Tennessee Law Review

Volume 90
Issue 2 *Winter 2023*

Article 10

2023

Hughes v. Northwestern University

Nicole S. Roth

HUGHES V. NORTHWESTERN UNIVERSITY

NICOLE S. ROTH

INTRODUCTION

Northwestern University ("Northwestern") operates two retirement plans which are available to eligible employees: Northwestern University Retirement Plan ("Retirement Plan")[1] and the Northwestern University Voluntary Savings Plan ("Savings Plan")[2] ("the Plans").[3] The Plans at issue—offered by a non-profit entity, Northwestern—are both 403(b) defined-contribution plans.[4]

In comparison to defined benefit plans—where upon retirement an employee is assured a "fixed periodic payment"—an employee with a defined contribution plan is not guaranteed a fixed benefit on retirement.[5] Rather, in defined contribution plans employee benefits at retirement are limited to their individual investment accounts.[6] These investment accounts are funded by employee salary contributions and, if applicable, matching contributions of the employer.[7] The employee is often able to select "the particular investments for their individual accounts from a menu of options" that

1. *See* Brief for Petitioners at 8, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401) ("As of December 31, 2015, the Retirement Plan had $2.34 billion in net assets and 21,622 participants.").
2. *See* Brief for Petitioners at 8, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401) (As of December 31, 2015, . . . the Voluntary Savings Plan had $530 million in net assets and 12,293 participants.").
3. Hughes v. Nw. Univ., 142 S. Ct. 737, 740 (2022).
4. Brief for Petitioners at 5, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).
5. *Id.* at 4.
6. *Id.*
7. *Hughes*, 142 S. Ct. at 740.

are determined by the plan fiduciary.[8] Then, the value of the investment account at retirement is dependent on the "market performance of the . . . contributions, less expenses."[9]

Two categories of fees make up the expenses that erode employee investments, (1) investment management fees and (2) plan administration/recordkeeping fees.[10] The first category, investment management fees, are generally charged for the design and maintenance of fund investment portfolios.[11] Those that are more actively managed based on investment strategies tend to have a higher management fee than funds that have a similar makeup to "a standardized index, such as the S&P 500."[12] The fee, an expense ratio, is based on the plan participant's investment choices and it is calculated by a percentage of the assets the participant has invested in the fund.[13] Petitioners found the Plans included 129 retail-class versions of mutual funds which had corresponding identical institutional versions—Petitioners and Respondents dispute whether this would be available to larger investors like the Plans[14]—where the only difference between the retail and institutional was the lower cost of institutional version.[15] Further, other investment vehicles offered to the petitioners through the Plans had expenses "[ten to twenty] times greater than comparable alternatives and that consistently underperformed those cheaper alternatives."[16] Second, the plan administration/recordkeeping fees are charged for the plan

8. Brief for Respondents at 5, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401); Brief for Petitioners at 5–6, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401) (noting that plan fiduciaries have exclusive control over the menu of investment options).

9. Brief for Petitioners at 5, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401) (quoting Tibble v. Edison Int'l, 575 U.S. 523, 525 (2015)).

10. Brief for Petitioners at 6, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

11. *Hughes*, 142 S. Ct. at 741.

12. *Id.*

13. *Id.*; *see also* Brief for Petitioners at 6, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401) (quoting George S. Mellman & Geoffrey T. Sanzenbacher, Brief, *401(k) Lawsuits: What Are The Causes And Consequences?*, 18-8 CTR. FOR RET. RSCH. B.C. 1, 3 (May 2018)) ("if the fee is $1 of every $100, the expense ratio is 1 percent").

14. *Compare* Brief for Respondents at 8–9, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401), *with* Brief for Petitioners at 10, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

15. Brief for Petitioners at 10, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

16. *Id.*

administrator's services including "track[ing] the balances of individual accounts, provid[ing] regular account statements, and offer[ing] informational and accessibility services to participants."[17] These recordkeeping fees are commonly allocated as either "a percentage of the assets for which the recordkeeper is responsible" or a "a flat rate per participant account."[18] The Petitioners stated that initially the Plans's two recordkeepers, TIAA-CERF ("TIAA") and Fidelity, were paid "approximately $3.96 million to $5 million each year" in recordkeeping fees.[19] "Based upon the Plans' size and features, petitioners allege that a reasonable recordkeeping fee would be approximately $1,050,000 in the aggregate for both Plans, or approximately $35 per participant."[20]

