Repudiation is Insufficient to Excuse Failure to Exhaust Remedies Under the Plan

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The defined benefit pension plan contained a provision that salaried employees who ? ÃÂ£involuntarily terminated?ÃÂ¥ within three years of a change in control would receive an additional five years of credited service and five years of age for purposes of determining pension benefits. The company underwent a change in control in 2008. In 2009, it sold off a subsidiary. At that time, it sent an FAQ to subsidiary employees telling them that they would not be eligible for the additional age and service credit at the time of the sale or when they terminated employment with the subsidiary. The U.S. Court of Appeals for the Eighth Circuit upheld the district court?ÃÃs dismissal for failure to exhaust administrative remedies under the plan. While exhaustion is excused if pursuing the administrative remedy would be futile, futility requires a showing of certainty that the claim would be denied on appeal, not merely doubts that the appeal would succeed. Since no claim was ever filed and the plaintiff?ÃÃs sole basis for the futility assertion was the FAQ, that was not sufficient to show with certainty that the claim would be denied. *Angevine v. Anheuser-Busch Cos. Pension Plan*, 10-2832 (8th Cir. July 22, 2011).

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