UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARK BERUBE, on behalf of himself and all others similarly situated,
Plaintiff,

v. **Case No. 20-C-1783**

ROCKWELL AUTOMATION, INC., et al.,
Defendants.

DECISION AND ORDER

Plaintiff Mark Berube alleges that the Rockwell Automation Pension Plan, violates the Employee Retirement Income Security Act of 1974 ("ERISA") because the plan's formulas for calculating certain annuity types rely on outdated mortality assumptions and, therefore, do not produce actuarially equivalent benefits. Before me now is the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

I. BACKGROUND

According to the allegations of the complaint, which I accept as true for purposes of deciding the motion to dismiss, the plaintiff receives a pension under the Rockwell Automation Pension Plan in the form of a 50% joint and survivor annuity. The plaintiff contends that, under ERISA, such an annuity must be the actuarial equivalent of a single life annuity. He further alleges that his annuity is not the actuarial equivalent of a single life annuity because the formulas the plan used to convert his benefit to a joint and survivor annuity rely on outdated mortality assumptions. The plaintiff contends that the use of such assumptions caused his monthly pension payments to be lower than they

would have been had his benefits been calculated using reasonable actuarial assumptions. He seeks various forms of relief under ERISA, including an order requiring that the plan be reformed to comply with the actuarial-equivalence requirement and that his benefits be recalculated under the reformed plan.

The defendants, Rockwell Automation, Inc., and the Rockwell Automation Employee Benefits Plan Committee, now move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

To avoid dismissal under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must, at a minimum, "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. In construing a plaintiff's complaint, I assume that all factual allegations are true but disregard statements that are conclusory. *Iqbal*, 556 U.S. at 678.

In their motion to dismiss, the defendants do not contend that the complaint fails to allege a plausible claim under ERISA. Instead, they contend that the plaintiff has not pleaded that he exhausted his internal plan remedies before filing this suit. However, "[a] failure to exhaust is normally considered to be an affirmative defense," and a plaintiff "ha[s] no obligation to allege facts negating an affirmative defense in her complaint." *See Mosley v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006); *see also Hess v. Reg-Ellen Mach. Tool Corp. Employee Stock Ownership Plan*, 502 F.3d 725, 729

(7th Cir. 2007) (describing lack of exhaustion as affirmative defense in ERISA case); *Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 248 (7th Cir. 1983) (same). Thus, lack of exhaustion is generally not a proper basis for dismissal under Rule 12(b)(6). *Mosley*, 434 F.3d at 533.

Although parties and courts occasionally "take short-cuts" and consider affirmative defenses under Rule 12(b)(6), *id.*, that is allowed only when the plaintiff pleads himself out of court by alleging all the ingredients of the affirmative defense in the complaint, *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004). In his complaint, the plaintiff did not allege facts suggesting that he failed to exhaust his internal plan remedies. Therefore, I may not dismiss his complaint based on the affirmative defense of lack of exhaustion. *See Mosley*, 434 F.3d at 533. If the defendants wish to present facts showing that the plaintiff did not exhaust his administrative remedies, they must do so through a motion for summary judgment.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the defendants' motion to dismiss the complaint for failure to state a claim (ECF No. 15) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 12th day of April, 2021.

s/Lynn ADelman
LYNN ADELMAN
United States District Judge