

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**BALTIMORE COUNTY, MARYLAND *
A Body Corporate and Politic
400 Washington Ave *
Towson, MD 21204**

Plaintiff *

V.

**BUCK CONSULTANTS, LLC *
A Delaware Limited Liability Company
And a Xerox Company *
One Pennsylvania Plaza *
New York, NY 10119**

Case No. RDB-15-cv-0089

**Serve on: *
CSC-Lawyers Incorporating Service Co.
7 St. Paul Street *
Suite 1660 *
Baltimore, MD 21202 ***

Defendant

* * * * *

FIRST AMENDED COMPLAINT

Baltimore County, Maryland, Plaintiff, by its undersigned attorneys, sues the Defendant, Buck Consultants, LLC, and for its Complaint, alleges:

Introduction

1. This civil action seeks a declaratory judgment, pursuant to 28 U.S.C.A. § 2201, that the Defendant has a contractual duty to defend, indemnify and hold harmless the Plaintiff, Baltimore County, Maryland (the County), in connection with a civil action now pending in the U.S. District Court for the District of Maryland,

EEOC v. Baltimore County, et al., RDB-07-CV-2500. That action was brought in 2007 under the Age Discrimination in Employment Act (ADEA) and alleged unlawful employment practices on the basis of age because older employees were required to pay higher contributions than those paid by younger employees to receive the same benefits from Plaintiff's pension plan. It sought relief for Wayne A. Lee, Richard J. Bosse, Sr., and a class of similarly-situated aggrieved individuals at least forty years of age.

Parties

2. The County is a body corporate and politic located in Baltimore County, Maryland.

3. Defendant, Buck Consultants, LLC (Buck), is a Delaware Limited Liability Company, is a citizen of that state and maintains its principal place of business at One Pennsylvania Plaza, New York, NY 10119. Buck is a subsidiary of Xerox Corporation, a New York Corporation.

Jurisdiction and Venue

4. Jurisdiction is proper under 28 U.S.C.A. §1332 based on diversity of citizenship between the parties. The amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

5. Venue is appropriate in this U.S. District Court pursuant to 28 U.S.C.A. §1391(a), in that the defendant is subject to personal jurisdiction within this District

and a substantial part of the events or omissions giving rise to this action occurred within this District.

The Pending Litigation

6. Buck has been the principal actuarial consulting firm for the Baltimore County Employees' Retirement System ("ERS") since its inception in 1945. The pending litigation commenced in 1999 and 2000 with the filing of age discrimination charges by two correctional officers, Richard Bosse and Wayne Lee. The U.S. Equal Employment Opportunity Commission (the Commission) commenced its investigation and then made no contact with the County for 5 ½ years, apparently because it misplaced its files.

7. On March 6, 2006, the Commission made determinations that the County had committed age discrimination against Mr. Bosse and Mr. Lee.

8. After conciliation failed, the Commission filed the action cited in paragraph 1, *supra*, against the County on behalf of the two complainants and a class of similarly-situated individuals. The Complaint sought injunctive relief and reimbursement of back wages for affected employees.

9. In its initial 2009 decision, the district court held that the contribution rates were justified by the time value of money and were not motivated by age. The district court held that under *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 128 S. Ct. 2361, 171 L.Ed.2d 322 (2008), there was no facial discrimination.

10. The United States Court of Appeals for the Fourth Circuit vacated this initial decision and remanded the case to the district court to consider the effect of a 20-year early-retirement option – a bargained for benefit that Buck had approved as compliant with the ADEA -, and whether the disparate contribution rates were still supported by “permissible financial considerations,” i.e., the time value of money, in light of the early-retirement option.

11. On remand, the district court found that the early retirement option decoupled an employee’s age from years until retirement and that at no time were the contribution rates adjusted as they should have been- to take account of the early retirement option. The district court found that as a result of this failure to account for this early retirement option the “ERS” was facially discriminatory under the ADEA. The district court therefore granted summary judgment in favor of the Commission on the issue of liability.

12. The district court granted the County permission to file an interlocutory appeal from its liability determination. The Fourth Circuit granted the County permission to appeal. The Fourth Circuit affirmed the second district court decision and the Supreme Court denied the County’s Petition for Writ of Certiorari.

The Indemnification Contracts

13. On July 1, 1999, the County entered into a Contract for “Actuarial Services for the Employees’ Retirement System” with Buck’s predecessor, Buck Consultants, Inc. (Exhibit A). Paragraph 14 of that contract provided:

14. Indemnification.

The Contractor shall indemnify and hold harmless the County, its employees, agents and officials from any and all claims, suits, or demands including attorney fees which may be made against the County, its employees, agents or officials resulting from any act or omission committed in the performance of the duties imposed by and performed under the terms of this Agreement by the Contractor or anyone under agreement with the Contractor to perform duties under this Agreement. The Contractor shall not be responsible for acts of gross negligence or willful misconduct committed by the County.

