UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARK BERUBE, on behalf of himself and all others similarly situated,
Plaintiff,

v. **Case No. 20-C-1783**

ROCKWELL AUTOMATION, INC., et al.,
Defendants.

DECISION AND ORDER

Plaintiff Mark Berube alleges that the Rockwell Automation Pension Plan violates § 205(d) the Employee Retirement Income Security Act of 1974 ("ERISA") because it provides qualified joint and survivor annuities to participants that are not actuarially equivalent to a single annuity for the life of the participant. *See* 29 U.S.C. § 1055(d)(1)(B). Before me now is plaintiff's motion for class certification under Federal Rule of Civil Procedure 23.

I. BACKGROUND

Plaintiff's claims involve the design of pension plans and related concepts such as actuarial equivalence. For this reason, I begin by providing background on the relevant concepts.

A. Background on Pension Plans and Actuarial Equivalence

The Plan is a "defined benefit plan," which is what most people would call a pension plan. 29 U.S.C. § 1002(35); *Thole v. U.S. Bank N.A.*, __ U.S. __, 140 S. Ct. 1615, 1618 (2020). Such plans define a fixed monthly payment that the participant will begin receiving at retirement. (Expert Report of Thomas S. Terry at 85; ECF No. 57-1.) The amount of

the monthly payment is typically determined by a formula based on the participant's years of service and earnings history. (*Id.*) In contrast, a "defined contribution plan," such as a 401(k), is a plan in which the participant or the employer—or both—contributes money to an account maintained by the plan. (*Id.* at 85 n.100.)

In a defined contribution plan, the amount of money paid to the participant over the course of retirement is determined by the amount of money in the account at the time of retirement. In a defined benefit plan, however, the amount of money that will be paid depends on the number of monthly payments. The number of monthly payments, in turn, is determined by the form of the annuity payment. Annuity forms commonly seen in pension plans are single life annuities, ten-year certain and life annuities, and joint and survivor annuities. (Terry Report at 86.) A single life annuity ("SLA") is an annuity payable monthly for the duration of the retiree's lifetime. (*Id.*) A ten-year certain and life annuity ("10CLA") is an annuity payable monthly for the duration of the retiree's lifetime, but for no less than ten years. (*Id.*) If the retiree dies within ten years, annuity payments will continue to the retiree's beneficiary until ten years have passed. (*Id.*) A joint and survivor annuity ("JSA") is an annuity payable monthly for the duration of the retiree's lifetime, with all or a portion of that annuity payable to the surviving beneficiary after the retiree's death and for the duration of the surviving beneficiary's lifetime. (*Id.*) Different variations of JSAs are characterized by the percentage of the retiree's monthly annuity payment that is paid to the surviving beneficiary after the retiree's death. (*Id.*) A 100% JSA, for example, pays the retiree's surviving beneficiary the same monthly amount as the participant received during his lifetime, while a 50% JSA pays the retiree's surviving beneficiary 50% of the monthly benefit the retiree received while alive. (*Id.*)

Plan documents typically define a "normal form" of the annuity, which is the form in which the monthly benefit determined by the formula using years of service and earnings history will be paid at normal retirement age *without making any adjustment to the amount produced by the formula*. (*See* Terry Report at 85.) For example, a plan might provide that benefits will be paid in the form of a single life annuity, in which case the participant will receive the amount produced by the formula each month for the rest of his life. However, plans also allow participants to choose to receive their retirement benefits in other forms, such as in a different annuity form or in a lump sum. (*Id.* at 85–86.)

