

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

JEANNINE P. ASPRINO,  
Plaintiff,

v.

INDEPENDENCE BLUE CROSS/  
PENNSYLVANIA BLUE SHIELD,  
Defendant.

CIVIL ACTION

NO. 96-7788

MEMORANDUM

Broderick, J.

October 16, 1997

Plaintiff Jeannine P. Asprino commenced this civil action alleging a violation of state law and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. ("ERISA"). Only one count of plaintiff's amended complaint remains before this Court, Count II, in which plaintiff alleges pursuant to § 510 of ERISA, 29 U.S.C. § 1140, that her former employer, defendant Independence Blue Cross/Pennsylvania Blue Shield, discharged her in retaliation for her filing the complaint in this action seeking employee benefits.

The Court held a bench trial on September 8 and 9, 1997. For the reasons set forth below, which are Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, judgment will be entered in favor of defendant Independence Blue Cross/Pennsylvania Blue Shield and against plaintiff Jeannine P. Asprino.

## **I. BACKGROUND**

On October 17, 1996, plaintiff filed a four count complaint in the Court of Common Pleas of Philadelphia County alleging claims under ERISA and state law. Plaintiff alleged that she was entitled to receive long term disability benefits under her employee benefit plan. Plaintiff named three defendants in the complaint: (1) her employer, Independence Blue Cross/Pennsylvania Blue Shield ("IBC"); (2) her employer's long term disability insurance program, the Non-Contributory National Long Term Disability Program; and (3) the administrator of the insurance program, Blue Cross Blue Shield Association. Defendants removed the action to this Court on November 21, 1996. By Memorandum and Order entered May 8, 1997, this Court dismissed plaintiff's state law claims on the grounds that they were preempted by ERISA. See 1997 WL 255675 (E.D. Pa. May 8, 1997).

Plaintiff then filed an amended complaint on May 21, 1997 which named the same defendants as in her original complaint but included only two counts, both brought under ERISA: her original claim for long term disability benefits (Count I) and a new claim for retaliatory discharge on the basis that she had been terminated after filing the complaint in this action (Count II). However, on August 7, 1997, plaintiff stipulated to the dismissal of her claim in Count I for recovery of benefits, as well as all of her claims against the Non-Contributory National Long Term Disability Program and Blue Cross Blue Shield Association. Accordingly, the only claim remaining before the Court is Count

II of the amended complaint for retaliatory discharge, and the only defendant remaining is plaintiff's former employer, IBC.

By Order dated August 15, 1997, the Court denied defendant IBC's motion for summary judgment and scheduled a non-jury trial.

## **II. FINDINGS OF FACT**

On April 3, 1994, plaintiff Jeannine P. Asprino was injured in an automobile accident. Asprino received treatment for a fractured ulnar bone and dislocated elbow. At the time of her accident, Asprino had been employed for two and one-half years as a senior secretary in the executive offices of defendant IBC, where she was eligible to receive disability benefits. Following her discharge from the hospital, Asprino did not return to work.

Asprino received short term disability benefits from IBC for six months, the maximum period allowed under her benefit plan. Asprino then applied for long term disability benefits from IBC's long term disability carrier, an independent association located in Chicago named the Blue Cross Blue Shield Association ("the Association"). Asprino was conditionally approved for long term disability benefits for the month of October, 1994. However, the Association informed Asprino that she would have to submit additional medical evidence to support her claim if she wished to continue receiving long term disability benefits beyond October 31, 1994.

Although the Association had only approved Asprino's application for long term disability benefits for the month of

October, 1994, Asprino inadvertently received benefits for eight months. By letter dated May 9, 1995, the Association informed Asprino that it had erroneously continued her long term disability benefits from November, 1994 through May, 1995 due to a computer error, and demanded reimbursement in the amount of \$1,821.40. The Association explained that Asprino had failed to submit additional medical evidence as it had requested when initially approving her claim. After giving Asprino another opportunity to support her claim for long term benefits, the Association denied her request for long term benefits, effective November 1, 1994, because she had failed to comply with her physician's treatment and because her medical records did not support a finding of disability beyond October, 1994. The Association also determined that Asprino could have returned to work at IBC in October, 1994.

Asprino appealed the denial of her long term disability benefits through the Association's administrative procedures. The Association issued its final decision denying her benefits on May 21, 1996. Throughout the entire appeals process, Asprino did not work at IBC, nor did she request to return to IBC following her final denial of benefits in May, 1996. Instead, Asprino served as a hostess several days each week at a Philadelphia restaurant and began taking classes to become a court reporter.

