBN 105089)
KATHRYN C. CURRY (SBN 157099)
2 ROPERS, MAJESKI, KOHN & BENTLEY
1001 Marshall Street
3 Redwood City, CA 94063
Telephone: (650) 364-8200
4 Facsimile: (650) 780-1701

5 Attorneys for Defendant
LIBERTY LIFE ASSURANCE COMPANY OF
6 BOSTON

7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 VORRIS BLANKENSHIP,
12 Plaintiff,

13 v.

14 LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON AS
15 ADMINISTRATOR AND FIDUCIARY
OF THE KPMG EMPLOYEE LONG-
16 TERM DISABILITY PLAN AND THE
KPMG EMPLOYEE LONG-TERM
17 DISABILITY PLAN,

18 Defendant.

CASE NO. C 03-1132 SC

**LIBERTY LIFE ASSURANCE COMPANY
OF BOSTON'S NOTICE OF AND
MOTION TO AMEND, ALTER OR
VACATE THE JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Fed.R.Civ.P. 59 (a) and (e)]

Date: November 19, 2004

Time: 10:00 a.m.

Dept.: Courtroom 1

The Honorable Samuel Conti.

19
20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 NOTICE IS HEREBY GIVEN that on November 19, 2004 at 10:00 a.m. or as soon
22 thereafter as the matter may be heard in Courtroom 1 of the above-entitled court located at, 450
23 Golden Gate Ave, San Francisco, California 94102, defendant Liberty Life Assurance Company
24 of Boston ("Liberty") will move pursuant to Federal Rules of Civil Procedure 59(a) and (e) for an
25 order amending, altering or vacating the court's Judgment entered on August 15, 2004.

26 This motion is made on the grounds the Judgment entered by the Court in favor of
27 plaintiff was based in part on erroneous findings of fact and conclusions of law. By this motion
28

MOTION TO ALTER OR AMEND THE
JUDGMENT - CASE NO.

1 defendant seeks an order amending the court's Findings of Fact and Conclusions of Law; the
2 Order Re: Costs, Attorneys Fees, Benefits and Interest; and the Judgment to reduce the benefits
3 awarded by the Court by the pro rata portion of the lump sum retirement benefits plaintiff
4 received from his KMPG Pension and Personal Account for Retirement ("PAR") plans in
5 December 2000 and January 2001 respectively. The Court's determination that the lump sum
6 retirement benefits did not fall within the policy's definition of "Other Income" because the
7 money was were not "received" by plaintiff was based on erroneous findings of fact and
8 conclusions of law that were contradicted by the evidence and statutes relied upon by the court.

9 This motion is based on this Notice, the attached memorandum of points and authorities,
10 the Request for Judicial Notice, the Declaration of Kathryn C. Curry, the Declaration of Jeanne
11 Sasek and the exhibits attached thereto.

12 Dated: September 28, 2004

ROPERS, MAJESKI, KOHN & BENTLEY

13
14 By: 

15 PAMELA E. COGAN
16 KATHRYN C. CURRY
17 Attorneys for Defendant
18 LIBERTY LIFE ASSURANCE
19 COMPANY OF BOSTON
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure, defendant Liberty Life Assurance Company of Boston seeks an order amending or altering the judgment entered by the Court on August 15, 2004. By this motion defendant seeks an order amending the Court's Findings of Fact and Conclusions of Law and the Judgment to reduce the benefits awarded by the Court by the pro rata portion of the lump sum retirement benefits plaintiff received from his KMPG Pension and Personal Account of Retirement ("PAR") plans. The Court's determination that the distributions did not fall within the definition of "Other Income" set forth in the Group Long Term Disability Income policy issued by Liberty Life Assurance Company of Boston to plaintiff's employer, KPMG, was based on erroneous findings of fact and conclusions of law that are contradicted by the evidence and statutes relied upon by the court. Contrary to the court's findings, plaintiff's employment with KPMG was not terminated because Liberty Life had discontinued payment of his long-term disability income payments. Rather, plaintiff was terminated because he had not returned to work within two years and plaintiff's employment would have been terminated in October 2002 even if Liberty had continued to pay benefits. Also contrary to the court's findings, the lump sum distributions from the KPMG Pension and PAR Plans were "received" within the meaning of the Internal Revenue Code, although it is expressly exempted for income tax purposes. Accordingly, the pro rata portions of the lump distributions fall within the meaning of "Other Income" and should have been deducted from the benefits awarded by the Court.