Importantly, different annuity forms have different values when viewed from the vantage point of the participant on his or her retirement date. The actual value of any annuity is not known for certain until the participant and any beneficiary die and the number of payments made can be added up. (Terry Report at 88 & n.104.) However, the value of an annuity can be calculated at the time of retirement based on the number of *expected* monthly payments. (*See id.* at 88.) This number changes depending on annuity form. For example, a joint and survivor annuity is more valuable to a participant than a single life annuity of the same monthly amount because a JSA is expected to be paid over a longer period—the lifetimes of both the participant and the beneficiary rather than the lifetime of the beneficiary alone. (*Id.*)

To account for the difference in value among annuity forms, a plan will typically adjust the amount produced by the plan's benefit formula if the participant selects an annuity form other than the normal form specified by the formula. (*Id.*) Such adjustments are based on actuarial assumptions that are designed to make the benefit forms "actuarially equivalent" to each other. (Expert Report of David Pitts ¶ 14, ECF No. 55-5.)

Actuarial equivalence is a term used by actuaries to describe when two distinct payment streams have equal actuarial present values. (*Id.* ¶ 9.) A present value is the value of a payment stream as of a given date, with each payment adjusted for the time value of money, *i.e.*, the fact that a dollar today is generally worth more than a dollar in the future. (*Id.*) Adding the word "actuarial" incorporates assumptions about the uncertainty of future events. (*Id.* ¶ 10.) Thus, an actuarial present value recognizes that the payment stream may be contingent on other factors. (*Id.*) The selection of actuarial assumptions about factors such as mortality and interest rates are central to actuarial present value calculations. (*Id.* ¶ 11.) Under actuarial standards, each assumption should reflect the actuary's best estimate of what is most likely to occur in the future. (*Id.*)

If two annuity forms are actuarially equivalent to each other, then they are equally valuable to the participant at the time of retirement and, from the plan's perspective, equally costly to fund. (Terry Report at 89–90; Pitts Report ¶ 14.) Thus, when a participant selects a benefit form other than the normal form specified by the plan's formula, a plan will apply actuarial assumptions to produce a monthly benefit payment that is actuarially equivalent to the payment that the participant would have received had he selected the normal form. For example, if the plan provides that the normal form is a single life annuity and the participant elects to receive benefits in the form of a joint and survivor annuity, then the plan will apply actuarial assumptions to reduce the monthly payments produced by the formula by an appropriate amount. (Pitts Report ¶ 13.)

B. The Rockwell Plan

The Plan is a defined benefit plan sponsored by defendant Rockwell Automation, Inc. It includes 36 "sub-plans" that contain the terms of plans that were sponsored by

companies that Rockwell acquired over the years. The present case concerns two such sub-plans: the B006 Sub-Plan and the B001 Sub-Plan. Plaintiff has attached excerpts from these sub-sub plans to the Declaration of Douglas P. Needham, ECF No. 55. The B006 Sub-Plan is Exhibit 2 (ECF No. 55-2) and the B001 Sub-Plan is Exhibit 3 (ECF No. 55-3).

The B006 Sub-Plan specifies that the normal form of benefit payments for unmarried participants is a single life annuity. (B006 Sub-Plan § 7.010(a).) The Sub-Plan then provides that the normal form for married participants is a 50% joint and survivor annuity "which is the Actuarial Equivalent of the [SLA] which the Participant would have received . . . if the Participant had not been married." (*Id.* § 7.010(b).) Although the Sub-Plan describes this joint and survivor annuity as the "normal form" for participants who are married, it should be noted that the monthly payment associated with the annuity is not the unadjusted monthly amount determined by the Sub-Plan's formula using years of service and earnings history. Instead, that monthly amount produces a monthly payment for a single life annuity, and then the Plan adjusts that amount using actuarial assumptions to produce a 50% JSA that the Plan believes is actuarially equivalent to the single life annuity that the participant would have received had he not been married. (*Id.*)

The B001 Sub-Plan specifies that the normal form of benefit payments for unmarried participants is a ten-year certain and life annuity. (B001 Sub-Plan § 7.010(a).) The Sub-Plan then provides that the normal form for married participants is a 50% JSA "which is the Actuarial Equivalent of the [10CLA] which the Participant would have received . . . if the Participant had not been married." (*Id.* § 7.010(b).) Like with the B006 Sub-Plan, the monthly benefit amount produced by the B001 Sub-Plan's formula using

years of service and earnings history yields an annuity in the normal form paid to unmarried participants, which for the B001 Sub-Plan is a 10CLA. If the participant is married, the Plan adjusts that monthly amount using actuarial assumptions to produce a 50% JSA that the Plan believes is actuarially equivalent to the 10CLA that the participant would have received had he not been married.[1]

