

employees were performing covered labor, the Funds were at risk of making payments for which it allegedly received no contributions. It is immaterial that the Funds did not apparently have to pay any such benefits. The Funds needed to have money available, regardless of whether that money was used," the court said.

The funds were represented by William B. Carter Jr. and Cameron S. Hill of Baker, Donelson, Bearman, Caldwell & Berkowitz, Chattanooga, Tenn. Crawford was represented by Robert L. Haun and John Rogan Hegeman of McKoon, Williams & Gold, also in Chattanooga.

Text of the decision may be accessed at <http://pub.bna.com/pbd/106cv245.pdf>.

ERISA

Members Can Sue IUOE Local 150 President For Using Training Funds for Personal Benefit

Five members of the International Union of Operating Engineers Local 150 can continue with their claim that the president of the local breached his fiduciary duties under the Employee Retirement Income Security Act by using assets of the union's apprentice training fund for his own personal benefit, the U.S. District Court for the Northern District of Illinois ruled Dec. 14 (*Waldron v. Dugan*, N.D. Ill., No. 07 C 286, 12/14/07).

In refusing to dismiss the union members' fiduciary breach claims against William E. Dugan, Judge Rebecca R. Pallmeyer rejected Dugan's contention that to bring a fiduciary breach claim under ERISA Section 502(a)(2), plaintiffs must pursue the claim either derivatively or as a class action, and not as individuals.

"[S]ection 502(a)(2) expressly grants the right to bring fiduciary duty claims to 'participants,' and does not appear to require them to sue derivatively or to use any other special procedural devices to represent absent parties," the court said.

The court also refused to dismiss the five union members' claim that Dugan breached his fiduciary duties as a labor organization officer under the Labor-Management Reporting and Disclosure Act by requiring 125 union employees to pay him \$100 each month to secure their jobs.

Allegations Against Dugan. According to the court, Dugan has been a member of the union for over 50 years and rose through the union's ranks, becoming its chief executive officer, president, and business manager in 1986.

The five union members alleged in their lawsuit that for approximately 15 years up until 2006, Dugan has required 125 salaried union employees to pay him \$100 per month. The union members charged that Dugan stored the money in his private safe and referred to the money as his "Christmas Fund."

In addition, the union members alleged that Dugan appropriated crops raised on a farm owned by the union, and used for his own personal benefit farming equipment owned by the union and its ERISA-governed apprenticeship training fund.

In their complaint, the union members alleged that Dugan: (1) breached his fiduciary duties as a labor or-

ganization officer under LMRDA Section 501(a) by requiring union employees to pay him \$100 per month; (2) breached his fiduciary duties under LMRDA Section 501 by appropriating union assets, including the labor of union employees, for his own benefit; (3) violated his fiduciary duties under ERISA Sections 404 and 406 by appropriating fund assets; and (4) extracted payments and appropriation of union assets in breach of the union's bylaws.

Dugan argued that all of the claims against him, with the exception of the ERISA claim, should be dismissed as time-barred under Illinois's five-year general catch-all statute of limitations. The court said, among other things, that the LMRDA claims were based on the allegation that Dugan threatened to terminate union employees if they refused to donate to his "Christmas Fund," and this conduct allegedly continued into 2006, which was well within the five-year limitations period.

In addition, the court noted there was "no limitations problem" with the claim that Dugan wrongfully converted crops and other assets belonging to the union and the training fund on 21 occasions from 2001 through 2006.

Pleading Requirements for Section 502(a)(2). The court rejected Dugan's argument that the ERISA claim should be dismissed because it was brought under ERISA Section 502(a)(2) and was not pleaded as a class action or as a derivative claim. According to the court, while Dugan pointed to cases that have required that Section 502(a)(2) claims be brought to benefit the plan as a whole rather than individuals, those cases did not stand for the proposition that a Section 502(a)(2) claim must be pleaded either derivatively or as a class action.

The court noted that a handful of courts have required that a Section 502(a)(2) claim by a plan participant against a plan trustee be pleaded either derivatively or as a class action. "None of these holdings are binding on this court, however, and the court respectfully declines to impose such a requirement," the court said in refusing to dismiss the union members' ERISA fiduciary breach claim.

The union members were represented by Stephen Bernard Horwitz of Sugarman & Horwitz in Chicago. Dugan was represented by Stanley Eisenstein of Katz Friedman Eagle Eisenstein & Johnson in Chicago; Matthew Farrish Prewitt of Greenberg Traurig in Chicago; and Brian Scott Cousin of Greenberg Traurig in New York.

Text of the decision may be accessed at <http://pub.bna.com/pbd/07c286.pdf>.

FLSA

Court Says FLSA Exemption Not Shown For Safety Supervisor With Authority to Fire

A construction contractor failed to prove that a supervisor with authority to direct the work of every employee on a project was exempt from the overtime requirements of the Fair Labor Standards Act because the supervisor's authority was "limited to the area of safety," a federal court in Florida ruled Dec. 4 (*Jones v. Riggs Distler & Co.*, M.D. Fla., No. 06-cv-168-Orl-31KRS, 12/4/07).