Defendants thereby respectfully request that the court's Findings of Fact and Conclusions of Law and the Judgment be amended to include a set-off for the retirement benefits received by plaintiff under the KPMG Pension and PAR Plans.

II. REQUESTED RELIEF

1. An order amending the Court's Findings of Fact and Conclusions of Law to find that the lump sum distributions from plaintiff's KPMG Pension and PAR Plans in December 2000 and January 2001 fall within the definition of "Other Income" within the meaning of the Liberty Life

1 policy.

2 2. An order vacating that portion of the Order Re: Costs, Attorneys Fees, Benefits and
3 Interest awarding plaintiff \$227,319.56 in benefits and \$74,345.48 in interest and amending the
4 order to award \$75,393.26 in benefits and prejudgment interest.

5 3. An order vacating the Court's Judgment awarding \$325,451.28 to plaintiff and the
6 entry of a new and different Judgment reflecting an award of benefits in the amount of
7 \$75,393.26, plus prejudgment interest.

8 III. PROCEDURAL HISTORY AND STATEMENT OF FACTS

9 Plaintiff filed this ERISA action against defendants seeking benefits under a Group
10 Disability Income Policy issued by Liberty Life Assurance Company of Boston ("Liberty Life")
11 to plaintiff's former employer, KPMG, after Liberty Life discontinued benefits on April 19, 2000.
12 (Exhibit 1 to Request for Judicial Notice, p. 1:21-26.) The parties stipulated that the applicable
13 standard of review to be applied by the court was *de novo* and a court trial was held on July 26,
14 2004. (Decl. of Kathryn Curry ¶ 4; Exhibit 1, pp. 1:26-28.)

15 In its trial brief, Liberty Life asserted that if the court should find in favor of plaintiff, the
16 past due benefits owed were \$75,393.26, which included deductions for a percentage of the lump
17 sum distributions received by plaintiff from his KPMG Pension Plan and PAR Plan. (Decl. of
18 Curry ¶ 5.) Because plaintiff did not address the issue of the retirement offsets in his trial brief,
19 his counsel requested an opportunity to be heard on the issue during the trial, which was granted
20 by the court. (Decl. of Curry ¶ 6.) Counsel argued that the distributions from the KPMG Pension
21 Plan and the PAR Plan did not fall within the definition of "Other Income" under the policy
22 because the lump sum distributions had been rolled over into an Individual Retirement Account
23 and therefore had not been "received" by plaintiff. (Decl. of Curry ¶ 6.) After further
24 questioning from the Court, plaintiff requested the opportunity to submit additional briefing on
25 the issue, which was granted. (Decl. of Curry ¶ 6; Exhibit 1:26-28.) Plaintiff was given three
26 days to submit a brief and defendant was given three days to respond. (Decl. of Curry ¶ 7.) The
27 briefs were filed and the Court took the matter under submission. (Decl. of Curry ¶ 7.)

