

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

FLORENCE HUNTER : CIVIL ACTION  
 :  
 v. :  
 :  
 FEDERAL EXPRESS CORP. : NO. 03-6711

MEMORANDUM

Dalzell, J.

July 15, 2004

After paying disability benefits to Florence Hunter for eight years, Federal Express Corporation ("FedEx") discontinued those benefits in December of 2002 because it determined that Hunter had failed to show that she was still entitled to them. Pursuant to Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132 (2004), Hunter brought this action to restore her disability benefits. The parties' motions for summary judgment<sup>1</sup> are now before us.

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<sup>1</sup> Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

## Factual Background

### A. The Plan

FedEx's Long Term Disability Plan (the "Plan"), see App.<sup>2</sup> 279-325, is an employee welfare benefit plan within the meaning of ERISA, see Stip. ¶ 1, 28 U.S.C. § 1002(1) (2004). Under the Plan, a covered employee is entitled to long term disability benefits if she submits "proof" that she "has incurred a Disability." App. 295. A "Disability" can mean either an "Occupational Disability"<sup>3</sup> or a "Total Disability,"<sup>4</sup>

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<sup>2</sup> The parties have submitted two filings entitled "Joint Stipulation of Facts." The first submission, filed on May 13, 2004, is a collection of documents that we refer to as their "Appendix." Filed on May 27, 2004, the second submission consists of 124 paragraphs of facts about which there is no dispute, and we refer to it as their "Stipulation."

<sup>3</sup> "Occupational Disability" means "the inability of a Covered Employee, because of a medically-determinable physical or mental impairment . . . , to perform the duties of his regular occupation." App. 290.

<sup>4</sup> "Total Disability" means "the inability of a Covered Employee, because of a medically-determinable physical impairment . . . , to engage in any substantially gainful activity for which he is reasonably qualified (or could reasonably become qualified) on the basis of his education, training or experience." App. 293. FedEx's January 1992 Employee Benefits manual (the "Summary Plan Description" of "SPD") includes slightly different language, explaining that "Total Disability" means that "you cannot, for physical reasons only, do any work on either a part-time or full-time basis, for which you have the training, education, or experience or for which you can obtain the education or training." App. 270.

Hunter makes much of the fact that a job with very few hours could be considered "part-time" without amounting to "substantially gainful activity." See, e.g., Pl.'s Br. at 9. Given its plenary authority to interpret the Plan's terms, see App. 316-17, we believe that FedEx could

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but all disabilities must be "substantiated by significant objective findings which are defined as signs which are noted on a test or medical exam and which are considered significant anatomical, physiological or psychological abnormalities which can be observed apart from the individual's symptoms." App. 287.

The Plan names FedEx as its Administrator and empowers the Administrator to "receive, evaluate and process all . . . claims and . . . allow payment of benefits under the Plan in accordance with its terms." See App. 285-86, 318. FedEx, however, elected to outsource the initial evaluation and processing of claims to Kemper. See App. 464-98. The Plan and the Kemper outsourcing agreement both recognize that FedEx has "sole and exclusive discretion" to determine whether it will pay long term disability benefits to any claimant under the Plan. App. 312; see also id. at 466, 469. To that end, the Plan explains that "[n]o Disability Benefit shall be paid . . . unless and until the Administrator has received . . . information sufficient for

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<sup>4</sup>(...continued)

appropriately construe the Plan's reference to "substantially gainful activity" to include at least some "part-time" work. For example, someone who could work thirty hours per week would probably not be entitled to receiving disability benefits. Someone who could work only ten hours per week, on the other hand, would probably be disabled, in spite of the residual capacity to perform that "part-time" work. At any rate, we need not dwell on this issue because our decision does not turn on the definition of "Total Disability" that FedEx applied in this case.

the Administrator to determine, in its sole and exclusive discretion that a Disability exists." App. 312.

If Kemper denies benefits to a claimant, then FedEx's Benefit Review Committee ("BRC") must "conduct[ a] review[] of denial of benefits and provid[e] the claimant with written notice of the decision reached." App. 315. The Plan vests the BRC with the authority "to interpret the Plan's provisions in accordance with its terms with respect to all matters properly brought before it," and its decision is "final, subject only to a determination by a court of competent jurisdiction that the committee's decision was arbitrary and capricious." App. 316-17; see also id. at 319.

When FedEx awards long term disability benefits, those benefits are deducted "exclusively out of the assets constituting the Trust Fund."<sup>5</sup> App. 310. Every fiscal year, FedEx contributes to this Trust Fund "in such amounts as are actuarially determined to be sufficient to fund on a level basis the benefits provided" under the Plan. Id. FedEx has no responsibility to make additional contributions to the Trust Fund if the fund lacks sufficient assets to pay the benefits due under the Plan. Id. On the other hand, FedEx's contributions to the Trust Fund are "irrevocabl[e]," and the Trust Fund's assets may be used only "for the exclusive

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<sup>5</sup> More precisely, Kemper pays the benefits, and then FedEx transfers funds from the Trust Fund to Kemper's bank account to reimburse Kemper for the amounts that it had paid to Plan beneficiaries. See App. 474-88.

purpose of providing Disability Benefits to Covered Employees and for defraying reasonable expenses of administering the Plan." App. 311-12.

Even after an employee has begun to receive benefits, she "may be required, as the Administrator shall determine, to submit continuing proof of Disability." App. 312. If an employee "fails to provide information, as requested by, and within the time set by, the Administrator," her benefits may be terminated. App. 297; see also id. at 313.

B. Hunter's Condition

Florence Hunter began her career at FedEx on January 9, 1984. Stip. ¶ 17. She stopped working on July 15, 1994 due to complications with a pregnancy, App. 46, and she began to receive short term disability benefits on July 29, 1994, Stip. ¶ 21. On October 13, 1994, a few days after giving birth to her child, Hunter experienced a cerebral vascular accident ("CVA") -- that is, a left posterior occipital parietal infraparenchymal hemorrhage. App. 46-47. As a result of the CVA, Hunter "essentially lost her ability to read as well as most of her ability to comprehend and utilize information received visually." App. 47. Apparently recognizing the seriousness of her condition, FedEx continued to provide a short term disability benefits to Hunter until her twenty-six weeks of eligibility ended on January 26, 1995. Stip. ¶ 21; App. 516. As soon as her eligibility for

short term disability benefits expired, Hunter immediately began to receive long term disability benefits pursuant to the Plan. Stip. ¶ 22.

