

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 **SUMMARY ORDER**

4 **THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER**
5 **AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER**
6 **COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER**
7 **COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN**
8 **ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

9 At a stated term of the United States Court of Appeals for the
10 Second Circuit, held at the Daniel Patrick Moynihan United States
11 Courthouse, 500 Pearl Street, in the City of New York, on the
12 10th day of August, two thousand and six.

13 PRESENT:

14 HON. ROBERT D. SACK,
15 HON. ROBERT A KATZMANN,
16 Circuit Judges,

17
18 HON. J. GARVAN MURTHA,*
19 District Judge.

20 -----
21 MARK PASTORE,

22 Plaintiff-Appellant,

23 - v -

No. 05-4157

24 WITCO CORPORATION SEVERANCE PLAN and EMPLOYEE BENEFITS COMMITTEE
25 OF THE WITCO CORPORATION SEVERANCE PLAN, in capacity as Plan
26 Administrator,

27 Defendants-Appellees.

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29 Appearing for Appellant: LAURENT S. DROGIN, Tarter Krinsky &
30 Drogin LLP (David S. Rich, of
31 counsel), New York, NY.

* Of the United States District Court for the District of Vermont, sitting by designation.

1 Appearing for Appellees: LYLE S. ZUCKERMAN, Kauff McInain &
2 McGuire LLP (Laura Sack, of
3 counsel), New York, NY.

4 Appeal from a judgment of the United States District Court
5 for the Southern District of New York (Stephen C. Robinson,
6 Judge).

7 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED and
8 DECREED that the judgment be, and it hereby is, AFFIRMED in part,
9 VACATED in part, and REMANDED for further proceedings.

10 The plaintiff, Mark Pastore, was employed by the Witco
11 Corporation ("Witco") and its corporate successors from 1987
12 until his resignation in 2000. Witco sponsored an employee
13 benefit plan called the Witco Corporation Severance Plan (the
14 "Plan"), which, together with the Plan's Employee Benefits
15 Committee (the "Committee"), is the defendant in this case.
16 Pursuant to the Plan, Witco offered severance benefits to certain
17 employees whose employment ended within one year of a change in
18 control of the company. Employees were eligible for such
19 severance benefits if, among other grounds, they resigned their
20 employment "after being required to relocate to an office" that
21 was more than 50 miles from their previous office or from their
22 principal residence.

23 In September 1999, Witco merged with another corporation.
24 The parties agree that this merger was a "change in control" for
25 purposes of the Plan. Early in 2000, a Witco manager stated at a
26 meeting attended by Pastore that Witco was planning to relocate
27 Pastore's work group from Greenwich, Connecticut, to Middlebury,
28 Connecticut. The Middlebury facility is 53 miles from the
29 Greenwich facility and 77 miles from Pastore's home in Suffern,
30 New York.

31 The parties dispute the precise sequence and nature of
32 subsequent events. They agree, however, that: (1) Pastore
33 expressed to his supervisor, Dr. Sean O'Connor, his displeasure
34 with the impending move; (2) O'Connor later wrote to Pastore
35 offering him "the opportunity to remain with the team by . . .
36 establishing a 'home office' as your base of operations . . . and
37 [] limiting your travel to Middlebury to, on average, 4 days per
38 month"; and (3) on July 25, 2000, Pastore submitted his written
39 resignation, in which he acknowledged that he had been offered
40 the option of working from home but stated that "[i]n order to .
41 . . be a valued member of our team, I would be required to work
42 in the head office with the rest of the business group and other
43 executives."

1 Pastore, through counsel, requested severance benefits from
2 Witco pursuant to the Plan. Witco responded that Pastore was
3 ineligible for the benefits because he had been offered the
4 option of working from home and therefore had not been "required
5 to relocate." Pastore then submitted a formal request for
6 benefits to the Committee. He argued that he was eligible for
7 benefits notwithstanding Witco's offer of a "home office,"
8 because (1) according to the offer, Pastore would still be
9 required to report to Middlebury an average of four days per
10 month; (2) Witco had failed to determine whether Pastore had
11 enough physical space in his home to set up a home office; and
12 (3) Pastore thought that it would be impossible for him to
13 "successfully perform his duties and responsibilities as a
14 'telecommuter.'"

15 The Committee discussed Pastore's claim in a meeting of
16 February 14, 2001, attended by all its members. By letter dated
17 February 15, 2001, the Committee denied Pastore's claim. The
18 letter said, "Mr. Pastore was not required to relocate to an
19 office more than 50 miles from his principal residence or his
20 prior work location" because he "was permitted to work from his
21 home," in that Witco had offered to set up, at its expense, a
22 "home office . . . for use as his 'base of operations.'" (Emphasis deleted).