28 On August 20, 2004, the court issued its Finding of Fact and Conclusions of Law.

1 (Exhibit 1 to Request fro Judicial Notice.) The court found that plaintiff was “totally disabled”
2 under the terms of the policy and was therefore entitled to an award of benefits, attorneys' fees,
3 costs and interest. (Exhibit 1, pp. 34-35.) The court found plaintiff was entitled to \$6,093.82 in
4 benefits per month from April 2000 through May 2003. (Exhibit 1, pp. 35.) The court held the
5 lump sum distributions made to plaintiff under the KPMG Pension Plan and the KPMG Personal
6 Account for Retirement (“PAR”) in December 2000 and January 2001 respectively, did not
7 qualify as “Other Income” under the policy because the benefits were not “received” as required
8 under the terms of the policy. (Exhibit 1, pp. 28-34.) The determination was based on the court’s
9 factual finding that plaintiff was terminated from KPMG because Liberty had terminated long-
10 term disability income benefits requiring plaintiff to take action with respect to the KPMG
11 retirement plans. (Exhibit 1, pp. 29:10-12 and 33:19-21.) In support of this finding of fact, the
12 court referenced pages VB 016 and VB 096 of the trial record. Document VB 016, however, is
13 irrelevant because it is a document created in 2002 (after plaintiff’s termination) and refers to the
14 subsequent long-term insurer, MetLife, not Liberty Life. Document VB 096 is an internal
15 memorandum from KPMG, which specifically states that plaintiff’s employment was terminated
16 because he had not returned to work after two years, not because Liberty Life had terminated his
17 disability benefits. (See also, Decl. of Jeanne Sasek filed concurrently herewith.)

18 The court’s determination was also based on the Court’s finding that the transfer of the
19 lump sum distributions to another IRA account did not constitute “receipt” of the money for tax
20 purposes. (Exhibit 1, p. 32, lines 1-9.) The Internal Revenue Code, however, expressly
21 acknowledges that the money is “received”, but it is “exempted” for income tax purposes. The
22 court also held plaintiff did not obtain the use and enjoyment of the funds by the transfer.
23 (Exhibit 1, p. 32, lines 10-18.) Because plaintiff was over age 59½ at the time of the lump sum
24 distributions, he did have unfettered use and enjoyment of the funds and was no longer subject to
25 a 10% penalty for early withdrawal of the funds. (Internal Revenue Code § 72(t).) Finally, the
26 court held its determination that the money was not “received” was consistent with the Ninth
27 Circuit’s opinion in *Kalvinskas v. California Inst. Tech.*, 96 F.3d 1305 (9th Cir. 1996.) (Exhibit
28 1, pp. 33-34.) The Ninth Circuit’s holding in *Kalvinskas*, however, is factually distinguishable

1 from the present claim. In its Supplemental Trial Brief, plaintiff did not allege that his
2 employment with KPMG was terminated because Liberty Life discontinued payment of his claim
3 long-term benefits, nor did plaintiff rely on or cite to the Ninth Circuit's opinion in *Kalvinkas*.
4 (Exhibit 4 to Request for Judicial Notice, Decl. of Curry ¶ 8.)

5 On September 15, 2004, the Court entered an Order Re: Costs, Attorneys Fees, Benefits
6 and Interest awarding plaintiff \$227,319.56 in benefits, \$74,345.48 in interest, \$22,800 in
7 attorneys' fees, and \$986.24 in costs, for a total award of \$325,451.28. (Exhibit 2 to Request for
8 Judicial Notice.) That day, Judgment was entered by the Court awarding plaintiff \$325,451.48.
9 (Exhibit 3 to Request for Judicial Notice.)

10 IV. LEGAL ARGUMENT

11 A. **THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW**
12 **AND THE JUDGMENT MUST BE AMENDED BECAUSE THE KPMG**
13 **PENSION PLAN AND PAR PLAN DISTRIBUTIONS SHOULD HAVE**
14 **BEEN DEDUCTED FROM FINAL AWARD OF BENEFITS**

15 District courts have the power to alter or amend a judgment by motion under Rule 59(e).
16 (F.R.C.P. 59(e).) The power to alter or amend includes the power to vacate or set aside the
17 judgment. (*Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984).) Additionally, a
18 motion challenging the district court's analysis of various pieces of evidence is proper under Rule
19 59(e). (*Tripati v. Henman*, 845 F.2d 205, 206 fn. 1 (9th Cir. 1988).) The court's commission of
20 some manifest error of law or fact justifies the grant of a Rule 59(e) motion. (*Divane v. Krull*
21 *Electric Co.*, 194 F.3d 845, 848 (7th Cir. 1999); *Innovative Home Health Care, Inc. v. P.T.O.T.*
22 *Assocs. of Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998).)

