

News | University

Class-action lawsuit filed against University for improper management of retirement plans

Similar cases are also being brought against five other universities

By Adam Beyer (<http://www.dukechronicle.com/staff/adam-beyer>) and Neelesh Moorthy (<http://www.dukechronicle.com/staff/neelesh-moorthy>) | Friday, August 12 2016



Duke University is being sued for allegedly failing to prevent excessive fees in its retirement savings plan.

A class-action lawsuit—which could affect the more than 37,000 employees and retirees in the University's Faculty and Staff Retirement Plan—was filed Wednesday by Missouri law firm Schlichter, Bogard & Denton LLP. The complaint alleges that Duke's retirement plan charges high administrative fees, offers a confusing array of investment options and invests in underperforming funds.

(<http://www.dukechronicle.com/multimedia/23906>)

"Defendants failed to use the Plan's bargaining power, causing the Plan to pay unreasonable and greatly excessive fees for recordkeeping, administrative and investment services," the complaint

states. "Defendants also selected and retained investment options for the Plan that consistently and historically underperformed their benchmarks and charged excessive investment management fees."

The same firm—and in particular attorney Jerome Schlichter—has brought several other fee-related cases in the past, including one that resulted in a \$57 million settlement with Boeing and another ending in a \$62 million settlement with Lockheed Martin. Earlier this week, Schlichter also filed cases against Yale University, New York University, Vanderbilt University, the University of Pennsylvania and the Massachusetts Institute of Technology.

In a statement, Michael Schoenfeld, vice president for public affairs and government relations, wrote that the University follows applicable federal laws governing retirement funds.

"Duke provides a range of options that give employees flexibility in designing retirement plans to meet their individual needs," he wrote. "These investments are reviewed and carefully managed in accord with federal law to provide low costs and good outcomes for our employees. We will continue to commit to these guiding principles."

Explaining the complaints

The lawsuit alleges a violation of the Employee Retirement Income Security Act, which states that retirement plan administrators have a "fiduciary duty" to beneficiaries, explained Nathaniel Bax, an attorney at Foster Law Firm, LLC, which is not connected to the lawsuit.

"What that means is that's a very high standard of care that they have to provide to the beneficiaries of the plan," Bax said. "They are charged with taking care of plan assets to the best of their ability to a reasonable degree."

This sort of claim is different from saying the University attempted to profit from the plan at the expense of retirees, said Norman Stein, Law '78 and a law professor at Drexel University.

According to the complaint, the retirement plan uses four "recordkeepers," which offer over 400 different funds the University can invest in.

Schlichter said that using so many recordkeepers and funds—many of which he said were duplicates of the same type of asset—weakens the retirement plan's bargaining power and led to larger fees.

Using only one recordkeeper, as well as using consolidated funds rather than 400 individual ones, would have enabled the University to obtain lower fees, the complaint said. Had it done so, "plan participants would have avoided losing in excess of \$2 million in fees in 2014 alone, and many more millions since 2010."

In addition, Schlichter said, Duke erred by investing in retail funds rather than institutional funds, which he said charge cheaper fees. The complaint includes several tables, showing retail funds Duke allegedly used and cheaper but similar investment funds.

"Same exact everything, except for fees," Schlichter explained. "Warren Buffet doesn't pay retail for his investments, and neither should the employee of a 4.7 billion dollar retirement plan."

The day-to-day of the retirement plan is largely operated by the Duke Investment Advisory Committee, a co-defendant. Bax said this complicates who ought to be sued, adding there is a possibility Duke could be removed as a defendant with only the committee left to be sued.

"If the employer sets up the trust with some advisory committee and they cede all control of it, then usually the employer is not named as a defendant," he explained. "If they do have some discretionary authority over it, or if they control the money in any way, then they can be named."

'An uphill battle'

In deciding ERISA cases, judges typically apply what is called an "abuse of discretion standard," Bax said. This means the retirement plan's decisions will not be overturned unless "they did something so egregious and outside the bounds of common reason."

Typically, he said, this is a very difficult standard—an "uphill battle"—for plaintiffs to meet. If proven, however, the nature of the complaint's specific allegations would in fact constitute "abuse of discretion."

Stein noted that simply claiming higher fees is not a smoking gun, even if it does suggest that the University did not act in the most prudent manner. The court must take into account what services are rendered by different fees.

Most courts do not focus on the outcome of the investments, but rather the process, Stein said. The law is unclear on whether Duke actually has to show it made the best possible decision or if it is sufficient to say a reasonable plan manager might have reached the same decision after thorough deliberation, he added.

"The kinds of things again that the plaintiffs will want to show is that the universities didn't use due process, they didn't try and use their leverage to negotiate good fees, they weren't careful in selecting a menu of options," Stein explained.

Even if Duke did not do everything it was supposed to do process-wise, Stein said, it could claim the choices it made would have been the same had it followed a perfect process. He added, however, that similar fee-based lawsuits have been successful elsewhere in the private sector, opening up a path for the plaintiffs to win or reach a settlement in the case.

Schlichter said the firm was prepared to follow the lawsuit until the very end.

"We are committed to taking the case all the way through to benefit the employees and retirees of Duke and to help them build meaningful retirement assets for the future," he said.

Stein noted the lawsuit—independent of what the final verdict might be—could achieve these effects just by being brought. Bringing attention to the issue makes corporations and universities more attentive to the need for efficient and high-performing investment programs. He said he suspects the lawsuit to positively affect retirement savings in the future.

“Even though in the short run this can create some pains to universities, in the long run it will be better for everyone,” Stein said.

The case will be heard in the United States District Court for North Carolina’s Middle District.

The full complaint can be viewed below:

[Retirement fees lawsuit filed against Duke University \(https://www.scribd.com/document/320970047/Retirement-fees-lawsuit-filed-against-Duke-University#from_embed\)](https://www.scribd.com/document/320970047/Retirement-fees-lawsuit-filed-against-Duke-University#from_embed)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

DAVID CLARK, KEITH A. FEATHER,
JORGE LOPEZ, THOMAS C. MEHEN,
SUSIE PETTUS, AND ROBERT
HEALY individually and as
representatives of a class of participants
and beneficiaries on behalf of the Duke
Faculty and Staff Retirement Plan,

Plaintiffs,

v.

DUKE UNIVERSITY AND THE DUKE
INVESTMENT ADVISORY
COMMITTEE,

Defendants.

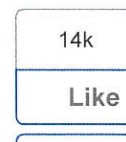
Civil Action No. 1:16-cv-1044

COMPLAINT—CLASS ACTION

JURY TRIAL DEMANDED

1. Plaintiffs David Clark, Keith A. Feather, Jorge Lopez, Thomas C. Mehen, Susie Pettus, and Robert Healy individually and as representatives of a class of participants and beneficiaries in the Duke Faculty and Staff

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