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Judge Tosses Fossil-Fuel Divestment Suit Against NYC Pensions

New York City employees and a conservative group had sued the pensions last year for allegedly pursuing political motives over financial gains.

By Sabiq Shahidullah | July 8, 2024

A county judge in New York last week dismissed a complaint against three pension funds over an alleged fiduciary violation when divesting from fossil-fuel assets.

The **New York City Employees' Retirement System**, the **Teachers' Retirement System** and the **Board of Education Retirement System** were defendants in the complaint, filed in the New York County district of the New York State Supreme Court in May 2023.

A group of city workers – a teacher, a subway train operator and an occupational therapist for the public school system – sued the pension funds for allegedly breaching their fiduciary obligations by divesting from fossil-fuel holdings.

The pension sought to "advance environmental goals unrelated to the financial health of the plans" and made the decisions without "regard for whether those assets would produce a superior return for the plans," according to the complaint.

The employees' lawyers argued the pensions had violated the Federal Employee Retirement Income Security Act, called Erisa, which sets standards for pension plans.

To argue a breach of Erisa or fiduciary duty in general, an injury must be "cognizable," or clearly measurable or identifiable, according to **Mark Greenstein**, an attorney with **The Wagner Law Group**, who spent nearly 25 years working for the **Department of Labor**'s Employee Benefits Security Administration, or EBSA, the division which interprets Employee Retirement Income Security Act law.

In August 2023, the three pensions filed a motion to dismiss, arguing the case was a "waste of time" and that the divestment did not cause injury to the workers. They also claimed that a fifth plaintiff in the suit, the **Americans for Fair Treatment Inc.**, is an anti-ESG advocacy group seeking to undermine the pensions' climate commitments.

The judge sided with the pensions on Wednesday.

Since the employees had defined benefit retirement plans, they received a fixed payment each month that wouldn't fluctuate based on the pension's investment performance, the judge said in a dismissal document. "Plaintiffs here have not, and will not, suffer any monetary losses based upon defendants' investment decisions," the judge stated.

"The promised benefit does not change based on how the investments performed," Greenstein said. "Whether they perform better or less, you just have the same promised benefits, therefore, you don't have a legal injury.

"[T]he plaintiffs should have never brought the case in the first place," said **Evelyn Haralampu**, partner at law firm **Burns & Levinson**. "The plaintiffs didn't suffer any harm, their case was badly argued, and their theory was thin at best. I doubt anyone would appeal that case, but you never know."

Even if the retirement plans had been defined contribution plans, where plan participants could suffer losses based on the pension's investment decisions, a breach of fiduciary duty would still be a hard case to argue, Haralampu added.

"The investment horizon of retirement assets is decades and, arguably, any short-term losses are not per se imprudent," Haralampu said. "Breach of fiduciary duty cases are very fact-specific."

In 2021, the three pension funds voted to divest roughly $4 billion from fossil-fuels to shield portfolios from the climate-threatening materials, which they say will become a financial burden in the future. The three systems have nearly $200 billion in combined assets.

The funds have also committed to transitioning their portfolios to net-zero carbon emissions by 2040, based on a roadmap by Comptroller **Brad Lander**, according to a spokesperson for the Comptroller's office. Two other city pensions – the $47 billion **New York City Police Pension Fund** and the $18 billion **New York City Fire Pension Fund** – have not agreed to the divestment or net-zero initiative.

New York City's pensions have been a major proponent of sustainable investing, as political polarization between Republican and Democrat states impacts the investment choices of public funds.

Americans for Fair Treatment, one of the plaintiffs, is a conservative organization that has funded the litigation, according to **Robert Skinner**, partner at law firm **Ropes & Gray**. He expects the group to appeal the court's decision.

American for Fair Treatment did not respond to request for comment before publication deadline.

"This litigation appears to be a well-funded effort to bring a high-profile challenge to a basic premise of ESG investing – that climate risk is financial risk," Skinner said. "AFFT was well aware of the procedural standing hurdle before bringing this case, and it can be expected to continue the fight."