23 District courts do not have authority to prohibit a Rule 59(e) motion and must carefully
24 weigh the merits. (*Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 502 (5th Cir. 2000).)
25 Here, the Judgment in favor of plaintiff must be amended because the court's findings and
26 conclusions of law with respect to the calculation of plaintiff's benefits were based on erroneous
27 facts.
28

1 **THE COURT'S DETERMINATION THAT THE PAR AND KPMG**
2 **PENSION PLAN DISTRIBUTIONS DID NOT FALL WITHIN THE**
3 **DEFINITION OF "OTHER INCOME" WAS BASED ON ERRONEOUS**
4 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

5 The lump sum distributions from the KPMG Pension and PAR Plans fall within the
6 definition of "Other Income" set forth in the Liberty Life policy because the money was
7 "received" by plaintiff in December 2000 and January 2001, respectively. The court's
8 determination to the contrary was based on erroneous findings of fact and conclusions of law.
9 Accordingly, the judgment and order awarding benefits to plaintiff in the amount of \$227,319.56
10 must be vacated and an amended order entered awarding benefits in the amount of \$75,393.26.

11 Pursuant to the terms of the Liberty Life policy, monthly benefits are computed by
12 multiplying the insured's monthly earnings (\$11,166.67) by the benefit percentage in the
13 application (66 2/3 %), less "Other Income benefits." Here, total monthly benefits available,
14 without deduction for "Other Income" through age December 23, 2003 is \$277,219.48. ("Gross
15 Benefits.")

16 "Other Income Benefits" is expressly defined in the policy to include, social security
17 (disability or retirement) and "retirement benefits." (VB 457 to 458, Exhibit E to Decl. of Curry.)
18 The parties do not dispute that the social security amounts received by plaintiff through
19 December 2003 in the amount of \$51,349.22 was properly offset from the Gross Benefit.
20 (Exhibit 4, p. 12:3-5 to Request for Judicial Notice.) The policy defines "Other income benefits"
21 to include:

- 22 (4) The amount of benefits the insured receives under the employer's
23 retirement plan as follows:
 - 24 1. (a) any disability benefits;
 - 25 (b) any retirement benefits.

26 (Exhibit E, pp. VB 458 to Decl. of Curry, emphasis added.)

27 Although the parties agreed the KPMG Pension Plan and KPMG PAR Plan fall within the
28 definition "retirement benefits," which is separately defined in the policy, the parties disagreed as
to whether the lump sum distributions had been "received." (Exhibit 1, p. 30:14-15.) Contrary to
the court's findings of fact and conclusions of law, the lump sum distributions from the KPMG

1 Pension and PAR Plans were “received” by plaintiff in December 2000 and January 2001. The
2 fact that plaintiff had the money directly deposited into a previously existing individual retirement
3 account does not mean that the money was not “received” by plaintiff.

4 In reaching its determination, the Court held that the transfer of the retirement benefits
5 from KPMG to the Vanguard IRA did not constitute “receipt” for tax purposes under Internal
6 Revenue Code section 402(a). (Exhibit 1, p. 32:1-9.) Section 402(a), however, actually
7 acknowledges that the money is “received,” but is exempted from income for tax purposes.
8 Section 402 of the Internal Revenue Code states:

9 “(a) Taxability of Beneficiary of Exempt Trust.

10 Except as otherwise provided in this section, any amount actually
11 distributed to any distributee by any employee’s trust described in
12 Section 401(a) which is exempt from tax under Section 501(a) shall
be taxable to the distributee, in the taxable year of the distributee in
which distributed, under Section 72 (relating to annuities).

13 (b) Taxability of Beneficiary of Non-Exempt Trust

14
15 (2) Distributions

16 The amount actually distributed or made available to any distributee
17 by any trust described in paragraph (1) shall be taxable to the
distributee, in the taxable year in which so distributed or made
available, under Section 72 (relating to annuities), except that
18 distributions of income of such trust before the annuity starting date
19 (as defined in Section 72(c)(4)) shall be included in gross income of
the employee without regard to Section 72(e)(5) (relating to
amounts not received as annuities).

