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PAGE 122



38



PENSIONS

CAN A COMPANY HOLD A 401(k) HOSTAGE?

A Southwest Airlines case has alarms ringing

At first blush, Gloria J. Cruz's beef with Southwest Airlines Co. seems like a typical employment dispute. After alleged problems with a new boss, Cruz charged the company with age and sex discrimination in a filing last year with the Equal Employment Opportunity Commission. A month later, four years after joining the company, Cruz was fired for what Southwest claims was a bad attitude and poor performance.

But Cruz's complaint is hardly garden variety. That's because she bumped into a little-known, unwritten policy followed by Southwest in managing its 401(k) retirement and profit-sharing plans. When the former Houston-based cargo manager went to collect some \$19,000 in 401(k) and profit-sharing money after her firing, Cruz discovered that Southwest would not release the funds—at least not until she signed a waiver promising she wouldn't try to get her old job back. Southwest, a company that calls itself "the love airline" and is widely praised for its employee-friendly ways, won't disburse 401(k) or profit-sharing funds to ex-workers as long as their efforts to seek reinstatement are unresolved.

"VINDICTIVE." Unemployed and caring for a husband with Alzheimer's disease, Cruz, 55, says she had little choice. Last February, she signed the waiver and took a 20% tax hit, including penalties, for withdrawing her retirement money early. "They [Southwest] were tightening the screws," says Cruz, who, despite the waiver, is pursuing reinstatement and damages in a discrimination lawsuit set to be tried in Houston early next year.

Says Cruz's attorney, Bruce A. Coane: "She was forced to sign this thing to get what was rightfully hers." Adds Dennis R. Coleman, a benefits consultant with Kwasha Lipton: "It seems that, almost on its face, it's being vindictive."

Cruz's case and Southwest's 15-year-old policy are raising concerns about how much power companies can wield over the 401(k) plans that employees increasingly rely on to fund their retirements. Companies routinely ask per-



CRUZ: Fired, she had to agree not to fight it to get her cash

sonnel to sign waivers in exchange for benefits such as fat severance packages. But Southwest's practice seems to go one step further: It uses an employee's own money as leverage against the employee. Though some benefits consultants question the policy, they say that if a company as successful as Southwest can get away with it, others may want to copy it—a prospect that alarms some EEOC officials. "We believe that that type of practice is discriminatory," says Jerome N. Scanlan, an EEOC attorney. Southwest defends its policy as a

sound business practice that actually protects employees as well. The Dallas-based carrier argues that if terminated employees could get their hands on their retirement funds early and then get reinstated in their jobs, the IRS might take the disastrous step of withdrawing preferential tax treatment of the company's entire 401(k) plan. (The IRS has never ruled on this issue.) Southwest also fears that, in this scenario, some employees might get a windfall not available to others. "We think this is a fair policy, which is uniformly applied," says Southwest General Counsel James F. Parker, conceding that the tax issue is not "clear-cut."

REASONABLE? Although many tax experts—and company executives—are leery of Southwest's argument, the airline has some legal ammunition on its side. In a 1988 challenge to the airline's policy by two former employees, a federal court in Dallas concluded that Southwest had not violated the Employee Retirement Income Security Act governing benefits plans because it applied its policy uniformly. It also found that Southwest, which in that case cited administrative burdens, not the tax-exemption issue, had "reasonable bases" for its practice from a business standpoint.

A similar suit brought in 1987 by the EEOC against family-owned manufacturing outfit J. M. Huber Corp. in Edison, N.J., ended the same way in 1993. The agency had charged Huber with illegally withholding retirement funds from ex-employees who had filed discrimination complaints. But a district court concluded that the practice had a "significant relation to a legitimate business concern." Still, Huber changed its rules and now pays retirement funds without delay to any fired workers, says a spokesman. Both rulings seem in keeping with judges' aversion to overriding a retirement-plan administrator's authority. Says Mary Kathryn Kelly, an expert in employee-benefits law: "Courts are very reluctant to get involved in cases which challenge the decisions of the fiduciaries of these pension plans."

Even so, many companies, including Hewlett-Packard, General Electric, and Tenneco, have steered clear of Southwest's practice. "Our view is that it's their [the employees'] money," says an IBM official. Since so few courts have addressed the issue, the conduct of such companies as Southwest could still be challenged. But Coane, Cruz's attorney, advises employees to sidestep the problem altogether: Get your money first. Sue later.

By Wendy Zellner in Houston