In October, 1996, six months after the Blue Cross Blue Shield Association had issued its final determination that Asprino did not qualify for long term disability benefits and two

years after the Association had ruled that Asprino had been capable of returning to work, Asprino contacted IBC's human resources department about returning to work. Although IBC had filled Asprino's former secretarial position, a human resources employee informed Asprino that she could have thirty days to apply for an internal position before being terminated.

On October 17, 1996, Asprino commenced the instant lawsuit in the Court of Common Pleas seeking recovery of long term disability benefits under ERISA and state law. Three weeks later, by letter dated November 8, 1996, IBC informed Asprino that she was being terminated immediately. IBC explained that its human resources employee had erroneously told Asprino that she could have thirty days to apply for an internal position, and that under company policy, she should have been terminated on May 21, 1996 when her final appeal for long term disability benefits was denied. Reproduced in full, the termination letter states:

November 8, 1996

Ms. Jeanne Asprino  
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RE: Asprino v. Independence Blue Cross  
CCP Phila. County, October Term--1996, No. 001285

Dear Ms. Asprino:

We regret to inform you that you were mistakenly advised that you have thirty days in which to seek alternate positions at Independence Blue Cross ("IBC") prior to your termination. This is not our policy. Your termination should have become effective on May 21, 1996, the date of your final denial of long term disability benefits. Notwithstanding the fact that IBC has continued your benefits for a period exceeding its obligation to do so, we will not seek to recover this overpayment. However, your termination will become effective immediately, with your health benefits to continue to the end of November. Notification of your COBRA rights will follow under separate cover.

We apologize for this inadvertent error; however, even if the thirty-day policy described to you were in effect, that time period would have long since expired since the calculation would have begun, according to the erroneous information provided to you, once you were eligible to return to work, which in your case was October 14, 1994. Even assuming that that time period was suspended while you exhausted your administrative remedies, the time period would have long since expired.

Thus, it is clear that under no circumstance are you eligible to post for internal positions. Of course, IBC is an equal opportunity employer and we accept all applications for employment. However, let me emphasize that it is IBC's position that at this time it had no obligation to provide you with a position, continue your benefits or continue your employment status.

We wish you the best in all of your future endeavors.

Very truly yours,

William J. Blount  
Senior Director  
Human Resources

(Plaintiff's Exhibit # 2; Defendant's Exhibit # 2)

At trial, the author of this letter and other IBC managers testified that employees returning from short term disability were eligible to "post" for internal positions at IBC, meaning that IBC would give them preference for open positions for which they qualified. However, once employees exhausted their short term benefits and entered Blue Cross Blue Shield Association's long term disability program, they were no longer considered "active" employees at IBC. Although IBC gives its employees who return from long term disability or who have been denied long term disability an opportunity to return to work, the employee must timely notify IBC that he or she is ready and willing to return to work and the company will then attempt to find an open position.

On May 21, 1997, Asprino amended her complaint to include a

claim for retaliatory discharge under § 510 of ERISA, 29 U.S.C. § 1140. Asprino claims that she was discharged by IBC on November 8, 1996 in retaliation for her filing her original complaint in the Court of Common Pleas three weeks earlier seeking recovery of long term disability benefits. Asprino has since stipulated to dismissal of her original claim for recovery of benefits, leaving the retaliation claim as her sole basis for relief.

Defendant IBC contends that it did not discharge Asprino in retaliation for her filing the lawsuit, but that the lawsuit merely brought to light the fact that it had erroneously kept Asprino listed in its records as an active employee. IBC claims that plaintiff was terminated in accordance with an unwritten company policy, in which employees are terminated if they do not promptly request to return to work after they are denied long term disability benefits and have exhausted their administrative appeals. IBC offered testimony at trial that it would have allowed Asprino to return to work if she had contacted the company immediately following her final denial of benefits in May, 1996, rather than waiting almost six months. IBC further claims that Asprino was terminated because she was absent from work without excuse for two years, having failed to return to work in October, 1994, the date the Blue Cross Blue Shield Association determined she was medically capable of doing so.

### **III. DISCUSSION AND CONCLUSIONS OF LAW**

The sole issue in this case is whether defendant IBC

discharged plaintiff in retaliation for her exercising her right to seek recovery of long term disability benefits under her employee benefit plan in violation of Section 510 of ERISA, 29 U.S.C. § 1140.

Section 510 of ERISA, captioned "Interference with protected rights," provides in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140. Congress enacted this section "primarily to prevent employers from discharging or harassing their employees in order to keep them from obtaining ERISA-protected benefits." Kowalski v. L&F Products, 82 F.3d 1283, 1287 (3d Cir. 1996) (citing Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir. 1987)).

