

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

EARLENE JENKINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2003-CV-4007-JPG
	)	
MICHAEL D. YAGER and	)	
MID-AMERICA DIRECT, INC.,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**GILBERT, District Judge:**

This matter comes before the Court on Plaintiff's motion for summary judgment (Doc. 25), to which Defendants responded (Doc. 26) and Plaintiff replied. (Doc. 28). As the moving party, to prevail Plaintiff must establish—considering all facts and the reasonable inferences from those facts in the light most favorable to Defendants—the absence of any genuine issue of fact and her entitlement to judgment as a matter of law. FED. R. CIV. P. 56(c); *Outlaw v. Newkirk*, 259 F.3d 833 (7th Cir. 2001). For the reasons discussed below, Plaintiff's motion will be DENIED.

This is an Employee Retirement Income Security Act (ERISA) case. Michael Yager owns and operates Mid America Direct, Inc., a small Effingham-based auto-parts distributor. He, his wife, Lori, and Steve Wiedman, are the company's president, vice president and secretary-treasurer, respectively, though Yager was the major player during all times relevant here. In mid-1991, Yager established a profit sharing and pension plan for the company's 100-plus employees. The pension aspect of the "defined contribution" plan allows employees

to defer up to fifteen percent of their salary and invest it for retirement, and any amounts so deferred are generally matched dollar-for-dollar by Mid America up to the legal limit of six percent. (Yager dep. at 17). In terms of profit sharing, at year end Mid America contributes a discretionary amount to the plan, which is then divided accordingly among the participants.

Thus, in Yager's view, "I'm taking money out of my pocket and giving it to employees. And I have every desire to make sure that they get a good rate of return." (Yager dep. at 44).

While presumably appreciative of Yager's donative intent as a general matter, Plaintiff Earlene Jenkins, a Mid America employee from August 1988 through September 2002, rejects the notion that Yager cared at all about the employees' return on their investments. Pointing to plan losses for the years 2000, 2001 and 2002, Plaintiff claims that Yager's performance fell below the standard imposed on ERISA trustees. See 29 U.S.C. §1101 et seq. This is how she summarized her position: "By [1] providing plan participants with unduly restrictive means to direct investments, by [2] failing to prudently monitor the [p]lan's investments, and by [3] failing to operate the [p]lan according to ERISA, Yager and Mid America breached their fiduciary duties to the [p]lan." In fairness to Yager, the Court notes that as of December 31, 2002, Jenkins had contributed \$28,970.80 of her salary to her retirement account, and her balance as of that date was \$78,263.42. (Pl. Ex. 10).

That said, let us begin our discussion with [3], the most persuasive of Plaintiff's arguments though the Court ultimately rejects it. As an initial matter, the Court notes that ERISA plans are governed by federal statutes filled in where necessary by company-specific plan documents. At issue in this case is the provision of Mid America's plan allowing participants to individually direct their investments; that is, the provision which enabled

employees to choose what percentage of their accounts would be allocated among four investment alternatives—alternatives which Yager admits to choosing in the first instance. (Mid America Empl. Sav. and Profit Sharing Plan at 62, 66). Parenthetically, the Court notes that such an election was not mandatory under the plan, and “[i]n the absence of any written designation of investment category preference,” the plan directed Yager (the trustee) to “invest all funds received on account of any [such] [p]articipant in the Money Market Account.” (Plan at 66). On that note, the money market fund sought “to earn income on [participants’] cash reserves [ ] while preserving capital and maintaining liquidity.” (Plan at 65).<sup>1</sup>

Getting back on track, the reader will note that the foregoing discussion concerned Mid America’s company-specific plan documents. And all such provisions, of course, must be consistent with ERISA. Enter 29 U.S.C. §1103(a), which provides: “[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees,” and “upon acceptance of being named or appointed, the trustee . . . shall have *exclusive* authority and discretion to manage and control the assets of the plan . . . .” (Emphasis added). Granted, the statute later qualifies that general rule with two exceptions, but neither party urges their application in this case. We are therefore left with the question, and the crux of Plaintiff’s argument, whether the plan provision allowing for participant direction violates §1103(a) by divesting the trustee of “exclusive” authority and discretion “to manage and control” plan assets. Aside from *Schetter v. Prudential-Bache Sec., Inc.*, 695 F.Supp. 1077 (E.D. Cal. 1988), a case that we shall see momentarily is inapposite to this case, Plaintiff’s argument is a species of the cannon of

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<sup>1</sup>To be sure, Yager could not recall at his deposition any instance in which an employee failed to direct her own investment and thereby invoked the latter provision. Plaintiff seemed to suggest that this was caused by the employees’ lack of knowledge regarding this possibility.