To convert benefits from the normal form for unmarried participants to a JSA for married participants, the Plan uses formulas specified in Exhibits 4A, 4B, 4C, and 4D to the main Rockwell Plan, which are based on actuarial assumptions. (ECF No. 55-1 at 11–29 of 29.) According to plaintiff, these formulas are based on the 1971 Group Annuity Mortality Table and a 7% interest rate. They have not changed since the Plan adopted them in the 1980s. (Pl. Br. on Class Cert. at 3, ECF No. 54.) For certain participants in the B006 Sub-Plan, JSA benefits are calculated using the UP-84 Mortality Table and a 6% interest rate for benefits earned before 1998 and the formulas in Exhibit 4A–4D for benefits earned thereafter. (*Id.*)

To actually perform the conversion, the Plan takes the amount of the normal annuity form for unmarried participants and then applies the relevant exhibit to produce a JSA. For those participants who accrue benefits in the form of an SLA, the Plan uses Exhibits 4B and 4C to identify a reduction factor that is then multiplied by the amount that

[1] The excerpts from the B001 and B006 Sub-Plans that plaintiff has filed indicate that the normal form for B006 participants is an SLA and that the normal form for B001 participants is a 10CLA. However, various references in the record suggest that some B001 participants may accrue benefits in the form of an SLA and that some B006 participants may accrue benefits in the form of a 10CLA. This possibility does not affect my analysis. As we will see, the important point is that some members of the proposed class accrue benefits in the form of an SLA, while others accrue benefits in the form of a 10CLA.

would have been payable as an SLA. (Def. Br. on Class Cert. at 4, ECF No. 56.) For those participants who accrue benefits in the form of a 10CLA, the Plan uses Exhibits 4A and 4D to identify a reduction factor that is then multiplied by the amount that would have been payable as a 10CLA. (*Id.*)

C. Plaintiff's Claims and Proposed Class Definition

Plaintiff receives his pension benefits under the B006 Sub-Plan and accrued them in the form of an SLA. At the time of his retirement, plaintiff was married, and he elected to receive his benefits in the form of a 50% JSA. To convert plaintiff's benefit from an SLA to a 50% JSA, the Plan used Exhibit 4B to identify a reduction factor and then applied that factor to the SLA to reduce the monthly payment to the amount for a 50% JSA. Exhibit 4B consists of a table of formulas that produce conversion factors. (ECF No. 55-1 at 17 of 29.) There is a formula for each age and JSA percentage. Plaintiff was 65 at the time of retirement and elected a 50% JSA, so the Plan used the formula corresponding to that age and JSA percentage. After entering plaintiff's spouse's age into the formula, the Plan produced a conversion factor of 0.8790, meaning that plaintiff's payments in the form of a 50% JSA are 87.90% of the payments he would have received in the form of an SLA. Plaintiff's monthly SLA benefit would have been $1,241.68. Multiplying this amount by .8790 produces a monthly benefit of $1,091.44, which is the benefit plaintiff currently receives.

Plaintiff contends that the actuarial assumptions underlying Exhibit 4B are outdated because they are based on decades-old mortality tables that do not reflect current mortality expectations. Thus, he contends that his JSA benefits are not actuarially equivalent to the SLA benefits he accrued. Plaintiff's actuarial expert opines that, had the

Plan used reasonable actuarial assumptions based on updated mortality tables, the Plan would have provided plaintiff with a 50% JSA that was 91.25% of his SLA rather than 87.9%. This would have increased his benefit amount by $41.58 a month.