Due to an IRS regulation change,[21] in 2009 Northwestern established an entity to review, oversee, and undertake the fiduciary responsibilities of the Plans— Northwestern University Retirement Investment Committee ("NURIC").[22] NURIC, after completing a review of the plans and constituencies, "oversaw the rollout of a new investment menu in 2016."[23]

In 2016, the Petitioners—current or former Northwestern University employees "participat[ing] in both the Retirement and Savings Plans"—filed suit against Northwestern University, NURIC, and the individual officials who administer the plans.[24] The premise of the Petitioner's claim was for breach of fiduciary duties under 29 U.S.C. § 1132(a)(2).[25] The Petitioners alleged that the respondents breached their fiduciary duty of prudence by:

(1) offering a selection of investments that had overly expensive investment management fees by selecting and retaining "retail-class

---

17. *Hughes*, 142 S. Ct. at 740.

18. *Id.*

19. Brief for Petitioners at 10, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

20. *Id.*

21. *See, e.g.*, Treas. Reg. §§ 1.403(b)-1–11 (2007).

22. Brief for Respondents at 10, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

23. *Id.*

24. *Hughes*, 142 S. Ct. at 740; *see also* Brief for Respondents at 10, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401) (highlighting that the initialsuit was filed just months before Northwestern University rolled out the new plan memo).

25. 29 U.S.C. § 1132(a)(2) (allowing for civil enforcement where there is liability for a breach of a fiduciary duty under 29 U.S.C. § 1109).

versions of mutual funds rather than identical lower-cost institutional class versions;"[26]

(2) paying excessive recordkeeping fees by "failing to monitor and control recordkeeping expenses;"[27]

(3) causing poor participant investing choices due to confusion over offering too many investment options.[28]

After the respondents's motion to dismiss in 2017, the United States District Court for the Northern District of Illinois granted the respondents motion and denied petitioners leave to amend.[29] The Court of Appeals of the Seventh Circuit affirmed the motion to dismiss and held that the "petitioners's allegations fail as a matter of law" because petitioners had a choice of low-cost plan options; thus, there was no concern that the respondents had not been prudent with monitoring, reviewing or controlling the fees associated with the other investment options.[30]

I. ISSUE—THE DUTY OF PRUDENCE TO MONITOR PLAN INVESTMENTS

The fundamental issue in *Hughes v. Northwestern University*, is whether the Seventh Circuit properly analyzed the respondents's duty of prudence.[31] A plan fiduciary, under the Employee Retirement Income Security Act ("ERISA"), "must discharge their duties '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.'"[32] The Supreme Court has interpreted this duty of prudence based on the common law of trusts.[33] "The Court concluded that they had because "a fiduciary is required to conduct a regular review of its investment. Thus, '[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones.'"[34] In *Hughes v. Northwestern University*, the Supreme Court had to address whether

26. Brief for Petitioners at 12, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

27. *Id.*

28. *Hughes*, 142 S. Ct. at 741 (noting there were over 400 investment choices in total during the period at issue).

29. *Id.*

30. *Id.* at 739, 741.

31. *Id.* at 741–42.

32. *Id.* at 739 (quoting 29 U.S.C. § 1104(a)(1)(B)).

33. *Id.* at 741 (citing Tibble v. Edison Int'l, 575 U.S. 523 (2015)).

34. *Id.* at 741 (quoting *Tibble*, 575 U.S. at 528, 530)).

the Seventh Circuit properly dismissed the petitioners's claims by focusing on the obligation of a fiduciary to curate a diverse menu of options rather than a duty to monitor plan investments.[35]

II. DEVELOPMENT OF THE ERISA DUTY OF PRUDENCE

The Congressional findings and declarations of policy state that ERISA was enacted in order to establish "'minimum standards' that would 'assur[e] the equitable character of [employee benefit plans] and their financial soundness.'"[36] Rather than "enumerating all of the powers and duties" of fiduciaries Congress looked to the common law of trusts to "define the general scope of [a fiduciary's] authority and responsibility."[37]

Under the statutory language, ERISA establishes a duty of prudence for fiduciaries under 29 U.S.C. § 1104(a)(1)(B).[38] "A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and— . . . 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."[39] When analyzing the extent of ERISA fiduciary duties, "courts often must look to the law of trusts."[40]

In *Tibble* the Supreme Court recognized that "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones."[41] This is distinct from the initial prudence that a fiduciary must exhibit in investment selection.[42] The fiduciary cannot assume that investments initially selected prudently, "will continue to remain so indefinitely."[43] As such, a fiduciary must "'systematic[ally] conside[r] all the investments of the trust at regular intervals' to ensure that they are appropriate."[44]

35. *Id.* at 741–42.

36. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) (quoting 29 U.S.C. § 1001(a)).

37. *Id.* at 570.

38. *See* 29 U.S.C. § 1104(a)(1)(B).

39. *Id.*

40. *Tibble*, 575 U.S. at 529.

41. *Id.*

42. *Id.*

43. *Id.* (quoting Amy M. Hess, Bogert's The Law of Trusts and Trustees 145–46 (3d ed. 2009)).

44. *Id.*

III. ANALYSIS OF *HUGHES V. NORTHWESTERN UNIVERSITY*

Because the extent of ERISA fiduciary duties looks to the common law to trusts, the Supreme Court has clarified a defined contribution plan fiduciary's responsibility. Under *Tibble*, a fiduciary has a duty to monitor and remove imprudent investments.[45] Even though plan participants may be able to select their own investments, by the Court applying *Tibble,* a fiduciary still has a duty "to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options."[46] In *Hughes v. Northwestern University*, the Court specifically declines to accept that a fiduciary may excuse itself from its continuing duty to monitor plan investments by offering a menu of options.[47] Rather, "if the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."[48] Here, the Supreme Court did not decide on whether respondents breached their duty of prudence, but gave the guidance after vacating the judgement below that necessary inquiry will be context specific due to "the duty of prudence turn[ing] on 'the circumstances ... prevailing' at the time the fiduciary acts."[49]

IV. IMPLICATIONS OF *HUGHES V. NORTHWESTERN UNIVERSITY*

While the Supreme Court left the breach of a duty of prudence issue to a decision on remand,[50] *Hughes v. Northwestern University* still has important policy implications for ERISA breach of fiduciary duty litigation. First, primarily the Court has refocused the duty of prudence question to a continuing duty to monitor and remove imprudent investments.[51] Second, the Court refutes the respondents and Seventh Circuit claims that additional offerings "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu."[52] Third, there are a "series of complaints filed against many of the nation's leading universities" claiming that the "universities

---

45. *Tibble*, 575 U.S. at 529.

46. *Hughes*, 142 S. Ct. at 742.

47. *Id.* at 741–42.

48. *Id.* at 742.

49. *Id.* (first quoting 29 U.S.C. § 1104(a)(1)(B); then quoting Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014).

50. *Hughes*, 142 S. Ct. at 742.

51. *Id.* at 741.

52. *Hughes*, 142 S. Ct. at 742 (quoting Divane v. Nw. Univ, 953 F.3d 980, 991 (7th Cir. 2020)).

breached their fiduciary obligations under" ERISA by managing their plans similar to Northwestern.[53] Further, there are a number of ongoing or recently decided cases being determined on the breach of fiduciary duty and citing *Hughes v. Northwestern University*.[54]

Conclusion

Hughes v. Northwestern University continues to define the scope of the fiduciary duty of prudence under ERISA. Requiring fiduciaries to do more than offer a menu of options and establishing a continuing duty to monitor and remove imprudent investments.[55] With additional complaints being filed and decisions being made at the District and Appellate Court level it remains interesting to review successes of plaintiffs and defendants as they respectively try to plead or motion to dismiss claims regarding an ERISA breach of fiduciary duty.[56] Further, plan fiduciaries should review this recent series of cases in order to develop a plan of action to monitor and remove imprudent investments.

---

53. Brief for Respondents at 1, Hughes v. Nw. Univ., 142 S. Ct. 737 (2022) (No. 19-1401).

54. *See, e.g.*, Forman v. TriHealth, Inc., 40 F.4th 443 (6th Cir. 2022); Beldock v. Microsoft Corp., 2023 WL 1798171 (W.D. Wash. 2023); Anderson v. Coca-Cola Bottlers' Ass'n, 2022 WL 951218 (D. Kan. 2022); Complaint, Gaines v. BDO USA, LLP, No. 1:22CV01878 (N.D. Ill. 2022).

55. *Hughes*, 142 S. Ct. at 741–42.

56. *See supra* notes 53–54 and accompanying text.