

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TRILBA HARTSOE	:	CIVIL ACTION
	:	99-429
v.	:	
	:	
KMART RETAIL DISTRIBUTION CENTER	:	
	:	
IRENE R. WEAKLAND	:	CIVIL ACTION
	:	99-461
v.	:	
KMART RETAIL DISTRIBUTION CENTER	:	

MEMORANDUM

BRODERICK, J.

APRIL 17, 2000

Presently before this Court are cross motions for summary judgment between the parties, Plaintiffs Trilba Hartsoe and Irene Weakland, and Defendant Kmart Retail Distribution Center, (“Kmart”), in the above-captioned actions. For the reasons which follow, Plaintiffs’ motions for summary judgment will be granted, and Defendant’s motions for summary judgment will be denied.

Background

The material facts of these cases, with which there are no genuine issues of dispute, may be summarized as follows. Plaintiffs, Trilba Hartsoe and Irene Weakland, filed the above actions in January, 1999, for the purpose of recovering attorney’s fees and costs in connection with their settlements with Defendant Kmart Retail Distribution Center. The underlying disputes which resulted in settlements arose from claims Plaintiffs made against Kmart pursuant to the Americans With Disabilities Act, 42 U.S.C. § 12205, (the “A.D.A.”). Plaintiffs Weakland and Hartsoe were hired by Kmart as full-time general warehouse workers in the Repack Department

in March, 1978, and March, 1979 respectively. Both Plaintiffs thereafter sustained injuries on the job. Both Plaintiffs returned to full-time work in new positions requiring a lesser level of physical activity. Subsequent to their reassignments, Plaintiffs claimed that they were being discriminated against with regard to overtime, promotions, and other benefits available to other full-time employees, in violation of the A.D.A. Plaintiffs further claimed that they suffered a loss of income and other benefits due to this adverse treatment.

As a result of these claimed violations, Plaintiffs filed charges with the Equal Employment Opportunity Commission, (the "E.E.O.C.") and the Pennsylvania Human Relations Commission. Kmart offered a Voluntary Early Retirement Program Package to Plaintiffs in exchange for the settlement of their claims. Plaintiffs accepted these offers and both signed an "Agreement and Release" stating in part:

I, [plaintiff], in exchange for the enhanced benefits referred to in Section VI, release and discharge Kmart Corporation . . . from all actions, causes of action, claims, demands, costs and expenses for damage which I now have on account of my employment with or retirement from the Company. This release includes, but is not limited to, any claim of discrimination on any basis. . .

Plaintiffs claim that the consideration provided in exchange for signing this relief constitutes a substantial advancement of their claims, and that they are thus prevailing parties and, as such, are entitled to attorney's fees and costs.

Plaintiffs then filed the instant actions in January, 1999 to recover the attorney's fees and costs incurred in connection with obtaining their settlements. The Clerk of the Court entered default, pursuant to Federal Rule of Civil Procedure 55(a), against Kmart in both cases on April 6, 1999. This Court held a hearing on January 10, 2000 for the purpose of considering whether the entry of default in both cases should be set aside. In a Memorandum and Order dated January

13, 2000, this Court ordered the default entered against Kmart in both cases to be set aside and ordered Kmart to file answers to Plaintiffs' complaints. Plaintiffs subsequently filed motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. Shortly thereafter, Kmart filed a cross-motion for summary judgment in both cases. Because there are no genuine factual issues of dispute and one party is entitled to judgment as a matter of law, this Court agrees with the parties that these cases are appropriate for disposition on summary judgment. See Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-47 (1986).

Analysis

Plaintiffs contend that they are entitled to an award of attorney's fees and costs, pursuant to 42 U.S.C. § 12205, for the successful resolution of their respective ADA claims. Section 12205 of the ADA states:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee, including litigation expenses, and costs. . .

Plaintiffs claim that Kmart's settlement offer of a voluntary early retirement package to them constituted a substantial advancement of their position and, as such, established Plaintiffs as prevailing parties entitling them to an award of attorney's fees. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Plaintiffs further claim that the issue of attorney's fees was not addressed in the settlement agreement. Conversely, Kmart argues that the language contained in its "Agreement and Release", heretofore set forth, which was signed by Plaintiffs, effectively waives Plaintiffs' ability to recover "a reasonable attorney's fee, including litigation expenses, and costs."