24 Pastore began this action against the Committee and the Plan
25 in the United States District Court for the Southern District of
26 New York on April 19, 2001. He asserts principally that the
27 defendants wrongfully denied him employee benefits to which he
28 was entitled in violation of section 502(a)(1)(B) of the Employee
29 Retirement Insurance Security Act ("ERISA"), 29 U.S.C.
30 § 1132(a)(1)(B). On June 27, 2005, the district court, rejecting
31 the recommendations of a magistrate judge, granted the
32 defendants' motion for summary judgment. See Pastore v. Witco
33 Corporation Severance Plan, 388 F. Supp. 2d 212 (S.D.N.Y. 2005).

34 When, as here, an ERISA plan grants discretion to a plan
35 administrator such as the Committee, federal courts review its
36 decisions regarding plan benefits under the "arbitrary and
37 capricious" standard. See, e.g., Garcia Ramos v. 1199 Health
38 Care Employees Pension Fund, 413 F.3d 234, 237 (2d Cir. 2005).
39 Denials of benefits "may be overturned as arbitrary and
40 capricious only if the decision is without reason, unsupported by
41 substantial evidence or erroneous as a matter of law." Fay v.
42 Oxford Health Plan, 287 F.3d 96, 104 (2d Cir. 2002) (internal
43 quotation marks and citations omitted).

1 We think that the Committee's decision to deny benefits to
2 Pastore was arbitrary and capricious in that it was rendered, in
3 effect, "without reason." Id. In denying Pastore's benefits
4 request, the Committee stated only that Pastore was not "required
5 to relocate" because he was "permitted to work from his home."
6 It is undisputed, however, that Pastore would have been required
7 to continue to participate in a work group that was located in
8 Middlebury and to report to Middlebury an average of four times
9 per month. The question was whether such an arrangement
10 constituted a requirement to relocate. The Committee did not
11 address this question; instead it stated in a conclusory fashion
12 that Pastore had been "permitted to work from his home." This
13 explanation was insufficient. See 29 U.S.C. § 1133(1) (plan
14 administrators must "provide adequate notice in writing to any
15 participant or beneficiary whose claim for benefits under the
16 plan has been denied, setting forth the specific reasons for such
17 denial, written in a manner calculated to be understood by the
18 participant").

19 We think, moreover, that the Committee acted arbitrarily and
20 capriciously in failing to consider whether Pastore had enough
21 space in his home for an office or whether he could "successfully
22 perform his duties and responsibilities as a 'telecommuter.'" See
23 Zervos v. Verizon New York, Inc., 277 F.3d 635, 647 (2d Cir.
24 2002) (claims process was arbitrary and capricious when, among
25 other things, administrator failed to give proper consideration
26 to testimonial evidence); Gaither v. Aetna Life Ins. Co., 388
27 F.3d 759, 773 (10th Cir. 2004) ("[F]iduciaries cannot shut their
28 eyes to readily available information when the evidence in the
29 record suggests that the information might confirm the
30 beneficiary's theory of entitlement and when they have little or
31 no evidence in the record to refute that theory."). The
32 defendants admit that the Committee reviewed only the
33 correspondence between Pastore and Witco and did not investigate
34 the dimensions of Pastore's home or the effects of working from
35 home on Pastore's job performance. It was required to consider
36 Pastore's arguments and evidence. See Zuckerbrod v. Phoenix Mut.
37 Life Ins. Co., 78 F.3d 46, 49 (2d Cir. 1996) (decision to deny
38 benefits must be "based on a consideration of the relevant
39 factors" (internal quotation marks and citations omitted)).

40 When a plan administrator "fails to provide an adequate
41 reasoning, the proper remedy in an ERISA case . . . is to remand
42 for further findings or explanations, unless it is so clear cut
43 that it would be unreasonable for the plan administrator to deny
44 the application for benefits on any ground." Quinn v. Blue Cross
45 and Blue Shield Ass'n, 161 F.3d 472, 477 (7th Cir. 1998)
46 (internal quotation marks and citations omitted). Similarly,

1 when an administrator fails to consider relevant evidence, we
2 "remand to the [administrator] with instructions to consider
3 additional evidence unless no new evidence could produce a
4 reasonable conclusion permitting denial of the claim or remand
5 would otherwise be a useless formality." Miller v. United
6 Welfare Fund, 72 F.3d 1066, 1071 (2d Cir. 1995) (internal
7 quotation marks and citations omitted). We think a remand to the
8 Committee is the appropriate remedy in this case. In so
9 concluding, we neither express nor mean to imply any opinion as
10 to whether denial of severance benefits to Pastore, after proper
11 explanation and investigation, would be reasonable.

12 We have considered Pastore's remaining arguments on appeal
13 with respect to other matters and find them to be without merit.
14 The district court's judgment as to those issues will be
15 affirmed.

16 For the foregoing reasons, the judgment of the district
17 court is hereby AFFIRMED in part and VACATED in part, and the
18 case is REMANDED for further proceedings.

19 FOR THE COURT:

20 ROSEANN B. MACKECHNIE, Clerk

21 _____

22 By: