FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER M. SULYMA, and all others similarly situated, *Plaintiff-Appellant*, v. INTEL CORPORATION INVESTMENT POLICY COMMITTEE; FINANCE COMMITTEE OF THE INTEL CORPORATION BOARD OF DIRECTORS; INTEL RETIREMENT PLANS ADMINISTRATIVE COMMITTEE; CHARLENE BARSHEFSKY; FRANK D. YEARY; JAMES D. PLUMMER; REED E. HUNDT; SUSAN L. DECKER; JOHN J. DONAHOE; DAVID S. POTTRUCK; RAVI JACOB; INTEL 401(K) SAVINGS PLAN; INTEL RETIREMENT CONTRIBUTION PLAN, *Defendants-Appellees.*	No. 17-15864 D.C. No. 5:15-cv-04977-NC OPINION

Appeal from the United States District Court
for the Northern District of California
Nathanael M. Cousins, Magistrate Judge, Presiding

Argued and Submitted October 18, 2018
San Francisco, California

Filed November 28, 2018

Before: J. Clifford Wallace and Susan P. Graber, Circuit
Judges, and Robert S. Lasnik,* District Judge.

Opinion by Judge Wallace

SUMMARY[**]

Employee Retirement Income Security Act

The panel reversed the district court's grant of summary
judgment in favor of the defendants in an ERISA action on
the ground that the limitations period had expired.

A former employee and participant in Intel's retirement
plans sued the company for allegedly investing retirement
funds in violation of ERISA section 1104. The district court
concluded that the employee had the requisite "actual
knowledge" to trigger ERISA's three-year limitations
period, 29 U.S.C. § 1113(2).

The panel held that a two-step process is followed in
determining whether a claim is barred by section 1113(2).
First, the court isolates and defines the underlying violation
on which the plaintiff's claim is founded. Second, the court
inquires whether the plaintiff had "actual knowledge" of the
alleged breach or violation. The panel held that actual

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[*] The Honorable Robert S. Lasnik, United States District Judge for
the Western District of Washington, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It
has been prepared by court staff for the convenience of the reader.

knowledge does not mean that a plaintiff had knowledge that the underlying action violated ERISA, nor does it merely mean that a plaintiff had knowledge that the underlying action occurred. Rather, the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff's action was filed. In an ERISA section 1104 case, the plaintiff must have been aware that the defendant had acted and that those acts were imprudent. Disagreeing with the Sixth Circuit, the panel held that the plaintiff must have actual knowledge, rather than constructive knowledge.

The panel concluded that disputes of material fact as to the plaintiff's actual knowledge precluded summary judgment, and remanded the case to the district court for further proceedings.

COUNSEL

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John J. Buckley Jr. (argued), Juli Ann Lund, David S. Kurtzer-Ellenbogen, and Daniel F. Katz, Williams & Connolly LLP, Washington, D.C.; Scott P. Cooper, Proskauer Rose LLP, Los Angeles, California; Myron D. Rumeld, Proskauer Rose LLP, New York, New York; for Defendants-Appellees.

OPINION

WALLACE, Circuit Judge:

A former employee and participant in Intel's retirement plans sued the company for allegedly investing retirement funds in violation of the Employee Retirement Income Security Act (ERISA). Intel moved to dismiss the complaint on the ground that the limitations period for his claims had expired. The magistrate judge[1] converted Intel's motion to dismiss into a motion for summary judgment and entered summary judgment in favor of Intel. The employee now appeals, arguing that the district court erred by concluding he had the requisite "actual knowledge" required by ERISA to trigger the limitations period. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I.

Christopher Sulyma worked at Intel between 2010 and 2012 and participated in two of Intel's retirement plans, both governed by ERISA. The first was the Intel Retirement Plan, also known as the Intel Retirement Contribution Plan. The second was the Intel 401(k) Savings Plan.

Sulyma's account performance depended in part on investment decisions controlled by Intel, through the performance of different Intel "funds." Sulyma's Retirement Plan account was invested in the Intel Global Diversified Fund. Sulyma's Savings Plan account was invested in the Intel Target Date 2045 Fund. The Funds were managed by an Intel investment committee responsible for choosing and managing the Funds' asset allocations. The investment

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[1] The parties consented to the jurisdiction of a magistrate judge. *See* 28 U.S.C. § 636.

committee members were appointed and supervised by a finance committee formed by members of the Intel Board of Directors. A third administrative committee was responsible for disclosing information about the Plans to plan participants. This opinion refers to these various groups as "Intel" unless the context otherwise requires.

When the Funds were established, they did not include significant "alternative investments," such as hedge funds. Intel increased the Funds' alternative investments to reduce the investment risk to the funds through greater diversification. But the reduction in investment risk came at the cost of higher fees and lower performance during periods of strong returns in the equity market. When equity markets did in fact begin to improve after the Great Recession, the Funds' performances lagged compared to index funds and comparable portfolios. Intel disclosed these investment decisions to Sulyma through various documents hosted on two websites. The documents disclosed both the fact of the alternative investments and the basic strategy behind the decision to invest in them. For instance, "Fund Fact Sheets" created in 2010 disclosed that the 2045 Fund was invested more in hedge funds than comparable portfolios, and that it was not performing as well as a result. Sulyma accessed some of this information on the websites, but he testified that he was not actually aware that his retirement accounts were invested in alternative investments while working at Intel.

Sulyma alleges that he eventually learned about the Funds' poor performance; he thereafter filed this action against Intel on October 29, 2015, raising six claims. His first and third claims alleged that the investment committee violated 29 U.S.C. § 1104 by imprudently investing in alternative investments. His second and fourth claims alleged that the administrative committee violated 29 U.S.C.

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