statutory construction *expressio unius est exclusio alterius*, or “the expression of one thing is the exclusion of another.” *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 308 (7th Cir. 1996). *Diehl* itself recognized that this canon “is at best an aid in interpretation, not a hard-and-fast rule.” 102 F.3d at 308. It follows that, were this the extent of Plaintiff’s argument (and it is in her brief), she would be in for a steep climb. But it is not, for her position is also supported by principles rooted in the common law of trusts, which *Variety Corp. v. Howe* recently emphasized applies equally to ERISA, “bearing in mind the special nature and purpose of employee benefit plans.” 516 U.S. 489, 506 (1996), quoting H.R. CONF. REP. NO. 93-1280, p. 302 (1974). RESTATEMENT (SECOND) OF TRUSTS §171 (1957) states the relevant notion as such: “The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform.” Closer to this case, comment h to that section explains that “[a] trustee cannot properly delegate to another power to select investments,” though comment f adds that a trustee may “properly consult with and take advice from others provided he personally makes the final decision in the matter.” Thus, one could argue from these principles that ERISA intended to codify these concepts. On that score reconsider §1103(a), which as noted above, and much like RESTATEMENT (SECOND) OF TRUSTS §171, prohibits a trustee from delegating “authority to manage and control the assets of the plan.” Similarly, 29 U.S.C. §1102(c)(2) allows a trustee to “employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan,” as would comment f to the Restatement.

But there are two sides to every coin, and this case is no different. Central here is 29 U.S.C. §1104(c)(1) which, as Defendants observe, relieves a fiduciary from liability “for any

loss, or by reason of any breach, which results from” a participant’s control “*[i]n the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account.*” (Emphasis added). A plain reading of that language suggests that participant control is assumed permissible in the first instance, for the statute absolves a fiduciary of liability “in the case of” a plan providing for individual accounts and allowing participant control. That alone is powerful evidence that an implied exception to §1103(a) exists, and the Department of Labor’s parallel understanding of this section adds more fuel to the fire. Recall that §1104(c) addresses the criteria necessary for a fiduciary to be absolved of liability “resulting from” a participant’s control of his account—a provision which, the Court notes, Defendants have not contended applies in this case. At any rate, §1104(c) does not empower (or “enable”) a fiduciary (or “trustee”) to do anything, as §1103(a) arguably does. Rather, §1104(c) sensibly recognizes that if a participant has made his own properly informed investment decisions, it makes little sense to hold a fiduciary liable for, say, the participant’s failure to diversify “the investments of the plan so as to minimize the risk of large losses.” §1104(a)(1)(C). Further explaining this “defense,” the Department of Labor has emphasized that “non-complying plans [‘non-complying’ with §1104(c), not ERISA in general] do not necessarily violate ERISA; non-compliance merely results in the plan not being accorded the statutory relief described in section 404(c).” 57 Fed. Reg. 46906-46907 (October 13, 1992). 29 C.F.R. §2550-404c-1(a)(2) also supports this view, as the last sentence of that subsection provides that “[s]uch standards [assuming §1104(c)’s ‘in the case. . .’ language could be called a ‘standard’ at all], therefore, are not intended to be applied in determining whether . . . a plan which does not meet the requirements for an ERISA section 404(c) plan . . .

satisfies the . . . other provisions of title I of the Act [i.e., §1103(a)].” At bottom, the §1104(c) exception merely reflects the common law notion of the “agent-trustee,” which is cogently distinguished from a garden-variety trustee in comment c to RESTATEMENT (SECOND) OF AGENCY §14B (1957):

Whether a person is a trustee, an agent, or an agent-trustee, depends upon the manifestation of intention of the parties. . . . If a person receives property from another who manifests an intention that the transferee is to hold the property for the benefit of and subject to the control of the transferor, an agency is created, whether or not title is transferred. If the title is transferred, the transferee is an agent-trustee. If, on the other hand, the person receiving the property is not to act under the control of the other, he is not an agent; if he receives title to the property, he is a trustee.

Accord Restatement (Second) of Contracts §318(2) (1979) (“*Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.*”) (Emphasis added). Finally, this discussion also demonstrates why *Schetter*, 695 F.Supp. 1077, a case cited by Plaintiff, is inapplicable here. The issue in *Schetter* was whether a securities firm qualified as an “investment manager” within the meaning of §1103(a)(2); the exception applicable in this case, by contrast, strictly concerns participant-beneficiaries.

Thus we reach arguments [1] and [2], which are really two peas in the same pod. To prevail on either front, Plaintiff must prove that Yager failed to act “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” §1104(a)(1)(B). Thus, whether Yager acted prudently in this case boils down to an evaluation of his decision-making process; our task is to establish whether he performed a “reasonable investigation” before investing, and having done so,

whether he acted reasonably in monitoring those investments. *Brock v. Robbins*, 830 F.2d 640, 646 (7th Cir. 1987); see also *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (“[T]he courts measure section 1104(a)(1)(B)’s ‘prudence’ requirement according to an objective standard, focusing on a fiduciary’s conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.”). As an initial matter, the Court notes that to the extent Plaintiff would limit herself at trial to the evidence presented in support of her motion for summary judgment, it will be a quick trial indeed. Stated more directly, the Court can detect no violation of §1104(a)(1)(B) based on the evidence thus presented. For starters, Plaintiff complained that the plan restricted investment directions to once per year. That seems inconsequential, however, in light of the plan’s goal of conservatively maximizing long-term growth. (Yager dep. at 44). Note that the mutual funds in this case were “load” funds, (Yager dep. at 105-106), so a service charge attached to each purchase. And to the extent more transactions occurred the plan would have spent more on service fees, thus decreasing the fund. It was reasonable for Yager to seek to minimize those costs.