A few weeks later, Hunter applied for disability insurance benefits under the Social Security Act, 42 U.S.C. § 423 (2004). App. 48. Apparently to substantiate her Social Security application, Hunter arranged for Dr. Roderick J. Hafer to conduct a neuropsychological evaluation on July 1, 1996.

Dr. Hafer observed that -- on a "subjective measurement" of her reading ability -- Hunter could not "sustain a concentrated effort for more than three or four minutes" and could not "comprehend the meanings of words or sentences" for more than that length of time. App. 80. He also noted "[s]ignificant deficits . . . in both Verbal and Visual memory, with somewhat more difficulty in the ability to process and retain information when presented verbally." App. 82. Despite relatively mild impairment in most areas, Dr. Hafer concluded that the cumulative effect of Hunter's deficits resulted in "severe cognitive impairment." App. 83.

The Social Security Administration's ALJ asked Dr. Milton Alter, a neurologist, to review Dr. Hafer's report and Hunter's other medical records. Relying on Dr. Alter's opinion that Hunter suffered a severe impairment, the ALJ awarded disability insurance benefits on December 11, 1996. App. 46-48. There is nothing in the record to suggest that

Hunter has not continued to receive Social Security benefits since late 1996.

In September, 2002, Kemper began to investigate whether Hunter remained eligible for long term disability benefits. App. 236. Dr. Jeffrey Perlson, Hunter's primary care physician, reported, on September 19, 2002, that Hunter could work at a job that did not require reading. App. 44, 189. When Kemper received Dr. Perlson's report, it arranged an independent medical examination ("IME") to confirm whether Hunter could in fact return to some job. See App. 238-42. Dr. Grant T. Liu<sup>6</sup> conducted this IME of Hunter on November 19, 2002. App. 182.

Dr. Liu took Hunter's medical history, reviewed some of her medical records, and examined her body. Still, he had "no formal reports of any CAT scans or MRI's or descriptions of her hospitalizations," and he did not perform a "formal visual field test." App. 183. Perhaps because of these limitations, Dr. Liu found "no visual field deficits or acuity deficits" and "no objective evidence for visual reading problems." Id. Thus, he concluded that there was

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<sup>6</sup> Although the record does not reveal Dr. Liu's precise speciality, his report indicates that he is a member of the University of Pennsylvania Medical Center's Department of Neurology and Ophthalmology. See App. 182.

"no reason why [Hunter] cannot work a minimum of twenty-five hours a week at an occupation."<sup>7</sup> Id.

On November 27, 2002, after receiving Dr. Liu's report, a Kemper employee telephoned Hunter to inform her that in three days she would no longer receive long term disability benefits. App. 242-44. Kemper confirmed the decision to terminate benefits in a December 6, 2002 letter, explaining that "clinical documentation . . . d[id] not substantiate an inability to work a minimum of twenty-five hours per week at any compensable occupation." App. 68. On December 24, 2002, Hunter's attorney notified Kemper that she planned to appeal the termination of her long term disability benefit. App. 70.

Soon after appealing Kemper's decision, Hunter underwent two important medical tests. First, Dr. Paul Suscavage, an optometrist, performed an eye examination on December 28, 2002. Though Dr. Suscavage noted that Hunter had "[g]ood central vision with current use of spectacles," he also found "marked field loss" and "stereo vision reduced to 25%." App. 39. The second examination was an MRI of Hunter's brain that Dr. Ira J. Braunschweig, a radiologist, performed on December 30, 2002. The MRI produced "[n]o

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<sup>7</sup> Dr. Liu did not render an opinion as to whether Hunter could engage in substantially gainful activity for which she is reasonably qualified (or could reasonably become qualified) on the basis of her education, training or experience. See supra note 4.

evidence of acute/subacute infarction, extra-axial fluid collection or suspicious mass lesion," but it did reveal "an area of chronic hemorrhagic infarction . . . in the left occipital lobe." App. 28. For some reason, several months passed before Hunter's attorney provided these two reports to Kemper. See App. 20-25.

Soon after her appointments with Dr. Suscavage and Dr. Braunschweig, Hunter underwent a neuropsychological evaluation. Over the course of the two-day evaluation in January, 2003, Dr. Joseph I. Tracy identified her "most significant deficits" as being in "visual perceptual and visuospatial reasoning." App. 166. Other deficits included "difficulty judging relationships, reproducing them, reasoning in visuospatial terms and engaging in rapid visual scanning." Id. Hunter also showed "weak conceptual rule learning and difficulty with coordinated movements" and "reduced mental speed and flexibility." Id. Another "area of deficit [was] memory"; Hunter had "reduced scores in both visuospatial and verbal memory," including "[m]ost notably . . . reduced retention for the material over time." Id. Dr. Tracy considered his findings consistent with those of Dr. Hafer, except perhaps that Dr. Tracy identified "anterior dysfunction" that had eluded Dr. Hafer. Id. Based on these

findings, Dr. Tracy "consider[ed] . . . Hunter disabled."<sup>8</sup>  
Id.

Dr. Jay Klazmer met with Hunter on January 23, 2003, and he noted that Hunter continued to "manifest difficulties with reading, night driving, recurring headaches, memory problems and word retrieval difficulties." App. 156. After reviewing her recent MRI and speaking with Dr. Tracy, Dr. Klazmer concluded that the effects of her CVA continued to "preclude[] her from returning to work in her former capacity and will impair her ability to obtain any type of commensurable employment for which she was reasonably qualified." App. 157. Apparently believing that this opinion sufficed to establish Hunter's disability, Hunter's attorney informed Kemper on March 12, 2003 that it could consider her appeal. App. 173.

### C. Peer Reviews

After receiving the March 12 letter, Kemper forwarded Hunter's medical records<sup>9</sup> to three doctors for "peer review" of the seriousness of her condition. Kemper asked the doctors to determine whether the records "reveal[ed] a

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<sup>8</sup> Dr. Tracy also explained that Hunter was "not . . . capable of working at her previous levels," App. 167, and it is not clear what relationship, if any, this observation had to his conclusion that Hunter was "disabled."