20
21
22 (c) Rules Applicable to Rollovers From Exempt Trusts

23 (1) Exclusions from Income If –

24 (A) any portion of the balance to the credit of any employee in a
qualified trust is paid to the employee in an eligible rollover
distribution,

25 (B) the distributee transfers any portion of the property **received** in
26 such distribution to an eligible retirement plan, and

27 (C) in the case of a distribution of property other than money, the
28 amount so transferred consists of the property distributed, then such
distribution (to the extent so transferred) shall not be includable in

1 gross income for the taxable year in which paid.

2 ...
3 (Title 26, Subtitle A, Subchapter 1, Subchapter D, Part 1, Part A,
4 Section 402, emphasis added.)

5 Thus, pursuant to the statute, the lump sum distributions, even though they were not
6 taxable, were in fact "received" by plaintiff.

7 Also contrary to the court's findings, the letter from KPMG to plaintiff setting forth the
8 various options under the employee benefit plans does not state that the lump sum distributions
9 would not be deemed "received" for tax purposes if the lump sum distribution was rolled over
10 into an IRA. (Exhibit 1, p. 29:23-27.) The letter actually states that the lump sum distribution is
11 "received," but is not taxable as income:

12 "A lump sum distribution represents the current value of your
13 lifetime annuity which is paid to you in a single sum. No further
14 benefits are payable under the Plan.

15 Your Lump sum distribution is taxable as ordinary income in the
16 year received, and may also be subject to a 10% excise tax if you
17 are under age 55, unless you roll it over into an IRA or other tax
18 qualified vehicle." (VB 529, VB 530 attached as Exhibit C to Decl.
19 of Curry.)

20 Similarly, the letter from KPMG dated December 6, 2000, also specifically acknowledges
21 that the distributions were received. (Exhibit D, p. VB 558.)

22 The lump sum distributions were also "received" within the plain meaning of that word
23 even though the money was directly deposited into an IRA account. The court's determination
24 that the money was not "received" because plaintiff did not have the use or enjoyment of those
25 funds (Exhibit 1, p. 32:10-13) is unsupported and erroneous. Because plaintiff was over age 59½
26 at the time of the lump sum distributions, he did have unfettered use and enjoyment of the funds,
27 because he was no longer subject to a 10% penalty for early withdrawal of the funds. (Internal
28 Revenue Code § 72(t).) The fact that plaintiff would be subject to income tax on any amounts
withdrawn from the IRA account (amounts that may have been withdrawn but are unknown) does
not mean that plaintiff did not have the use or enjoyment of that money. He was free to use the
money as he wished. Indeed, there is no evidence that plaintiff did not make withdrawals from

1 the IRA account during the years in question.

2 The court's finding that plaintiff did not "receive" the lump sum distributions because he
3 did not have access to the money and he was in the same position as if the money had remained in
4 the KPMG plan is also erroneous. Plaintiff had to make the election to receive the retirement
5 plan distributions regardless of whether he was receiving disability benefits from Liberty Life
6 because he was terminated after he failed to return to work within two years. (Decl. of Jeanne
7 Sasek ¶ 2-5.) Further, unlike when the money was in the KPMG Plans, plaintiff could withdraw
8 whatever amounts he wanted from his IRA account, whenever he wanted. There were no
9 limitations and the IRA simply allowed plaintiff the ability to defer taxes until he actually
10 withdrew the money.

11 Also contrary to the Court's findings, plaintiff did receive something in the transaction.
12 (Exhibit 1, p. 32:13-18.) Prior to his retirement and election under the Plans, plaintiff did not
13 have immediate access to the money held in the KPMG Pension and PAR Plans. After the
14 transaction, the money was taken out of the KPMG Plans and distributed to plaintiff in whatever
15 form he chose and he had the right to use the money as he wished. The fact that he was able to
16 defer income tax on the money does not mean that plaintiff did not receive anything in the
17 transaction. Also, according to the Internal Revenue Code the money deposited from the KPMG
18 Plans to the IRA was considered received, but exempt from taxation.