Plaintiff also criticized Yager for not adequately monitoring the plan’s investments. As suggested in the opening paragraphs of this order, recall that the plan offered participants a choice among four mutual funds. Established and managed by American Funds, these funds included the Euro Pacific Growth Fund, The Growth Fund of America, The Income Fund of America, and The Cash Management Trust of America. (Plan at 62-66). Mutual funds are made up of many different investments, of course, and Plaintiff’s failure to identify the specific investments (not funds) in this case is telling. For the amount of energy necessary to effectively

monitor an investment is directly related to the degree of risk or volatility associated with that investment, and Plaintiff's failure to acknowledge this basic truth is the central defect in her case. Take her suggestion that Yager was imprudent for ignoring the cash management fund, a charge we may take as true for the moment. (Yager dep. at 92). If that fund's holdings even vaguely resembled what the fund holds today, she's in effect questioning the character (i.e., the security) of such investments as commercial paper, *cash*, government agency securities, U.S. Treasury Bills, and certificates of deposit, see <http://www.americanfunds.com> (visited November 30, 2004). Common experience suggests there is little chance the Government will go belly-up, and even were that to happen Yager would have likely found out through normal news channels. Reasonable prudence doesn't require one to watch paint dry, but that is the practical import of what Plaintiff accuses Yager of failing to do. Moreover, to the extent the character of any given fund is reflected by the company it keeps, this whole line of argument becomes even more problematic. It would certainly be reasonable for Yager—recognizing that he is an auto-parts distributor, not a stockbroker—to have chosen these funds because, although they concededly produced a conservative return, at least some growth was possible and they didn't require much work or expertise on his part. Plaintiff hasn't challenged the procedures Yager used in selecting these funds in the first place, perhaps in light of the detailed recitation he provided at his deposition. (Yager dep. at 40-44). So in the final analysis, if one accepts Yager's long-term investment strategy (as Plaintiff apparently has) and the methodology used to select the initial investments, it is exceedingly difficult to fault Yager for not hastily retreating from that strategy in the face of what appears to have been nothing more than mere market fluctuation. (“Appears” because nothing to the contrary has been submitted). No prudent investor would have done so.

That aside, Plaintiff's case suffers from yet another defect. As a fallback position to her non-delegation claim, she faults Yager for not sitting down with each of his 100-plus employees and mapping out an investment strategy tailored to meet their specific needs. Not surprisingly, she cites no authority for this proposition, and neither ERISA nor the plan documents in this case required this of Yager. On a similar note, Plaintiff suggested that Yager was negligent in not providing her with sufficient information to enable her to make an informed decision regarding the allocation of her money among the four investment alternatives—again, none of which she challenges as imprudent in the first instance. She apparently would have liked a statement of her account (showing her account balance) before the decision making window closed. What she fails to explain, however, is how knowing her account balance would have affected her decision, particularly when she admittedly received a form telling her what percentage of her funds were allocated among the various investments (Jenkins dep. at 31-32), and other information detailing the fund's performance during the past year. (Jenkins dep. at 29). Indeed, having an account balance in hand could have even been misleading to her, as the year-end statements included past gains and losses, thereby distorting the fund's performance for that year. In any event, cases like *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 817 (7th Cir. 1997), and *In re Unisys Sav. Plan Litig.*, 74 F.3d at 443, reiterate the common-law principle that a trustee, under certain circumstances, "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." RESTATEMENT (SECOND) OF TRUSTS §173, comment d (1957). In this case, however, the evidence suggests that everything Plaintiff needed to know to make an informed decision

was literally “on the table”—the break-room table. (Jenkins dep. at 29). Therefore, Defendants breached no fiduciary duty by not providing additional advice or information to her.

In closing, the Court notes that, even assuming Plaintiff could establish that Yager acted imprudently, she failed to demonstrate that Yager’s conduct resulted in “loss or damages to the ERISA plan.” *Brock*, 830 F.3d at 647. This is especially so when one considers that Plaintiff has not challenged the prudence of Yager’s investment selections in the first instance. Because three of the four funds apparently sustained losses during the relevant time period, it is difficult to see how changing from one of these investments to another would have changed her bottom line. Stated differently, regardless of which investment she may now claim she would have selected had she been “properly” informed, she would have still lost money, given that three of the four funds sustained losses. (Doc. 25 at 7). For good measure, the Court notes that Plaintiff has not suggested that she considered investing in the cash management fund, the one fund that did not suffer a loss.

**CONCLUSION**

Plaintiff’s motion for summary judgment (Doc. 25) is **DENIED**.

**IT IS SO ORDERED.**

**Dated: December 7, 2004.**

/s/ J. Phil Gilbert  
**J. PHIL GILBERT**  
**U.S. District Judge**