<sup>9</sup> Kemper forwarded the records from Drs. Hafer, Perlson, Liu, Tracy, and Klazer that we have already discussed. Records from Dr. Suscavage and Braunschweig were not sent because Hunter's attorney had not yet provided them to Kemper. See App. 20-25.

functional impairment that would preclude [Hunter] from engaging in any compensable employment for a minimum of twenty-five hours per week."<sup>10</sup> App. 205, 208, 211. The doctors issued written opinions on this question without examining Hunter for themselves.

The first peer reviewer, Dr. Gerald Goldberg, a neurologist, relied heavily on Dr. Liu's relatively positive assessment of Hunter's condition, but he failed to note that Dr. Liu lacked the benefit of an MRI and a "formal visual field test" when he formulated his opinion. See App. 205. Although Dr. Goldberg recognized that Dr. Klazmer had reviewed an MRI, Dr. Goldberg simply concluded that the brain damage revealed by the MRI "would not be a deterrent for working at any occupation," without explaining why he rejected Dr. Klazmer's opposite conclusion. Id. Dr. Goldberg also admitted that he could not comment on the effect of the deficits that Dr. Tracy's neuropsychological testing identified. App. 206. Nevertheless, Dr. Goldberg concluded that "there is nothing [in the evidence that he reviewed] to suggest that she has a functional impairment that would preclude the claimant from engaging in any compensable employment for a minimum of twenty five hours per week." Id.

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<sup>10</sup> Presumably, Kemper posed this question because it erroneously believed that the Plan's definition of "disability" made reference to an ability to work at least twenty-five hours per week. See supra note 4.

To address Dr. Goldberg's concerns that a neuropsychologist evaluate Dr. Tracy's findings, Kemper also solicited a peer review from Dr. Devon Carpenter. Dr. Carpenter focused principally on Dr. Hafer's 1996 report and Dr. Tracy's 2003 report, and he concluded that "even though [Hunter] continues to report the presence of multiple cognitive complaints, the results of the intellectual and memory assessment measures do not support the presence of a functional impairment which would preclude [her] from engaging in any compensable employment a minimum of 25 hours per week, especially since cognitive scores typically stabilize or improve following a stroke, not decline."<sup>11</sup> App. 208. Notwithstanding his prediction that Hunter's cognitive abilities would "stabilize or improve," Dr. Carpenter did not mention that Dr. Tracy found few significant differences between Hunter's condition in 2003 and the condition that Dr. Hafer described in 1996. See App. 166.

Finally, Kemper asked Dr. Russell Superfine, an internist, for his opinion about the severity of Hunter's impairments. Recognizing the limitations of his "internal medicine perspective," Dr. Superfine "deferred to [Kemper's] concurrent neurology and neuropsychology reviews" for an evaluation of Hunter's cognitive limitations. App. 212. In

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<sup>11</sup> Dr. Carpenter later elaborated that "it would not be expected that [Hunter] would experience significant changes in her neurological status" nine years after her stroke. App. 53.

his opinion, however, Hunter's other limitations would not preclude her "from performing any compensable occupation a minimum of twenty five hours per week." Id.

While considering the peer review reports that Drs. Goldberg, Carpenter, and Superfine submitted, FedEx noticed that Kemper had solicited opinions as to whether Hunter could work twenty-five hours per week when the Plan defined Total Disability to mean an inability to engage in "substantially gainful activity." See supra note 4. The BRC decided to defer consideration of Hunter's appeal "to obtain additional information from Kemper." App. 5; App. 13 (reporting FedEx's request to "correct the disability definition in the peer reviews"). On April 24, 2003, Kemper sent Hunter a letter that was much the same as the December 6, 2002 letter that had informed her that her long term disability benefits had been terminated, except that the revised letter referenced the correct definition of Total Disability. Compare App. 15-16 (revised letter) with App. 68-69 (original letter). Kemper also asked Drs. Goldberg, Carpenter, and Superfine to consider whether the medical records that they reviewed "reveal[ed] a functional impairment that would preclude [Hunter] from engaging in any part-time or full-time job." App. 53, 55, 57. All three doctors noted that the new definition of disability did not change their conclusions that Hunter was not disabled.

While Kemper's three doctors formulated their revised opinions, Hunter's attorney finally submitted the reports prepared by Drs. Suscavage and Braunschweig. App. 20-25. Kemper appears to have realized that these newly submitted reports required review, so it submitted them to Dr. Goldberg and to Dr. Gil Epstein, an ophthalmologist, for their opinions. In early June of 2003, Drs. Goldberg and Epstein reviewed the entire medical record that we have discussed so far.

Dr. Goldberg's third opinion, which is dated June 11, 2003, mentions "some additional data that was presented," App. 60, but it discusses neither Dr. Suscavage's eye exam<sup>12</sup> nor Dr. Braunschweig's MRI. Rather, Dr. Goldberg again relied on Dr. Liu's conclusions without recognizing that Dr. Liu did not perform a "formal visual field test" and Dr. Suscavage did perform formal tests, both in 1995 and again in 2002. Dr. Goldberg concluded that "there is still nothing that would support a functional impairment that would preclude the claimant from working part time or full time at a particular activity for which she is reasonably qualified." App. 60.

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<sup>12</sup> Dr. Goldberg does refer to "visual field data . . . from an evaluation that took place in 1995," which we interpret as a reference to a 1995 report that Dr. Suscavage prepared. See App. 30-35. Dr. Goldberg, however, makes no reference to Dr. Suscavage's 2002 report, see App. 36-39, which we discussed above.

As an ophthalmologist, Dr. Epstein concentrated on Dr. Suscavage's reports. He noted that the CVA left Hunter with a "visual field deficit involving essentially the superior quadrant of the visual field in both eyes," and that Dr. Suscavage's 2002 examination revealed a "similar quadratic defect in both eyes." App. 62. Moreover, the 2002 examination also showed "diffuse reduction of sensitivity and a marked change in the visual field, which is not accounted for." Id. Dr. Epstein noted Dr. Liu's opinion (again, without recognizing its limitations) and repeated its conclusion that "there is no objective evidence to substantiate disability."<sup>13</sup> App. 62-63. In the next breath, however, Dr. Epstein reiterated that "the visual field abnormality has not been addressed." App. 63.

#### D. The Appeal

With all of the medical evidence in hand, FedEx's Benefit Review Committee took up Hunter's appeal on June 25, 2003. See App. 7-12. The BRC voted unanimously to uphold Kemper's denial of long term disability benefits beyond November 30, 2002. App. 12. On behalf of the BRC, William

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<sup>13</sup> Without such evidence, Dr. Epstein concluded that "the data submitted does not substantiate that a functional impairment exists that would preclude the claimant from engaging in any substantially gainful activity, part-time or full-time, for which he [sic] is reasonably qualified on the basis of his [sic] education, training or experience." App. 62.

L. Rahner informed Hunter of the committee's decision in a letter dated July 2, 2003. See App. 1-3.

Although the BRC claimed to have "reviewed the appeal information submitted including all medical documentation," see App. 1, it focused on the peer reviews that its doctors conducted. When the July 2 letter referred to the neuropsychological evaluations that Drs. Hafer and Tracy performed, it merely summarized the conclusions about those evaluations that were contained in the peer reviews without any indication that the original reports were considered. See App. 2. The letter did not mention the reports submitted by Drs. Suscavage, Braunschweig, or Klazmer. On the basis of the peer reviews, the BRC "found that, beginning on 12/01/02, Ms. Hunter does not meet the definition of total disability under the terms of the Plan because the information submitted fails to provide evidence of a functional impairment that would preclude Ms. Hunter from engaging in any substantially gainful activity, part-time or full-time, for which she is reasonably qualified on the basis of her education, training or experience." App. 2. By way of further explanation, the letter noted the "requirement of significant objective findings that a functional impairment exists . . . was not met in this case." App. 3.

Pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (2004), Hunter filed this civil action

seeking to recover long term disability benefits under the Plan. Her complaint also included a count alleging that FedEx violated 42 Pa. Cons. Stat. § 8371 (2004) by denying her benefits in bad faith. Both parties have moved for summary judgment, and we turn now to those motions.

## Legal Analysis

### A. Pennsylvania Bad Faith Statute

"In an action arising under an insurance policy," Pennsylvania law allows a plaintiff who has proven that "the insurer has acted in bad faith toward the insured" to recover pre-judgment interest, punitive damages, court costs, and attorneys' fees. 42 Pa. Cons. Stat. § 8371 (2004). Hunter bases the first count of her complaint on this statute, but FedEx maintains that it is entitled to summary judgment on that claim because ERISA preempts Section 8371. See Def.'s Mem. Supp. Mot. Summ. J. at 8-9.

Indeed, ERISA contains a sweeping preemption clause designed to "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (2004). This provision is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46, 107 S. Ct. 1549, 1552 (1987) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523, 101 S. Ct. 1895, 1906 (1981)). Because of this expansiveness, the Supreme Court has given "the phrase 'relate to' . . . its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389 (1985) (some

internal quotations and citation omitted). Thus, "a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S. Ct. 478, 483 (1990).

Although Section 8371 does not explicitly refer to employee benefit plans, we presume (for these purposes only) that it "has a connection with" such a plan. See Metropolitan Life, 471 U.S. at 179, 105 S. Ct. at 2389. After all, if there were no such connection, Hunter could not have brought her Section 8371 claim because there would have been no relationship between the Plan and the statute. Whatever this connection may be, it is enough for us to presume that Section 8371 "relate[s] to" employee benefit plans within the meaning of 29 U.S.C. § 1144(a).

Because ERISA's preemption clause encompasses Section 8371, we must consider whether the statute also falls within ERISA's saving clause, which exempts "any law of any State which regulates insurance, banking or securities" from preemption. 29 U.S.C. § 1144(b)(2)(A) (2004). On its face, Section 8371 does not regulate banking or securities, so we concentrate on whether it "regulates insurance."

In Kentucky Ass'n of Health Plans v. Miller, 538 U.S. 329, 341-42, 123 S. Ct. 1471, 1479 (2003), the Supreme Court made a "clean break" with its prior precedent

interpreting ERISA's saving clause and announced a refined two-part test. For a state law to "regulate[] insurance," and thus be saved from preemption, it must (1) "be specifically directed toward entities engaged in insurance"; and (2) "substantially affect the risk pooling arrangement between the insurer and the insured." Id. Section 8371's principal effect is to make insurers liable for punitive damages if they act in bad faith toward their insureds, so it cannot be doubted that the measure is specifically directed toward entities engaged in insurance. See also Gen. Accident Ins. Co. v. Fed. Kemper Ins. Co., 682 A.2d 819, 822 (Pa. Super. Ct. 1996) ("Upon review of the express language and purpose of section 8371, it appears clear that the Pennsylvania legislature intended this section to protect an insured from bad faith denials of coverage."). It is less clear, however, whether Section 8371 substantially affects the risk pooling arrangement between the insurer and the insured.

Even if we were to assume that Section 8371 substantially affected risk pooling, Hunter's claim would have to contend with ERISA's deemer clause. That clause provides that "[n]either an employee benefit plan . . . , nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance

companies [or] insurance contracts." 29 U.S.C. § 1144(b)(2)(B). By preventing states from applying their general insurance regulations to employee benefit plans, the deemer clause "relieves plans from state laws 'purporting to regulate insurance.'" FMC Corp. v. Holliday, 498 U.S. 52, 61, 111 S. Ct. 403, 409 (1990). Thus, even if Section 8371 "regulates insurance" within the meaning of the saving clause, the deemer clause prevents plaintiffs from applying it to employee benefit plans. See also id. ("State laws that directly regulate insurance are 'saved' but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies . . . for purposes of such state laws.")

To sum up, Section 8371 regulates insurance. ERISA ordinarily does not preempt state insurance regulation, but the deemer clause prevents state laws that regulate insurance generally from being applied to employee benefit plans in any particular case. Thus, ERISA preempts Section 8371 insofar as Hunter seeks to apply it to FedEx's Plan,<sup>14</sup> and we shall

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<sup>14</sup> Without considering the effect of the deemer clause, several other judges in this district have held that Section 8371 is preempted by ERISA because it provides a punitive damages remedy that is not available under ERISA. See, e.g., Rieser v. Std. Life Ins. Co., No. 03-5040, 2004 U.S. Dist. LEXIS 9378, at \*7 (E.D. Pa. May 25, 2004) (Schiller, J.) ("Plaintiff's claims pursuant to Pennsylvania's bad faith statute are preempted by ERISA because § 8371 does not "regulate insurance" for purposes of ERISA's savings clause, and, even if § 8371 did fall within the savings clause, it would nonetheless be preempted because  
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grant FedEx's motion for summary judgment on Hunter's Section

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<sup>14</sup>(...continued)

it provides plan participants with a remedy that Congress rejected in ERISA."); Tannenbaum v. UNUM Life Ins. Co., No. 03-1410, 2004 U.S. Dist. LEXIS 5664, at \*24 (E.D. Pa. Feb. 27, 2004) (Surrick, J.) ("[B]ecause section 8371 enlarges ERISA's remedies, it is preempted even if it falls within ERISA's savings clause."); Dolce v. Hercules Inc. Ins. Plan, No. 03-1747, 2003 U.S. Dist. LEXIS 23890, at \*14 (E.D. Pa. Dec. 15, 2003) (Davis, J.) ("Because Section 8371 provides a form of relief in addition to the remedies provided by ERISA, the statute is incompatible with ERISA's enforcement scheme and is preempted under Pilot Life."); Nguyen v. Healthguard of Lancaster, Inc., No. 03-3106, 2003 U.S. Dist. LEXIS 22043, at \*1 n.1 (E.D. Pa. Oct. 7, 2003) (Van Antwerpen, J.) ("The Supreme Court has never wavered in its assertion that Congress did not intend to authorize remedies other than those provided under § 502(a) of ERISA."); Morales-Ceballos v. First UNUM Life Ins. Co., No. 03-925, 2003 U.S. Dist. LEXIS 9801, at \*8 (E.D. Pa. May 27, 2003) (J. Kelly, J.) ("[E]ven if the Pennsylvania bad faith statute satisfies the Miller factors, the statute is nevertheless preempted by ERISA since it expands ERISA's exclusive remedy provisions by providing for an award of punitive damages against the insurer."); McGuigan v. Reliance Std. Life Ins. Co., 256 F. Supp. 2d 345, 348 (E.D. Pa. 2003) (R. Kelly, J.) ("[E]ven if Section 8371 did come within the realm of the saving clause, the statute is ultimately preempted by ERISA since Section 8371 creates the additional remedy of punitive damages which is unavailable under the possible ERISA remedies.").

The Supreme Court recently confirmed that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Aetna Health Inc. v. Davila, Nos. 02-1845 and 03-83, 2004 U.S. LEXIS 4571, at \*15 (June 21, 2004). Thus, even if the deemer clause did not prevent the application of Section 8371 to the Plan, the state statute would still be preempted by ERISA because it authorizes punitive damages and ERISA does not.

One of our learned colleagues has held that ERISA does not preempt Section 8371. See Rosenbaum v. UNUM Life Ins. Co., No. 01-6758, 2003 U.S. Dist. LEXIS 15652 (E.D. Pa. Sept. 8, 2003) (Newcomer, J.). Although we agree with Judge Newcomer's application of the Miller test, see id. at \*16-18, he did not have the benefit of the Supreme Court's teachings in Davila to inform his conflict preemption analysis, see id. at \*18-25. Thus, we respectfully disagree with his ultimate resolution of the preemption question.

8371 claim.

B. ERISA

Having determined that ERISA preempts Hunter's Section 8371 claim, we must now consider her ERISA claim to "recover benefits due to [her] under the terms of [her] plan." 29 U.S.C. § 1132(a)(1)(B) (2004). The first issue is what standard of review to apply to FedEx's decision to terminate her long term disability benefits.

1. Standard of Review

The Supreme Court has held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 956-57 (1989). In this case, the Plan gives FedEx's BRC the power "to interpret the Plan's provisions in accordance with its terms with respect to all matters properly brought before it." App. 316. This delegation would ordinarily require us to review the committee's decisions under the deferential "arbitrary and capricious" standard. See McLeod v. Hartford Life & Accident Ins. Co., No. 03-1744, 2004 U.S. App. LEXIS 12253, at \*10 (3d Cir. June 22, 2004); see also Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 (3d Cir. 1993) ("Under the arbitrary and capricious (or abuse of discretion) standard of review, the

district court may overturn a decision of the Plan administrator only if it is 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'").

There are circumstances, however, when a court ought not defer so readily to a plan administrator, even one to whom a plan assigns plenary interpretative power. For example, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." Firestone, 489 U.S. at 115, 109 S. Ct. at 957 (internal quotations omitted). Our Court of Appeals has interpreted this language as mandating a form of "heightened arbitrary and capricious" review when the plan administrator operates under a conflict of interest. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 387-93 (3d Cir. 2000).

Our scrutiny is heightened -- that is, our deference to the administrator diminishes -- along a "sliding scale . . . , according different degrees of deference depending on the apparent seriousness of the conflict." Id. at 391; see also Doe v. Group Hospitalization & Med. Servs., 3 F.3d 80, 87 (4th Cir. 1993) ("[T]he fiduciary decision will be entitled to some deference, but this deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict."). In other words, we must "approximately calibrat[e] the intensity of our review

to the intensity of the conflict." Pinto, 214 F.3d at 393. This task requires us to "look at any and all factors that might show a bias and use common sense to put anywhere from a pinky to a thumb on the scale in favor of the administrator's analysis and decision." Gritzer v. CBS, Inc., 275 F.3d 291, 295 n.3 (3d Cir. 2002).

The factors relevant to evaluating the severity of an administrator's conflict of interest include "(1) the sophistication of the parties; (2) the information accessible to the parties; (3) the exact financial arrangement between the insurer and the company; and (4) the status of the fiduciary, as the company's financial or structural deterioration might negatively impact the 'presumed desire to maintain employee satisfaction.'" Stratton v. E.I. DuPont de Nemours & Co., 363 F.3d 250, 254 (3d Cir. 2004). The first factor weighs in favor of heightened scrutiny because there is no reason why Hunter would have had ERISA or claims experience, but FedEx is a large, successful company with so many claims that it outsourced their processing to Kemper. On the other hand, the second and fourth factors do not alter the arbitrary and capricious standard because there is nothing in the record to suggest that the parties did not have equal access to information or that FedEx faced financial difficulties.

Finally, we must consider the severity of the potential conflict of interest that FedEx created by both

funding and administering the Plan. Although our Court of Appeals has recognized that "a higher standard of review is required when reviewing benefits denials of insurance companies paying ERISA benefits out of their own funds," Pinto, 214 F.3d at 390, FedEx makes "irrevocabl[e]" contributions to its Plan's trust fund "in such amounts as are actuarially determined to be sufficient to fund on a level basis the benefits provided" under the Plan. App. 310, 312. In other words, FedEx's plan is "funded," and FedEx "incurs no direct expense as a result of the allowance of benefits, nor does it benefit directly from the denial or discontinuation of benefits." Abnathya, 2 F.3d at 45 n.5; see also Mitchell v. Eastman Kodak, 113 F.3d 433, 437 n.4 (3d Cir. 1997). Unlike the unfunded plans that courts in this circuit often subject to heightened scrutiny, see, e.g., Smathers v. Multi-Tool, Inc., 298 F.3d 191, 198-99 (3d Cir. 2002); Pinto, 214 F.3d at 388-90, funded plans -- like the one at the heart of this case -- present less severe conflicts of interest.

Whatever conflict existed here would have been even further diminished by FedEx's decision to outsource initial claims determinations to Kemper, a neutral third-party. See Stratton, 363 F.3d at 254-55 (explaining that the fourth factor "counsel[ed] for only a slightly heightened standard" when administrator outsourced administration of funded plan).

In short, the teachings of Pinto and its progeny, as applied to the facts of this case, require us to defer to FedEx's decision somewhat less than we might in a situation that called for the application of the "arbitrary and capricious" standard. We shall heighten our scrutiny, but only modestly.

## 2. FedEx's Decision

Arbitrary and capricious review permits us to overturn FedEx's decision "only if it is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan," Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am., Inc., 222 F.3d 123, 129 (3d Cir. 2000) (internal quotations omitted), but we must temper "any deference we might ordinarily afford" because of our moderately heightened scrutiny, see Smathers, 298 F.3d at 200. Hunter does not allege that FedEx failed to comply with Plan procedures, so we shall consider only whether substantial evidence supports the decision.

At the outset, we emphasize that this case does not involve an initial denial of benefits. Rather, FedEx terminated Hunter's benefits after having paid them for nearly eight years. The Plan clearly gives FedEx the power to terminate benefits when an employee no longer qualifies as "disabled," see App. 312-13, but it is worth noting that FedEx considered her "disabled" for the better part of a

decade before it abruptly ceased paying her benefits.<sup>15</sup> Moreover, one of Hunter's doctors found her at least as impaired in early 2003 as she was in 1996. See App. 166.

So why did FedEx stop paying? According to the BRC's July 2, 2003 letter, FedEx denied benefits because Hunter had failed to provide objective evidence of a functional impairment that would preclude her from working at a job for which she was qualified. See App. 2-3. In fact, Hunter submitted three medical reports, all of which we believe qualify as "objective" evidence under the Plan's terms. See App. 287. First, Dr. Suscavage's December 28, 2002 report described "marked field loss" and "stereo vision reduced to 25%." App. 39. Dr. Braunschweig's December 30, 2002 MRI also revealed "an area of chronic hemorrhagic infarction . . . in the left occipital lobe." App. 28. Finally, Dr. Tracy's January, 2003, report identified many deficits that collectively rendered Hunter "disabled." See App. 166.

Perhaps medical experts could debate about whether this evidence was sufficient to show that Hunter could not work, but FedEx did not rest its decision on the sufficiency of the evidence. The BRC based its decision on Hunter's

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<sup>15</sup> Minutes from the BRC's meeting explain that Hunter had been receiving disability benefits because "data submitted [when benefits were initially granted] provided significant objective findings of a disability as defined by the Plan." App. 10.

"failure" to produce any objective evidence at all. Substantial evidence does not support this decision because her attorney submitted three reports that contained objective evidence of disability.<sup>16</sup>

Had FedEx based its denial on an allegedly insufficient amount of objective evidence, rather than on the utter lack of objective evidence, its decision would remain problematic. In addition to the physicians that we have just mentioned, Drs. Hafer, Perlson, Liu, and Klazmer all examined Hunter, and all of these doctors -- except for Dr. Liu, the "independent" medical expert that Kemper chose -- found significant perceptual and/or cognitive impairments.

Although Dr. Liu found "no reason" why Hunter could not work, he did not say that she was not disabled. Rather,

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<sup>16</sup> FedEx's insistence on a lack of objective evidence in the face of the three reports is puzzling, to say the least. We recognize that Hunter's attorney submitted two of the reports after Kemper solicited the first round of peer reviews, but Drs. Goldberg and Epstein claimed to consider the late submissions in their June, 2003, reports. See App. 58-59, 61-62.

Perhaps FedEx simply believed that the reports were not "objective" evidence. Still, if this is the crux of FedEx's argument, it is so underdeveloped and bereft of support that we need not dwell on it. FedEx has never explained why the evidence that Hunter submitted was not "objective." Moreover, it never suggested what "objective" evidence of impairment it would have accepted as proof of Hunter's particular disability. Cf. Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 391 (3d Cir. 2003) ("[O]nce a claimant makes a prima facie showing of disability through phsycians' reports . . . and if the insurer wishes to call into question the scientific basis of those reports . . . , then the burden will lie with the insurer to support the basis of its objection.").

Dr. Liu only found "no objective evidence for visual reading problems." He might have had access to such objective evidence had Kemper given him the results from Dr. Suscavage's "formal visual field test," Dr. Braunshcweig's MRI, and the comprehensive two-day neuropsychological evaluation that Dr. Tracy performed. It is true that Hunter did not provide these results to Kemper until after Dr. Liu had issued his report, but Kemper cannot rely so heavily on Dr. Liu's conclusion that Hunter was not disabled when Dr. Liu himself recognized the limited scope of his opinion and carefully qualified his conclusions.

Even Kemper's peer reviews do not support its decision as convincingly as they appear. First, none of the peer reviewers examined Hunter personally. Although they are certainly entitled to formulate opinions on the basis of records alone, written words cannot capture every nuance of direct, physical examination. A patient's inflection when responding to her physician's question, like a witness's expression when testifying before a jury, can shade a doctor's impression in ways that a brief report, necessarily focused more on bottom-line conclusions than on shades of meaning, cannot always reflect. Because, all else being equal, doctors' reports based on personal contact with a patient are generally more reliable assessments of the patient's condition than summaries of first-hand reports,

FedEx should not have focused so myopically on the peer reviews when it considered Hunter's appeal.<sup>17</sup>

Another defect in Kemper's peer review process is that only two of the peer reviewers, Drs. Goldberg and Epstein, reviewed the entire record, including the reports prepared by Drs. Braunshcweig, Suscavage, and Tracy. Kemper should not have relied on any peer reviewer who did not consider all of the evidence in the record, and the failure to consider the three pieces of evidence most helpful to Hunter is especially troubling.

Even those peer reviewers who did review all of the medical evidence did not render satisfactory opinions. As an ophthalmologist, Dr. Epstein focused on Dr. Suscavage's report and recognized that the 2002 examination revealed "diffuse reduction of sensitivity and a marked change in the visual field, which is not accounted for." App. 62. Without

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<sup>17</sup> The Supreme Court has recently held that "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834, 123 S. Ct. 1965, 1972 (2003) (emphasis added). We are not suggesting, however, that FedEx should have given special weight to the opinions of Hunter's "treating" physicians or that it must explain why it rejected one of two kinds of equally reliable evidence. We merely emphasize that the opinions of physicians who examine a patient are inherently more reliable than the opinions of those who do not. The Court said as much in Nord when it recognized that "[p]lan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Id.

noting the Dr. Liu had not performed a "formal visual field test," Dr. Epstein relied on Dr. Liu's opinion to counter Dr. Suscavage's findings. In the end, Dr. Epstein concluded that there was "no objective evidence to substantiate disability," App. 62-63, but he immediately qualified that conclusion by noting that "the visual field abnormality has not been addressed" and recommended that someone more qualified than he evaluate the "psychological" evidence. App. 63. Given these heavily qualified findings, FedEx could not have terminated Hunter's benefits based on Dr. Epstein's opinion alone.

Dr. Goldberg reached an unqualified conclusion, but only by ignoring critical evidence. For example, his June 11, 2003 opinion noted that "[s]ome visual field data [from] 1995 . . . indicate[d] a field defect," but dismissed this data because Dr. Liu found "nothing to support visual field defects." App. 59. This statement ignores that Dr. Suscavage collected "visual field data" in 1995 and in 2002, and both sets of tests revealed field defects. See App. 32-33 (1995 results), 37-38 (2002 results). Dr. Goldberg either did not notice that the tests were performed twice or he consciously ignored the later data to suggest that there was no current objective evidence of a field defect. Moreover, Dr. Goldberg failed to recognize that Dr. Liu had not performed a "formal visual field test," so Dr. Suscavage's conclusions -- supported as they were by objective evidence -

- should have received more weight than Dr. Liu's. Despite his expertise in neurology, Dr. Goldberg did not address Dr. Braunshcweig's MRI or Dr. Tracy's neuropsychological evaluation, which were both fully consistent with the Hunter's complaints.

To sum up, FedEx considered Hunter disabled between 1994 and 2002. In late 2002, it terminated her long term disability benefits allegedly because she had failed provide objective evidence that she was disabled. The record demonstrates, however, that Hunter did submit three items of objective evidence to substantiate her disability claim. Although Kemper arranged for an IME with Dr. Liu, it did not provide Dr. Liu with all of Hunter's medical records, and Dr. Liu did not perform a formal visual field test. Similarly, Kemper failed to provide important medical evidence to most of the peer reviewers. Only Drs. Epstein and Goldberg reviewed the entire record, and their conclusions were troubling. Dr. Epstein recognized that he was unqualified to assess much of the evidence and he could not explain the divergent findings of Drs. Liu and Suscavage. Only Dr. Goldberg claimed to have reviewed all of the evidence and opined that Hunter was not disabled, but he failed to explain -- or even mention -- most of the contrary objective evidence that Hunter had submitted.

Substantial evidence does not support FedEx's termination of Hunter's long term disability benefits,<sup>18</sup> so that decision cannot pass muster under our modestly heightened standard of review. Indeed, FedEx's decision is so flawed that it could not stand even if we had applied the highly deferential "arbitrary and capricious" standard. We shall, therefore, grant Hunter's motion for summary judgment on her ERISA claim.

### 3. Remedy

Having found that FedEx inappropriately denied benefits to Hunter, we need only craft a suitable remedy. Hunter has requested that the remedy include past and future benefits, interest, and reasonable attorney's fees and costs, see Compl. at 9, and we shall address each of these requests in turn.

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<sup>18</sup> FedEx maintains that substantial evidence supports its decision because (1) none of her physicians explicitly concluded that she could not work part time; and (2) the record is "peppered" with positive assessments of Hunter's condition. The first contention ignores Dr. Klazmer's opinion that Hunter's impairment "precludes her from returning to work in her former capacity and will impair her ability to obtain any type of commensurable employment for which she was reasonably qualified." App. 157 (emphasis added). FedEx's second argument fails to address the many negative assessments of Hunter's condition. An administrator may not simply ignore evidence of disability merely because there is other, less reliable, evidence of non-disability.

Moreover, FedEx did not terminate Hunter's benefits because it chose to credit its peer reviewers over the doctors that actually examined her. FedEx claimed only that Hunter had not submitted objective evidence of her disability. As we have explained, however, the record is replete with substantial evidence that Hunter submitted objective evidence of disability.

When a district court grants summary judgment to a plaintiff on her § 1132(a)(1)(B) claim, it may either award the wrongfully withheld benefits or remand the case to the administrator for further development of the record. Generally, courts remand the case when the record is somehow incomplete or when the administrator misapplied the terms of the plan. See, e.g., Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1163 (9th Cir. 2001) ("[A] plan administrator will not get a second bite at the apple when its first decision was simply contrary to the facts."); Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321, 1330 (11th Cir. 2001) ("We do not agree, however, that a remand to the plan administrator is appropriate in every case."); Quinn v. Blue Cross & Blue Shield Ass'n, 161 F.3d 472, 476-78 (7th Cir. 1998) (discussing relevant considerations in awarding retroactive benefits and remanding to administrator); see also Cook v. Liberty Life Assur. Co., 320 F.3d 11, 23-25 (1st Cir. 2003) (same). Here, the parties have submitted hundreds of pages of medical records, and FedEx urges that we "may only consider evidence that was contained in the administrative record at the time the plan administrator made its final decision." Def.'s Br. at 5 (emphasis added). Because the record is complete and FedEx did not misapprehend the terms of the Plan, remand would serve no purpose here.

Thus, we shall direct FedEx to resume paying long term disability benefits to Hunter as of August 1, 2004. We shall also enter judgment against FedEx in an amount equal to the total payments that Hunter should have received between December 1, 2002 and July 31, 2004. At this time, we cannot determine the precise amount of this lump-sum payment of retroactive benefits, so we shall require the parties to submit briefing on the subject.

In addition to benefits, Hunter has requested that we award prejudgment interest. "[A]n ERISA plaintiff who prevails under § 502(a)(1)(B) in seeking an award of benefits may request prejudgment interest under that section as part of his or her benefits award," Skretvedt v. E.I. Dupont de Nemours, Nos. 02-3620 & 02-4283, 2004 U.S. App. LEXIS 11944, at \*35 (3d Cir. June 16, 2004), and we believe that an award of interest is appropriate here to compensate Hunter fully for FedEx's improper denial of the funds that she was legally due. Still, we shall direct the parties to address the issue of the precise rate at which we should compute prejudgment interest.

Finally, Hunter has requested that we award attorney's fees under 29 U.S.C. § 1132(g)(1). Under that statute, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." See also Skretvedt v. E.I. Dupont De Nemours & Co., 268 F.3d 167, 185 (3d Cir. 2001) (emphasizing the district court's

discretion). When considering requests for attorney's fees and costs under § 1132(g)(1), we must consider the following factors: "(1) the offending parties' culpability or bad faith; (2) the ability of the offending parties to satisfy an award of attorneys' fees; (3) the deterrent effect of an award of attorneys' fees against the offending parties; (4) the benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' position." McPherson v. Employees' Pension Plan of Am. Re-Insurance Co., 33 F.3d 253, 254 (3d Cir. 1994). In this case, we treat FedEx as the "offending party" because its decision to terminate Hunter's benefits was not supported by substantial evidence.

Turning to the first factor, we cannot find on the basis of this record that FedEx acted in bad faith, but it is certainly "culpable" for the claim review procedures that it implemented. Under these procedures, benefits were terminated before Hunter had a chance to submit evidence of her continuing disability. Even after she submitted such evidence, FedEx continued to deny benefits on the basis of reports submitted by doctors who lacked access to and/or did not discuss Hunter's evidence. These procedures surely discourage claimants from hiring an attorney to represent them before the BRC (because money is often tight immediately after benefits are cut off) and from appealing to this Court. Under the circumstances, the possibility of fee-shifting

offers some modest hope to claimants whose benefits were wrongfully terminated through FedEx's discouraging process. Thus, the first factor weighs in favor of awarding attorney's fees.

We presume that FedEx, a large, multinational corporation, could satisfy an award of reasonable attorney's fees here, so its financial condition cannot weigh against such an award.

The third McPherson factor requires us to consider the deterrent effect of an award of attorney's fees against FedEx. We are not so naive as to believe that awarding fees would encourage FedEx to reform its claims handling procedures. After all, the attorney's fees in this case are probably inconsequential when compared to the overall cost of administering the Plan. Nevertheless, requiring FedEx to reimburse Hunter would -- at least at the margin -- deter FedEx from denying similar claims without substantial evidence to support its decisions.

With regard to the fourth factor, we find that awarding attorney's fees would have, at most, only de minimis effects on the other individuals that the Plan covers. For example, premiums might increase slightly to offset a fee award that will likely be relatively small when compared to the total cost of the Plan. Such inconsequential repercussions weigh neither in favor of nor against the award.

Finally, we must assess the relative merits of the parties' positions. Although we ultimately sided with Hunter, FedEx's position was not frivolous, especially given the rather deferential standard of review to which its decision was entitled. Thus, the fifth factor weighs only slightly in favor of an award of attorney's fees.

To summarize, the first factor weighs heavily in favor of awarding attorney's fees to Hunter. The third and fifth factors also counsel in favor of an award, but not so much as the first factor. While the second and fourth factors do not support a fee award, neither do they suggest that an award would be inappropriate. Balancing all five McPherson factors, we find that Hunter is entitled to have FedEx pay her reasonable attorney's fees and costs. We shall, therefore, order the parties to submit their views on the reasonableness of the attorney's fees and costs that she incurred.

### Conclusion

FedEx is entitled to summary judgment on the first count of Hunter's complaint because ERISA preempts Pennsylvania's bad faith statute. On the second count, however, we shall enter summary judgment in favor of Hunter because FedEx's decision to terminate Hunter's long term disability benefits was not supported by substantial

evidence. Thus, we shall order FedEx to resume paying Hunter's benefits effective August 1, 2004.

After considering the parties' supplemental submissions, we shall enter final judgment against FedEx in an amount equal to the total payments that Hunter should have received between December 1, 2002 and July 31, 2004, plus prejudgment interest and reasonable attorney's fees and costs.

An appropriate Order follows.



5. By July 30, 2004, defendant shall FILE a response to plaintiff's motion.

BY THE COURT:

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Stewart Dalzell, J.