When the parties to a settlement agreement dispute whether the prevailing party waived

its statutory right to attorney's fees, "the burden is on the losing party to show that the settlement agreement clearly waived" this right. El Club Del Barrio, Inc., v. United Community Corps., 735 F.2d 98, 99 (3d Cir. 1984). In El Club Del Barrio, the Third Circuit rejected the "silence equals waiver" rule, by holding that, if the losing party desired to foreclose a suit for attorney's fees, it must place a stipulation to that effect in the settlement agreement. Id. at 101. See also Ashley v. Atlantic Richfield Co., 794 F.2d 128, 139 (3d Cir. 1986) ("[W]here a defendant seeks to settle its total liability on a claim, it shall be incumbent upon the defendant to secure an express waiver of attorney's fees. Silence will not suffice.").

The El Club Del Barrio holding was recently reaffirmed by the Third Circuit in Torres v. Metropolitan Life Ins. Co., 189 F.3d 331, 334 (3d Cir. 1999). In Torres, as in the case at bar, the settlement agreement did not contain a specific reference concerning a waiver of "a reasonable attorney's fee, including litigation expenses and costs." The defendant in Torres relied upon a section of the agreement which stated in part:

Without limitation, Plaintiff specifically releases all claims, charges, or demands asserted or assertable in the Pending Lawsuit, and all claims, charges, or demands arising from or relating to Plaintiff's relationship of any kind with the Released Parties, including without limitation any rights or claims Plaintiff may have under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991.

The defendant in Torres claimed that this language effectively waived Plaintiff's claim for attorney's fees. However, the Third Circuit, though conceding that the language of the release was broad, rejected defendant's waiver claim, holding that the language failed to expressly state that plaintiff's claim for attorney's fees was waived. Id. at 333. "If the parties to a settlement agreement wish to extinguish the prevailing party's claim for attorney's fees, they must do so

specifically and expressly in the terms of the agreement. Because the parties here did not do so, [plaintiff's] claim for attorney's fees was not waived." Id. at 333-34.

As in Torres, Kmart similarly relies upon a release which does not specifically and expressly waive the Plaintiffs' claims to attorney's fees. The release language of the settlement agreement states in relevant part:

I, [plaintiff], in exchange for the enhanced benefits referred to in Section VI, release and discharge Kmart Corporation . . . from all actions, causes of action, claims demands, costs and expenses for damage which I now have on account of my employment with or retirement from the Company. This release includes, but is not limited to, any claim of discrimination on any basis. . .

Despite Kmart's arguments to the contrary, Kmart's release, although broad, does not include the language required by the Third Circuit in Torres and El Club Del Barrio, explicitly stating that "a reasonable attorney's fee, including litigation expenses and costs" is waived by the plaintiff.

Because Kmart's release lacks this express language, this Court cannot conclude that Plaintiffs waived their claim to attorney's fees and costs. Therefore, the Plaintiffs' claims with respect to attorney's fees and costs survive, and summary judgment will be granted to the Plaintiffs for an award of a reasonable attorney's fee and costs.

An appropriate Order follows.

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ORDER

AND NOW, this 17th day of April, 2000; the Court having considered the parties' cross-motions for summary judgment and the responses thereto; the Court having determined that there are no genuine issues of material fact; for the reasons set forth in the Court's accompanying Memorandum of this date;

IT IS ORDERED: that the motions for summary judgment of Plaintiff Trilba Hartsoe and Plaintiff Irene Weakland are **GRANTED** for a "reasonable attorney's fee, including litigation expenses and costs";

IT IS FURTHER ORDERED: that the motions for summary judgment of Defendant Kmart are **DENIED**;

IT IS FURTHER ORDERED: that a hearing will be held in this United States Courthouse, Courtroom 10B, 601 Market Street Philadelphia, Pennsylvania before the Honorable Raymond J. Broderick on Wednesday, June 7, 2000 at 11:00 a.m. for the purpose of determining the propriety and amount of an award of attorney's fees and costs to which Plaintiffs may be entitled;

IT IS FURTHER ORDERED: that Plaintiffs shall file proposed findings of fact and

conclusions of law in support of their request for attorney's fees and costs on or before May 19, 2000;

IT IS FURTHER ORDERED: that Defendant shall file proposed findings of fact and conclusions of law on the issue of a reasonable award of attorney's fees and costs for Plaintiffs on or before May 26, 2000.

Raymond J. Broderick, J.