14. On June 19, 2006, the County entered into a Contract for “Actuarial consulting services primarily for the Employees’ Retirement System of Baltimore County” with Buck (Exhibit B). Paragraph 14.1 of that contract provided:

14.1 Indemnification.

The Contractor shall defend, indemnify and hold harmless the County, its employees, agents and officials from any and all liabilities, claims, suits, or demands including attorney fees which may be incurred or made against the County, its employees, agents or officials resulting from any act or omission committed in the performance of the duties imposed by and performed under the terms of this Agreement by the Contractor or anyone under agreement with the Contractor to perform duties under this

Agreement. The Contractor shall not be responsible for acts of gross negligence or willful misconduct committed by the County.

* * *

14.3

Contractor shall provide defense for County, its employees, agents and in accordance with this Article 14 and in doing so Contractor shall allow County to participate in said defense of County, its employees, agents and officials, to the extent and as may be required by the County and the Contractor shall cooperate with County in all aspects in connection therewith.

The Actual Controversy

15. Paragraph 1 of both the 1999 and 2006 Contracts (entitled “Contractor’s Duties”) provides, in relevant part, that “[t]he Contractor’s services will be provided with due care and in a manner satisfactory to the County and in accordance with all applicable professional standards.”

16. Paragraph 2.4.2 of the 1999 Contract states that, among the services Buck was required to perform, were “interpretations of the benefit provisions of the Retirement Code, advice as to the implication of federal legislation, and advice on legal implementations of proposed legislation . . .”.

17. Paragraph 4.4 of the 2006 Contract provides that “[t]he professional services to be provided under this Agreement shall be performed competently and with due care, and in accordance with all applicable laws, codes, ordinances and regulations and licensing requirements.”

18. Both Contracts incorporate the requirements set forth in the underlying requests for bids. Section 7.7 of the Request for Proposal No. 205643 (the bid request underlying the 2006 Contract) states, in relevant part, that “[t]he Consulting Actuary shall provide actuarial consultation and advisory services on any technical, policy, legal or administrative problems arising during the course of operations . . .”. Section 7.9 states, in relevant part, that “[t]he Consulting Actuary shall keep the System advised on developments in federal legislation and regulations regarding financing, benefits, vesting, fiduciary responsibility, disclosure, etc.”

19. Over the course of the 70 years that Buck has been the actuarial consultant for the Baltimore County ERS they have in fact provided advice as to the legality of various aspects of the ERS. Indeed, when the County agreed to provide the 20 year early retirement option to correctional officers this change in the ERS was specifically reviewed and approved by Buck as in conformance with all applicable laws.

20. Then, in the early stages of the EEOC litigation the County again asked Buck to review these provisions of the ERS and explain to the Commission, on the County’s behalf, why the ERS was in compliance with the ADEA. By letter to the County’s Director of Budget and Finance dated August 16, 2000, Buck provided that actuarial and legal advice, maintaining its position that these provisions of the ERS were lawful. *See*, Buck advice letter, attached as Exhibit C.

21. Baltimore County reasonably relied on this advice, retaining these provisions of the ERS, and maintaining – with Buck’s advice and consent – throughout the pending litigation that the ERS was in all respects in compliance with the ADEA.

22. However, as explained above, the advice provided by Buck was erroneous and the early retirement provisions of the ERS have been found to be facially discriminatory under the ADEA.

23. Buck breached its duty to provide competent actuarial and legal advice by failing to use due care when first reviewing and approving the early retirement revisions to the ERS, and then by affirmatively advising the County at the beginning of and throughout the pending litigation that these ERS revisions were in compliance with the ADEA.

24. As a direct and proximate result of these breaches, the County, through no lack of due care on its part, has been found to be liable and is now subject to civil damages.

25. Based on the contractual obligations set forth above, on June 25, 2007 the County advised Buck of the Commission’s threat to sue the County for age discrimination. The County asserted that Buck was contractually obligated to defend, indemnify and hold harmless the County in the event suit was filed.

26. On September 18, 2007, the Commission filed its Complaint in the underlying litigation as referenced in paragraph 1, *supra*.

27. On October 3, 2007, Buck's counsel took the position that Buck was not obligated to defend, indemnify, or hold the County harmless in the pending litigation.

28. Buck subsequently proposed, and the County agreed, that Buck and the County would "work collaboratively with the goal of having the County prevail in the lawsuit."

29. Buck and the County in fact worked collaboratively, but the County did not prevail on the liability issue in the pending litigation, which will now move to a damages phase.

30. The County has once again called upon Buck to defend, indemnify, and hold harmless the County in connection with that damages phase and Buck refused to meet its contractual obligations.

31. There exists an actual controversy within this Court's jurisdiction between Buck and the County as to Buck's duty to defend, indemnify, and hold harmless the County as stated in the contracts provisions referenced above.

WHEREFORE, Plaintiff respectfully requests:

- A. That the Court stay the underlying litigation until the Court has made its declaration in this case;

- B. That the Court order a speedy hearing of this action pursuant to Rule 57;
- C. That the Court render a declaratory judgment in Plaintiff's favor, declaring that the Defendant is obligated to defend, indemnify and hold harmless the Plaintiff in the underlying litigation;
- D. That the Court enter an Order requiring the Defendant to defend, indemnify and hold harmless the Plaintiff in the underlying litigation;
- E. That the Court grant Plaintiff all costs and attorneys' fees related to this action;
- F. That the Court grant Plaintiff such other and further relief as the nature of this cause and justice may require.

Respectfully Submitted,

MICHAEL E. FIELD,
County Attorney

/s/

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