Retaliatory discharge claims under ERISA are governed by the same presumptions and shifting burdens of production used in employment discrimination cases under Title VII. Kowalski, 82 F.3d at 1288-89. First, the plaintiff must establish a prima facie case. To establish a prima facie case under Section 510 of ERISA, "an employee must demonstrate (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of any right to which the employee may become

entitled." Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997) (citing Gavalik, 812 F.2d at 852). Most importantly, the plaintiff must also prove that the defendant had a specific intent to interfere with ERISA-protected rights. As the Third Circuit recently stated:

Interpreting section 510 of ERISA in Gavalik, we held that in order to recover under section 510, a plaintiff need not prove that "the sole reason for his [or her] termination was to interfere with [employee benefits]." Nonetheless, a plaintiff must demonstrate that the defendant had the "specific intent" to violate ERISA. Proof of incidental loss of benefits as a result of a termination will not constitute a violation of section 510.

Dewitt, 106 F.3d at 522 (citing Gavalik, 812 F.2d at 851).

If the plaintiff establishes a prima facie case of retaliatory discharge by a preponderance of the evidence, then a rebuttable presumption is created that Section 510 was violated, and the burden of production shifts to the employer to introduce evidence of a legitimate, nondiscriminatory reason for terminating the employee. Gavalik, 812 F.2d at 853. However, the burden of persuasion "remains at all times with the plaintiff." Id. at 852 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

If the employer meets its burden of articulating a nondiscriminatory reason for terminating the plaintiff, the burden then shifts back to the plaintiff, who must demonstrate that the employer's articulated reason for terminating her was fabricated, or pretextual. Id. The plaintiff need not prove that retaliation was the sole reason for her discharge, but she

must prove that retaliation had a determinative effect on the employer's decision to terminate her. Woodson v. Scott Paper Co., 109 F.3d 913, 935 (3d Cir. 1997).

After thoroughly reviewing the evidence presented at trial, the Court has concluded that the plaintiff has failed to establish a prima facie case of retaliatory discharge. Asprino has not shown that Independence Blue Cross had the specific intent to discharge her for filing an ERISA complaint or for the "purpose of interfering with the attainment of any right to which [she] [might] become entitled," namely, her right to seek recovery of long term benefits. Dewitt, 106 F.3d at 522. Specific intent, as this Court has often charged juries, means more than a general intent to commit an act. It requires that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all of the facts and circumstances surrounding the case.

IBC's termination of Asprino following her filing of an ERISA complaint did not, and could not, have interfered with her right to seek recovery of ERISA-protected benefits, since IBC did not exercise any influence over administration of the long term disability plan it offered to its employees. The proper defendant in an action for recovery of benefits under ERISA is either the benefit plan, itself, or a fiduciary of the plan who exercises discretionary authority or control over administration of the plan. Curcio v. John Hancock Mutual Life Ins. Co., 33

F.3d 226, 232-34 (3d Cir. 1994). Asprino failed to present any evidence at trial that IBC exercised control over benefit decisions made by the Blue Cross Blue Shield Association, or that IBC stood to gain anything by terminating her after she filed the complaint. Thus, when IBC terminated Asprino, it could not have knowingly tried to interfere with her right to seek recovery of long term disability benefits, since it possessed no ability to influence or control her entitlement to such benefits.

Even if plaintiff had established a prima facie case of discriminatory discharge, however, she has failed to rebut the defendant's legitimate, nondiscriminatory reason for terminating her. As heretofore stated, IBC claimed at trial that it discharged Asprino in accordance with a company "policy" in which employees are terminated if they do not promptly seek to return to work after exhausting all of their administrative appeals for long term disability benefits. Although IBC presented no written or other formal record of such a policy, the fact that Asprino was absent from work for more than two years despite a finding that she could have returned to work in October, 1994, is a legitimate, nondiscriminatory reason for her termination.

Asprino presented two theories at trial in an attempt to demonstrate that IBC's articulated reason for terminating her was fabricated or pretextual. First, Asprino noted that the caption on her November 8th termination letter, see supra, referenced her lawsuit against IBC. Asprino claimed that IBC's inclusion of this caption demonstrated that IBC terminated her in response to

and in retaliation for her filing the lawsuit. However, after considering all of the evidence presented at trial, the Court cannot conclude that the mere reference to Asprino's lawsuit in her termination letter supports a finding that IBC terminated Asprino in retaliation. IBC elicited testimony at trial that Asprino's filing of her lawsuit merely brought to light the fact that the company had mistakenly listed Asprino as an active employee for more than two years. IBC also offered testimony that the termination letter only referenced the lawsuit for the benefit of Asprino's legal counsel, who had previously contacted IBC and who received a "carbon copy" ("cc") of the termination letter. These explanations are entirely credible.

Asprino's second theory to demonstrate that IBC's reason for terminating her was pretextual involved a telephone conversation she allegedly overheard between Robert Brady, her ward leader and chairman of the Philadelphia Democratic Party, and Fred DiBona, the chief executive officer of IBC. Asprino alleged that she went to see Brady shortly after being terminated from IBC, and that Brady called DiBona on a speakerphone while Asprino was in Brady's office. Asprino claimed that she overheard DiBona, whose voice she recognized from working as an executive secretary at IBC, tell Brady that Asprino had been terminated because she was suing IBC and its long term disability carrier, the Blue Cross Blue Shield Association and IBC in her lawsuit.

Asprino testified at trial: "The basic content [of the conversation] was that Mr. DiBona said that because I was suing

the Association in Chicago, that was like an umbrella policy, even though they were separate entities, that I could not be rehired because of litigation purposes, and there was nothing he could do about it." (N.T. Sept. 8, 1997, at 83-84).

Both Asprino and IBC called Fred DiBona to testify at trial. DiBona testified that he received a message that Brady had called sometime in November, 1996 and that he returned Brady's call (N.T. Sept. 8, 1997, at 64). DiBona and Brady spoke about Asprino. However, DiBona testified that he told Brady that he knew little about Asprino's situation except that "it was in litigation." DiBona categorically denied ever saying or implying anything about Asprino being fired in retaliation for filing a lawsuit. When questioned by defense counsel, DiBona testified:

Q. Now, you earlier testified to the brief discussion you had with Mr. Brady in connection with Ms. Asprino. At any time did you suggest to Mr. Brady that Ms. Asprino was fired in retaliation for filing a claim against Blue Cross/Blue Shield Association?

A. Absolutely not. I was very specific on the fact that there was litigation would not allow me to discuss the case with him. I have very little facts. I was reticent to have that discussion with him and that's why I told him I would speak to Mr. Frick, our senior vice president of HR, and have him get back to Mr. Brady, and explain whatever the situation was.

Q. At any time did you suggest or say to him that she had been fired because she filed a suit against IBC?

A. Never.

(N.T. Sept. 8, 1997, at 97-98).

As the fact finder in this non-jury trial, the Court has

determined that DiBona's version of the conversation is more credible than Asprino's. Asprino has offered no corroborating evidence in support of her contention that DiBona told Brady that IBC had terminated her because she filed a lawsuit against the company. Most significantly, Asprino did not call Robert Brady to testify at trial. Brady was the only other party to the conversation, and his testimony would have supported Asprino's allegations had they been true. In short, Asprino failed to offer credible evidence to rebut IBC's legitimate, nondiscriminatory reason for terminating her.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court has determined that plaintiff Jeannine P. Asprino has failed to establish a prima facie case of retaliatory discharge under § 510 of ERISA, 29 U.S.C. § 1140. Asprino has not demonstrated that her former employer, defendant Independence Blue Cross, terminated her in retaliation for her filing a lawsuit against the company or for the purpose of interfering with her right to seek recovery of long term disability benefits. Moreover, even assuming Asprino had established a prima facie case of retaliatory discharge under § 510 of ERISA, Asprino has failed to show that the reason offered by IBC for terminating her was a pretext for unlawful retaliation or that retaliation had a determinative effect on IBC's decision to terminate her. IBC explained at trial that it terminated Asprino because she did not promptly seek to return to

work after her appeals for long term disability benefits had been denied. Asprino's reliance on the caption in her termination letter which referred to her lawsuit and her testimony that she overheard a telephone conversation between IBC's chief executive officer and her ward leader have not demonstrated that she was discharged in retaliation for filing her lawsuit against IBC. Accordingly, judgement will be entered in favor of defendant Independence Blue Cross and against plaintiff Jeannine P. Asprino.

An appropriate Order follows.

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JEANNINE P. ASPRINO,  
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INDEPENDENCE BLUE CROSS/  
PENNSYLVANIA BLUE SHIELD,  
Defendant.

CIVIL ACTION

NO. 96-7788

ORDER AND CIVIL JUDGMENT

AND NOW, this 16th day of October, 1997; for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED: Judgement is hereby ENTERED in favor of defendant Independence Blue Cross/Pennsylvania Blue Shield and against plaintiff Jeannine P. Asprino as to Count II of plaintiff's amended complaint for retaliatory discharge pursuant to § 510 of ERISA, 29 U.S.C. § 1140.

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RAYMOND J. BRODERICK, J.