Plaintiff alleges that the Plan's use of outdated mortality assumptions violates a provision of ERISA that requires a Plan to offer a "qualified joint and survivor annuity" ("QJSA") to married participants that is "the actuarial equivalent of a single annuity for the life of the participant." 29 U.S.C. § 1055(d)(1)(B). Under the B006 Plan, the 50% JSA is a QJSA and therefore must comply with the actuarial equivalence requirement of § 1055(d)(1)(B). Plaintiff brings various claims for relief under ERISA to redress this alleged violation, including claims for declaratory relief, plan reformation, and breach of fiduciary duty.

In addition to bringing these claims on his own behalf, plaintiff proposes to represent a class of other married participants in the Rockwell Plan who receive benefits under the B001 or B006 Sub-Plans in the form of a QJSA. He contends that the Plan used the same outdated actuarial assumptions that were used to convert his benefits to a JSA to convert the benefits of the proposed class members. He also contends that, had the Plan used reasonable actuarial assumptions to convert the proposed class members' annuities, each class member would be receiving higher monthly benefits. Plaintiff thus moves to certify the following class:

> All married participants (and their beneficiaries) of the B006 Sub-Plan and the B001 Sub-Plan that began receiving pension benefits in the form of a joint and survivor annuity on or after January 1, 2015.

(Mot. for Class Cert. at 1, ECF No. 53.) This class would contain 438 members. Defendants oppose class certification.

II. DISCUSSION

To be certified, a proposed class must satisfy the requirements of Federal Rule of Civil Procedure 23(a), as well as one of the three alternatives in Rule 23(b). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). The Rule 23(a) requirements are numerosity, typicality, commonality, and adequacy of representation. *Id.* The Rule 23(b) alternatives correspond to the three different "types" of class actions. Rule 23(b)(1) generally applies in cases in which individual actions would result in incompatible standards or which involve multiple claims to a limited fund. 2 Newberg and Rubenstein on Class Actions §§ 4:5 & 4:16 (6th ed.), Westlaw (database updated Dec. 2022). Rule 23(b)(2) generally applies in cases involving injunctive or declaratory relief, and Rule 23(b)(3) generally permits damages class actions when common questions of law or fact predominate over individualized issues.

In the present case, there is no dispute that the numerosity requirement is satisfied, as the proposed class would contain more than 400 members. However, the remaining Rule 23(a) requirements are disputed. The principal dispute, which affects all remaining requirements but primarily typicality, pertains to the class definition. Under plaintiff's definition, the proposed class would contain participants in the B006 and B001 Sub-Plans who accrue benefits in the form of either an SLA or a 10CLA. Plaintiff participates in the B006 Sub-Plan and accrued benefits in the form of an SLA. No other person has stepped forward to represent participants in the B001 Sub-Plan or those class members who accrued benefits in the form of a 10CLA. Defendants contend that differences between how members of the proposed class accrued benefits prevents class certification.

Plaintiff contends that such differences do not pose a problem for class certification because the main common question in this case (whether the Plan uses unreasonable actuarial assumptions) affects all proposed class members in the same way and causes them all to suffer the same harm (namely, a reduction in their monthly pension benefit). However, as discussed below, that would be true only if § 1055(d) is interpreted in a certain way. And it turns out that the relevant question of statutory interpretation does not affect plaintiff's claim at all.

Plaintiff and approximately half of the proposed class accrued their benefits in the form of an SLA, while the other half accrued benefits in the form of a 10CLA. (Terry Report at 26 (Figures 4 & 5).) Because the class is limited to married participants who elected to receive benefits in the form of a JSA, all class members have had their benefits adjusted using the actuarial assumptions that underlie the tables attached to the main Rockwell Plan. The legal claim at the core of this case is that those assumptions are unreasonable and therefore do not produce QJSAs (qualified joint and survivor annuities) that satisfy 29 U.S.C. § 1055(d)(1)(B)'s actuarial equivalence requirement. That requirement states that the QJSA must be "the actuarial equivalent of *a single annuity for the life of the participant*." *Id.* (emphasis added). The italicized language describes what the parties refer to as an SLA, a single life annuity. Plaintiff concedes that a 10CLA is not a single annuity for the life of the participant. (Reply Br. at 2 n.2, ECF No. 59.)