19 Finally, in reaching its decision that the lump sum distributions were not "received" by
20 plaintiff, the court erroneously found that plaintiff was terminated by KPMG because Liberty Life
21 had discontinued his disability benefits. (Exhibit 1, pp. 29:10-12 and 33:19-21.) In support of
22 this finding of fact the court referenced pages VB 016 and VB 096 of the trial record. Document
23 VB 016, however, is irrelevant because it is a page from the current Long Term Disability Plan
24 insured by MetLife beginning in January 1, 2001. (Exhibit A to Decl. of Curry, pp. VB 1-4.) The
25 document was generated on February 21, 2002, well after plaintiff's termination in October
26 2000.¹ (Exhibit A to Decl. of Curry, VB 16, VB 96.) Document VB 096 is an internal

27 _____
28 ¹ Liberty Life had objected to the inclusion of the Met Life documents on the ground they were irrelevant. (Decl. of Curry ¶ 9.)

1 memorandum from KPMG, which specifically states that plaintiff's employment was terminated
2 because he had not returned to work after two years, not because Liberty Life had terminated his
3 disability benefits. (Exhibit B Curry Decl.) Neither supports the court's finding. Indeed, KPMG
4 had an employee practice whereby employees who are on medical leave and do not return to
5 work within two years are terminated. (Decl. of Jeanne Sasek ¶ 3.) The termination does not
6 affect the continuation of any group insurance benefits or entitlement to post-retirement benefits.
7 (Decl. of Jeanne Sasek ¶ 3.) Blankenship was terminated by KPMG on September 12, 2000, after
8 a two-year leave of absence. (Decl. of Jeanne Sasek ¶ 4.) The termination of plaintiff's
9 employment by KPMG was unrelated to Liberty Life's discontinuation of disability income
10 benefits and he would have been terminated after two years even if disability benefits were still
11 being paid. (Decl. of Jeanne Sasek ¶ 5.) Thus, contrary to the court's finding, plaintiff was not
12 forced into retirement because Liberty Life terminated his disability payments. (Exhibit 1, p.
13 33:19-21.)

14 Because plaintiff was not forced to retire due to Liberty Life's discontinuation of benefits,
15 the court's reliance on the Ninth Circuit's opinion in *Kalvinskas v. California Inst. Tech.*, 96 F.3d
16 1305 (9th Cir. 1996) was misplaced. In *Kalvinskas*, the Plan took the offset for retirement
17 benefits even though plaintiff had not retired, because he was *eligible* to retire and yet had chosen
18 not to. The court held the eligible retirement benefits were not received and were not proper
19 offsets under the Plan. The Plan had argued it was entitled to the offset because plaintiff could
20 have retired at age 65 and received benefits. Here, unlike the plaintiff in *Kalvinskas*, plaintiff
21 actually retired and elected to receive a lump sum payout from the KPMG Pension and PAR
22 plans. Accordingly, the Ninth Circuit's holding in *Kalvinskas* does not support the court's
23 finding that the benefits were not "received" within the meaning of the Liberty Life policy.

24 V. CONCLUSION


25 The lump sum distributions from the KPMG Pension and PAR Plans qualified as "Other
26 Income" within the meaning of the Liberty Life policy. Contrary to the court's findings, the
27 distributions were "received" within the plain meaning of the term and as that term is used in the
28 Internal Revenue Code, the KPMG Plans and the relevant case law. Therefore, the pro rata

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portions of the lump sum distributions should have been deducted from the Court's award of benefits. Accordingly, defendant respectfully requests that the Judgment and the court's Findings of Fact and Conclusions of Law be amended and that the portion of the Order Re: Costs, Attorneys Fees, Benefits and Interest awarding plaintiff \$227,319.56 in benefits and \$74,345.48 in interest be vacated and amended to award \$75,393.26 in benefits, plus prejudgment interest.

Dated: September 28, 2004

ROPERS, MAJESKI, KOHN & BENTLEY

By: 
Pamela E. Cogan
Kathryn C. Curry
Attorneys for Defendant
LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON