

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

GERALD E. KOLLMAN	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 03-2944
HEWITT ASSOCIATES, LLC	:	

MEMORANDUM

Baylson, J.

December 20, 2005

Presently before the Court is Plaintiff's Petition for Counsel Fees and Costs (Doc. No. 84), filed November 7, 2005.

I. Background

On October 18, 2005, this Court entered judgment in favor of Plaintiff and against Defendant for penalties in the amount of \$9,800.00 pursuant to § 1132(c) of ERISA for failure to produce documents which Plaintiff had requested within the time limits set forth under the ERISA statute. See Kollman v. Hewitt, 2005 WL 2746659, at *10 (E.D. Pa. Oct. 18, 2005).

Initially, Defendant had moved to stay this Petition for Counsel Fees and Costs (Doc. No. 88) pending an appeal on the merits, but the parties have subsequently agreed that the Court should go ahead and decide the attorney fee issue, and presumably, any further disputes on this issue will be consolidated into the merits appeal now pending before the Court of Appeals for the Third Circuit.

The claim on which the Court awarded judgment in favor of Plaintiff was a relatively minor claim. Plaintiff's principal claims, which allegedly are worth much more money to the Plaintiff, were common law claims, equitable estoppel and breach of fiduciary duty. In earlier

memoranda, the Court dismissed these claims.

Plaintiff's first Complaint in this Court asserted common law claims which were dismissed. Plaintiff was given leave, however, to file an Amended Complaint under ERISA, see Kollman, 2003 WL 22331870 (E.D. Pa. Sept. 22, 2003), which Plaintiff did on November 20, 2003. Defendant filed a Motion to Dismiss, and the Court dismissed Counts II and III of the Amended Complaint, alleging professional malpractice and equitable estoppel. However, the Court refused to dismiss Count I, in which Plaintiff alleged that Defendant had not supplied information which Plaintiff had requested. See Kollman, 2004 WL 1211961 (E.D. Pa. Apr. 14, 2004).

In the Fee Petition, Plaintiff's counsel has established that they first started working on the claim for failure to produce information as of October 3, 2003. However, in Count I of his Amended Complaint filed on November 20, 2003, Plaintiff cited ERISA regulations rather than the ERISA statute as governing the requests. This turned out to be an incorrect citation.

It appears that Plaintiff did not recognize until April 2005 that his claim in Count I for failure to produce documents should have been under § 1024 of the ERISA statute. In this Court's August 11, 2005 Opinion on summary judgment, see Kollman, 2005 WL 1941658 (E.D. Pa. Aug. 11, 2005), the Court found that penalties could not be imposed for violation of agency regulations, but might be imposed for a violation of § 1024 of the ERISA statute. However, the Court found that there were factual issues as to exactly what documents Plaintiff had requested and what had been provided, and therefore, a trial would be required as to Count I. The non-jury trial was held on August 24, 2005. The Court found in favor of the Plaintiff and against Defendant pursuant to 29 U.S.C. 1132(c). Kollman, 2005 WL 2746659, at *10.

II. Discussion

Plaintiff now seeks an award pursuant to the attorney fee provision of ERISA, 29 U.S.C. § 1132(g)(1) (2005), which provides: “the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.” Thus, while ERISA does not automatically mandate an award for the prevailing party, Ellison v. Shenango, Inc. Pension Bd., 956 F.2d 1268, 1274-75 (3d Cir. 1992), the defendant in an ERISA action ordinarily bears the burden of paying attorney’s fees for the prevailing plaintiff. Brytus v. Spang & Co., 203 F.3d 238, 242 (3d Cir. 2000). Ultimately, however, the award of attorneys' fees under this statute is discretionary. Martorana v. Bd. of Trs. of Steamfitters Local Union 420 Health, Welfare, & Pension Fund, 404 F.3d 797, 804-05 (3d Cir. 2005).

A. Factors Supporting Granting an Award of Attorney’s Fees

The Third Circuit has set forth five factors that must be considered when determining whether to grant attorney fees in ERISA cases: (1) offending parties' culpability or bad faith; (2) ability of offending parties to satisfy an award of attorneys' fees; (3) deterrent effect of an award of attorneys' fees against offending parties; (4) benefit conferred on pension plan members as a whole; and (5) relative merits of parties' positions. Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). See also Fields v. Thompson Printing Co., 363 F.3d 259, 275 (3d Cir. 2004). Considering the Ursic factors is required. Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1011 (3d Cir. 1992). However, the factors are not mandatory in the sense that a party must demonstrate all of them in order to warrant an award of attorney's fees, but rather they are elements a court must consider in exercising its discretion. Fields, 363 F.3d 275.

Here, the factors — which we address in turn — favor an award of attorney’s fees for

Plaintiff. First, while there is no specific evidence indicating bad faith, this Court has found culpability on the Defendant's part. Also, Defendant has the ability to pay attorney's fees. Moreover, given that the facts underlying Plaintiff's claim establish that Defendant deliberately stonewalled in response to Plaintiff's requests for information with no valid excuse, the potential of an attorney fee award to deter such conduct by others similarly situated to Defendant is particularly acute in this case. Finally, this Court's entering judgment in favor of Plaintiff on Count I demonstrates that at least with respect to that claim, Plaintiff's position as compared to Defendant was stronger.¹ Thus, four of the five factors support this Court's conclusion that attorney's fees are appropriate against Defendant.

B. Amount of Attorney's Fee Award

Having determined that Plaintiff is entitled to an award of attorney's fees, we must next determine the amount of such award. It is well-settled in this Circuit that the "lodestar" approach is used to calculate reasonable attorneys fees granted pursuant to statutes, including ERISA. Brytus, 203 F.3d at 242, citing Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983). In order to calculate the lodestar, the court multiplies the hours reasonably expended by the prevailing party's counsel and the applicable hourly rate for these services. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986); Loughner v. Pittsburgh, 260 F.3d 173, 177 (3d Cir. 2001).

1. Reasonable Hourly Rate

A "reasonable" hourly rate is generally calculated according to the ordinary market rates

¹The fourth factor, regarding benefit conferred upon members of the pension plan as a whole, is inapplicable in this case.

in the community. Rode, 892 F.2d at 1183. This is generally determined by looking to the attorneys' usual billing rate, although this is not dispositive. PIRG v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995); Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard, 487 F.2d 161, 167 (3d Cir. 1973) (finding "value of an attorney's time generally is reflected in his normal billing rate"). Plaintiff's counsel requests hourly rates ranging between \$175 and \$300 an hour, depending on the year and the attorney billing the matter, and fees ranging from \$85 to \$135 an hour for services of a paralegal. Defendant urges that these hourly rates are excessive.

Having reviewed the record as to the attorneys fees, the Court will allow the rates suggested by Plaintiff's counsel in his Petition, finding that they are reasonable and appropriate for the attorneys representing Plaintiff in this Court, given their backgrounds and experience and the prevailing rates in this jurisdiction. The Court thus rejects Defendant's assertions that the Plaintiff's rates are too high and that his counsel were not ERISA experts.

2. Time Reasonably Spent

The next step in determining the lodestar is to calculate the time reasonably expended in conducting the litigation. Hensley, 461 U.S. at 433-34; PIRG, 51 F.3d at 1188. After the plaintiff provides evidence supporting their claimed time, the district court must review this proposal for reasonableness and exclude hours from the fee petition that are "excessive, redundant or otherwise unnecessary." Id.

Plaintiff's Fee Petition provides a somewhat detailed breakdown of the hours attributable to various stages of litigation related to Count I.² Plaintiff's counsel has alleged a number of

²Plaintiff only petitions this Court for work related to Count I, the claim on which he prevailed. Plaintiff has not provided an overall lodestar, calculated for time spent working on the *entire litigation*. In certain cases, an attorney can recover a fully compensatory fee, even for

hours worked which, when multiplied by the reasonable hourly rate discussed above, totals \$76,970.69. It is important to note that Plaintiff's Fee Petition does not seek any fees for any time spent on this case prior to October 3, 2003, when Plaintiff began researching and preparing a Complaint to assert that Defendant was liable for failure to produce information/documents.

Although Defendant is correct that the Plaintiff did not assert his right to documents under § 1024 of the statute until late in the litigation, apparently in a brief filed as of April 12, 2005, it is clear that Plaintiff had first alleged a claim based on a failure to provide the requested documents in the filing of the Amended Complaint, which dates back to November 20, 2003, although citing the regulations instead of the applicable statute. On May 18, 2005, the Court allowed Plaintiff to amend his Complaint to specifically allege inter alia the failure to produce documents under § 1024(b)(4).

The Court will not deprive Plaintiff of any fees for the hours spent by counsel citing the wrong authority. However, this factor must be taken into account in the award of attorneys fees. Further, the fact remains that Plaintiff's claim for failure to produce requested documents was a relatively minor claim. The Court rejects Plaintiff's proposed allocation of time set forth in the Fee Petition, and also rejects Defendant's assertions that the Plaintiff spent too much time,³ and

unsuccessful claims, but only if those unsuccessful claims "were so closely related by common facts and related legal theories to the successful claims that the fees, expenses, and costs associated with them will not be segregated." Hensley, 461 U.S. at 465; Rode, 392 F.2d at 1183. However, normally, the district court "should reduce the hours claimed by the number of hours spent litigating claims on which the party did not succeed." Loughner, 260 F.3d at 178; PIRG; 51 F.3d at 1190. The Court has independently reviewed the record and determined the amount of time reasonably necessary for Count I.

³Defendant aggressively defended the case, which is its privilege, but in doing so, cannot justly complain about Plaintiff's counsel spending too much time. The Court found Defendant's arguments as to Count I to be without merit, and that Defendant both incorrectly cited and

that a minor amount of time was spent on the ultimately successful claim in Count I.

In proposing the time reasonably spent, Plaintiff has attempted to ascribe certain percentages of his counsel's efforts to Count I, as compared to the other Counts. However, having reviewed the Plaintiff's Fee Petition and the exhibits, the Court finds that it would be impossible for Plaintiff, or for this Court, to specifically delineate the precise time actually spent on the efforts under Count I, and thus has discretion to allocate percentages of total time for different aspects of the litigation. See McNaboe v. NVF Co., 2002 WL 31496655, at *6 (D. Del. Oct. 31, 2002) (rejecting party's proposal that it allocated one-third of the total time working on the case to the ERISA-related charge and substituting its own judgment that "twenty percent is a more reasonable amount of time."). Specifically, the Court finds that Plaintiff's counsel has not taken into account the fact that, if properly researched and plead from the beginning, the presentation of the ultimately successful claim on Count I is fairly straight forward and would have required little, if any, discovery. Further, although the Court was obviously not present in determining the course of discovery or at the few depositions that were taken, the Court does know from many conferences with counsel, reading multiple briefs, and presiding over arguments, that at least until August 11, 2005, very little time was spent on Count I compared to Counts II and III.

Accordingly, the Court has determined that the most fair way to proceed is for the Court to allocate its own specific percentages to the total amount of Plaintiff's counsel's time within relative dates. See PIRG, 51 F.3d at 1190 (rejecting reduction by district court of fees by one

omitted relevant case law. If the Third Circuit finds error in this court's disposition of the merits, the attorney's fee issue may be revisited.

half because party prevailed only on one of two courts and instead endorsing fees based on the percentage of time dedicated to the successful count). The Court does so as follows:

1. The Court will allow ten percent (10%) of Plaintiff's counsel's time from the start date of the work on Count I for the filing of the Amended Complaint, or October 3, 2003, through the Order of May 18, 2005 when the Court allowed the Second Amended Complaint, in part, to cite § 1024. (See ¶ 123).

2. The Court will allow twenty-five percent (25%) of Plaintiff's counsel's time from May 18, 2005 through the Court's Opinion on August 11, 2005, at which time the Court granted summary judgment in favor of Defendant on Counts II and III.

3. The Court will allow one hundred percent (100%) of Plaintiff's counsel's time from August 11, 2005 through the entry of judgment on October 18, 2005 because, after the Opinion of August 11, 2005, the only remaining claim was on Count I.

The Court also concludes that the proposed time spent by Plaintiff in preparing the instant Fee Petition was reasonable, in that it was a reasonable effort to comply with the Court's request for a Fee Petition even though the Court has not thoroughly endorsed it. However, the Court will not allow any further fees for the calculations which the Court will now require Plaintiff's counsel to do.

Accordingly, to facilitate a final calculation of the lodestar in accordance with this opinion, Plaintiff's counsel shall prepare a new Fee Petition based on and limited to the allocation set forth above and shall submit it to defense counsel within fourteen (14) days. Within fourteen (14) days thereafter, defense counsel shall, if he so desires, inspect any time records at the office of Plaintiff's counsel, and may, by letter, submit exceptions to Plaintiff's

counsel's calculations. Plaintiff's counsel shall promptly thereafter file the revised Fee Petition and attach any exceptions by the Defendant, without any legal argument by either party, and the Court will determine and enter an appropriate award of attorneys fees.

III. Conclusion

Plaintiff is entitled to an award of reasonable attorney's fees. Further, the Court will allow the hourly rates suggested by Plaintiff's counsel. However, the Court rejects Plaintiff's proposed allocation of time set forth in the Fee Petition. Accordingly, Plaintiff's counsel shall prepare a new Fee Petition setting forth the time reasonably expended in the litigation of Count I in accordance with this opinion.

An appropriate Order follows.

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GERALD E. KOLLMAN	:	CIVIL ACTION
	:	
v.	:	
	:	CIV. NO. 03-2944
HEWITT ASSOCIATES, LLC	:	

ORDER

AND NOW, this 20th day of December, 2005, it is hereby ORDERED that Plaintiff's Petition for Attorney Fees and Costs (Doc. No. 84) is GRANTED in part and denied in part, as reflected in the attached Memorandum. Plaintiff shall submit an Amended Fee Petition within thirty (30) days. Defendant's Motion to Stay Plaintiff's Petition for Counsel Fees and Costs (Doc. No. 88) is denied as moot.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.