Because plaintiff accrued his benefits in the form of an SLA, it is clear that § 1055(d)(1)(B) required his JSA to be actuarially equivalent to the unadjusted benefits he accrued under the Plan's formula using years of service and earnings history. However, for those class members who accrued benefits in the form of a 10CLA, things

are different. For those class members, it is still the case that, pursuant to § 1055(d)(1)(B), the JSA they received had to be actuarially equivalent to "a single annuity for the life of the participant." But because those class members accrued their benefits in the form of a 10CLA rather than an SLA, we cannot measure compliance with § 1055(d)(1)(B) by comparing the JSAs those class members received to the unadjusted benefits they accrued, like we can for plaintiff. Instead, to determine actuarial equivalence for the 10CLA group, their accrued benefits must first be converted to SLAs and then compared to the JSAs they received.

The question thus arises: What actuarial assumptions should be used when converting unadjusted 10CLA payments to SLAs that can be compared to the JSAs that the proposed class members received? Defendants contend that plaintiff's actuarial expert employed the following methodology. First, he converted the 10CLA into an SLA using *the Plan's* actuarial assumptions, which plaintiff's expert contends are unreasonable. Second, he used *his own* actuarial assumptions, which he contends are reasonable, to convert the SLA to a JSA. (Terry Report at 5–8.)

Plaintiff disputes that his expert performed conversions in the two-step manner described by defendants. He contends that his expert simply took the SLA that the Plan *offered* to each class member at the time of retirement and then applied his own, reasonable actuarial assumptions to that amount to produce an actuarially equivalent JSA, just as he did for the class members who accrued benefits in the form of an SLA. However, before the Plan offered those class members who accrued benefits in the form of a 10CLA an optional SLA, the Plan used its actuarial assumptions to convert the 10CLA payment into an SLA payment. *See* Terry Report ¶ 184 ("[S]tarting with the benefit

amount payable in normal form, the Plan document provides for the calculation of an optional form of benefit payable as an SLA. The formula for this conversion is also defined as part of the Plan's actuarial equivalence provisions."). And because plaintiff alleges that the Plan's actuarial assumptions are unreasonable, plaintiff's expert is necessarily comparing the JSAs received by the 10CLA group to SLAs that were produced using allegedly unreasonable actuarial assumptions. Thus, although plaintiff's expert may not have used the two steps described by defendants, the point made by defendants remains true: for the 10CLA group, plaintiff's expert determined actuarial equivalence by comparing the JSAs they received to SLAs produced using the very actuarial assumptions that plaintiff contends are unreasonable.

Defendants point out that, had plaintiff's expert used his own, allegedly reasonable actuarial assumptions to convert a 10CLA to an SLA for each class member in the 10CLA group, then the SLA the class member was offered would have been *lower* than the SLA calculated using the Plan's allegedly unreasonable actuarial assumptions. (Terry Report at 9 & ¶¶ 247–50.) Further, if plaintiff's expert's assumptions were used to convert 10CLAs to JSAs, the JSAs that some members of the 10CLA group are currently receiving would have been lower than they are now. (*Id.*) For some members, the JSA amount would be higher, but, on average, the JSA benefits for the 10CLA group would have been lower. (*Id.*)

Plaintiff does not dispute that defendants' have properly described the implications of consistently using his expert's actuarial assumptions to convert 10CLA benefits to SLAs and JSAs. That is, he does not dispute that those assumptions would produce lower SLA and JSA benefits for some members of the 10CLA group. However, he contends

