

Hammer v. First Unum Life Ins. Co.
C.A.2 (N.Y.),2005.
This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,Second Circuit.

David **HAMMER**, Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY,

Defendant-Appellee.

No. 05-1663-CV.

Dec. 23, 2005.

Appeal from a final decision of the United States District Court for the Southern District of New York ([Casey, J.](#)).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Christopher P. Foley ([Patrick F. Foley](#), on the brief), McCormick Dunne & Foley, New York, N.Y., for Appellant.

Patrick W. Begos (Evan L. Gordon, on the brief), Begos & Horgan, LLP, Westport, CT, for Appellee.

PRESENT: Hon. [JAMES L. OAKES](#), Hon. [GUIDO CALABRESI](#), and Hon. [RICHARD C. WESLEY](#), Circuit Judges.

**1 Prior report: [2004 WL 1900334](#); [2005 WL 525445](#)

SUMMARY ORDER

Plaintiff-Appellant David Hammer (“Hammer”) brought suit under the Employment Retirement Insurance Savings Act (ERISA), [29 U.S.C. § 1001 et seq.](#), to recover disability insurance benefits from his insurer, First Unum Life Insurance Company (“First Unum”). The district court granted summary judgment in First Unum's favor, and denied Hammer's motion for reconsideration. Hammer appeals both rulings.

We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on appeal.

In their briefs, the parties argue over whether, in light of an alleged violation of [29 C.F.R. § 2560.503-1\(h\)](#), the denial of benefits should be reviewed *de novo* or under the arbitrary and capricious standard. See [Nichols v. Prudential Ins. Co. of Am.](#), 406 F.3d 98, 109 (2d Cir.2005). They also debate whether Hammer, not having raised the issue initially, should now be heard to argue that *de novo* review *104 is appropriate. The standard of review, however, is not relevant to the disposition of this appeal.

The only question in this case is whether or not Hammer was engaged in “active employment,” and hence, covered under the terms of his employer's Group Long Term Disability Insurance Policy (“the Policy”) with First Unum, when he became disabled in February 2001. The Policy defines Hammer's “active employment” as working twenty or more hours a week, and Hammer does not contend that he satisfied this requirement. Instead, Hammer asserts that he was on a medical leave of absence, so that, under the terms of the Policy, his coverage continued as if he had been in active employment. But the Policy provides that coverage may be continued during a medical leave of absence only if, *inter alia*, the employer has approved the leave in writing. Hammer has produced no evidence of any written leave authorization. His claim must, therefore, be rejected.

We have considered all of Hammer's arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.