that this is not a problem for class certification because the manner in which the class member accrued benefits is not relevant to the actuarial equivalence requirement of § 1055(d). He notes that this section requires that actuarial equivalence be determined based on "a single annuity for the life of the participant" rather than the "normal form" of benefit. (Reply Br. at 3.) But this takes us back to the question of the meaning of "a single annuity for the life of the participant" in the context of a participant who did not accrue benefits in that form. Plaintiff contends that this language refers to the optional SLA that the Plan *offered* to the participant at the time of retirement. *See* Reply Br. at 1 ("Each Class Member is receiving a JSA that is not actuarially equivalent *to the SLA offered under the Plan* in violation of ERISA § 205(d)." (Emphasis added)). But § 1055(d) does not explicitly mention the SLA "offered by the plan"; it refers instead to "a single annuity for the life of the participant." This could mean an SLA produced by converting the participant's accrued benefits into an SLA using *reasonable* actuarial assumptions, even if the Plan used different, unreasonable actuarial assumptions when calculating the SLA that it offered the participant at the time of retirement. If this were the case, then to determine compliance with § 1055(d) for the 10CLA group, reasonable actuarial assumptions would have to be used to convert the 10CLA payments to *both* SLAs and JSAs. Determining whether plaintiff's argument is correct thus presents a question of statutory interpretation.

Importantly, this question of statutory interpretation does not arise in plaintiff's individual claim. That is so because he accrued benefits in the form of an SLA in the first place and thus was never offered an optional SLA. In other words, the Plan did not use actuarial assumptions to calculate the SLA it offered plaintiff, because that SLA was

simply his unadjusted, accrued benefit that the Plan produced using its formula based on years of service and earnings history. Thus, to prevail on his own claim, plaintiff does not need to litigate the meaning of "a single annuity for the life of the participant" as applied to a participant who did not accrue benefits in that form. However, for those class members in the 10CLA group, this is a central issue, as the court must identify the appropriate comparator SLAs before it can determine whether the JSAs they received satisfy § 1055(d)'s actuarial equivalence requirement. And under one interpretation of "a single annuity for the life of the participant," many members of the 10CLA group will have suffered no injury from the alleged lack of actuarial equivalence and would instead be better off with their current annuity payments.

Because plaintiff's individual claim will be resolved without answering one of the central issues that affects every member of the 10CLA group, he cannot represent a class that includes members of that group. In terms of Rule 23(a), his claims are not "typical of the claims" of the 10CLA group. The typicality requirement "limit[s] the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Here, the claims of the 10CLA group present the legal issue of how to interpret "a single annuity for the life of the participant" when the participant did not accrue benefits in that form. Plaintiff's individual claim does not present that issue. Thus, his claim does not fairly encompass the 10CLA group's claim. Further, the Seventh Circuit understands the typicality requirement to mean that "there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). Because plaintiff's claim

does not present an issue that is central to the claims of the 10CLA group, his claim is not congruent with the claims of that group. *See also Culver v. City of Milwaukee*, 277 F.3d 908, 911–12 (7th Cir. 2002) (finding that class representative's claim is not typical of the claims of the class when representative would have to "get into issues . . . that are inapplicable to his own situation"); *Clarke ex rel. Pickard v. Ford Motor Co.*, 228 F.R.D. 631, 634 (E.D. Wis. 2005) ("the premise of the typicality requirement is that 'the named plaintiff who proves his own claim would also prove the claim of the entire class'").

Because plaintiff's claim is not typical of the claims of the class he proposes to represent, that class cannot be certified. Although plaintiff's claim might be typical of the claims of others, like him, who accrued benefits in the form of an SLA, plaintiff has not moved, in the alternative, to certify such a class. Thus, I do not consider whether this smaller class could be certified. Moreover, plaintiff does not contend that another class representative—one who accrued benefits in the form of a 10CLA—could be found. Thus, I do not consider whether the problem with the current class definition could be solved by creating subclasses for the SLA and 10CLA groups. *See Culver*, 277 F.3d at 912 (noting that problems with class definition might be cured through creation of subclasses, but not considering the issue further because plaintiff did not propose such an approach).

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that plaintiff's motion for class certification is **DENIED**.

Dated at Milwaukee, Wisconsin, this 3rd day of April, 2023.

/s/Lynn Adelman
LYNN ADELMAN
United States District Judge