



5. Defendant William Muehsam is the secretary of Kencor.  
N.T. at 45.

6. Plaintiff, Kevin Ahern, was employed by Defendant Kencor from November 1979 to November 1994 as an elevator mechanic. N.T. at 7.

7. Kevin Ahern contributed funds to Kencor's pension plan in the following amounts:

1991 - \$2,040.00

1992 - \$2,040.00

1993 - \$1,080.00

1994 - zero

N.T. at 9; Br. in Support of Pls.' Claims for Payment in Equity at 1.

8. Kencor, through Maureen Muehsam, reported contributions to the pension plan from Kevin Ahern in the following amounts:

1991 - \$1,840.00

1992 - \$200.00

1993 - zero

1994 - zero

N.T. at 9.

9. A difference of \$3,120.00 was missing from Kevin Ahern's contributions to the Kencor pension plan. Pls.' Resp. to Defs.' Mot. in Limine at 1.

10. On January 29, 1995, Kevin Ahern sent Maureen Muehsam a written request for: (1) the amount of his deposits into the pension plan; (2) the balance of the pension plan; and (3) a copy

of the pension plan. Pls.' Am. Compl. Ex. G; N.T. at 10.

11. Kevin and Lee Ann Ahern, husband and wife, ("Plaintiffs") filed two complaints in the Chester County Court of Common Pleas. Pls.' Resp. to Defs.' Mot. in Limine at 3.

12. In Kevin Ahern v. Kencor, Inc., No. 94-09488, Kevin Ahern sought to recover wages and medical benefits. Pls.' Resp. to Defs.' Mot. in Limine at 3.

13. After a non-jury trial in Kevin Ahern v. Kencor, Inc., No. 94-09488, The Honorable James P. MacElree II reached the following verdict as to medical benefits:

We find that the health care benefit [sic] for all employees, including Plaintiff, was canceled in accordance with D-1 effective November 1, 1993. We find Plaintiff did not meet his burden of proof that any health care benefit was due or was not paid to Plaintiff. The Plaintiff was uncertain as to the amount of the per person deductible or even if it had been met in any particular year.

Defs.' Mot. in Limine Ex. B.

14. In Kevin Ahern v. Kencor, Inc., No. 94-09488, Plaintiff was awarded \$1,702.31 pursuant to 43 P.C.S.A. § 260.3 and \$1,500.00 in attorney's fees. Defs.' Mot. in Limine Ex. B.

15. In Kevin Ahern v. J. Donald Kennedy, Richard Kennedy, Maureen Muehsam and William Muehsam, No. 96-01118, Kevin Ahern sought recovery of pension benefits. Pls.' Resp. to Defs.' Mot. in Limine at 3.

16. Kevin Ahern v. J. Donald Kennedy, Richard Kennedy,

Maureen Muehsam and William Muehsam, No. 96-01118 was dismissed by the Order of the Honorable James P. MacElree II dated October 9, 1996. Pls.' Resp. to Defs.' Mot. in Limine Ex. C.

17. In connection with the state court litigation, Kevin Ahern received a complete copy of the pension plan sometime after October 6, 1996, approximately 614 days after it was requested. N.T. at 12.

18. Plaintiffs filed the instant cause of action on January 14, 1997 alleging that Kencor improperly withheld funds from the pension plan, improperly denied them medical benefits, and failed to provide them with a copy of the pension and/or medical plan in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 et seq. Pls.' Am. Compl.

19. Pursuant to ERISA § 502(h), Plaintiffs properly served a copy of the complaint upon the Secretary of the Department of Labor. 29 U.S.C. § 1132(h); Br. in Support of Pls.' Claims for Payment in Equity at 2.

20. On May 14, 1997, the Department of Labor filed a separate action against Kencor entitled Alexis M. Herman, Secretary of Labor, United States Department of Labor v. Maureen Muehsam and Kencor, Inc., No. 97-3395, alleging breach of fiduciary duties and dealing in prohibited transactions in violation of ERISA §§ 404, 406. 29 U.S.C. §§ 1104, 1106; Br. in Support of Pls.' Claims for Payment in Equity at 2.

21. On July 17, 1997, the action brought by the Department of Labor terminated with the entry of a consent judgment by which

Defendants agreed to pay \$5,989.48 as a civil penalty to the Department of Labor and to pay \$29,947.38 to the pension plan, terminate the pension plan, and distribute its assets. Defs.' Mot. in Limine Ex. A.

22. Pursuant to the consent judgment Plaintiffs would receive approximately \$3,600.00, including interest, in pension benefits. Defs.' Mot. in Limine Ex. A.

## **II. CONCLUSIONS OF LAW.**

23. The pension plan sponsored by Kencor is an "employee pension benefit plan" within the meaning of ERISA § 3(3). 29 U.S.C. § 1002(3).

24. Plaintiffs filed this action to "recover benefits due under the terms of a plan," specifically medical and pension benefits, pursuant to ERISA § 502(a)(1)(B). 29 U.S.C. § 1132(a)(1)(B).

25. Plaintiffs filed this action to recover \$61,400.00 from Maureen Muehsam for her failure, as named Fiduciary, to provide Kevin Ahern with a copy of the pension plan pursuant to ERISA § 502(a)(1)(A). 29 U.S.C. § 1132(a)(1)(A).

26. Maureen Muehsam, as the plan Administrator was required to provide Plaintiff Kevin Ahern with a copy of the plan within 30 days of his request and, may, in the Court's discretion, be held personally liable for up to \$100.00 per day pursuant to ERISA § 502(g)(1)(B). 29 U.S.C. § 1132(g)(1)(B).

27. The action brought by the Department of Labor did not foreclose Plaintiffs from bringing suit in their individual

capacity. Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 688 (7th Cir. 1986); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Picardi v. Chicago Truck Drivers, 581 F. Supp. 794, 799 (N.D. Ill. 1983).

28. Plaintiff Kevin Ahern is entitled to recover approximately \$3600 in pension benefits, including interest. N.T. at 8.

29. Maureen Muehsam shall immediately distribute to Plaintiffs the balance of Plaintiff Kevin Ahern's pension plan account, however, Plaintiffs shall be precluded from recovering any sums pursuant to the consent judgment entered into between the Department of Labor and Kencor Inc.

30. Competent state courts and federal district courts share concurrent jurisdiction over actions filed pursuant to 29 U.S.C. § 1132(a)(1)(B). 29 U.S.C. § 1132(e).

31. The verdict reached in Plaintiffs' action filed in the Court of Common Pleas of Chester County, entitled Kevin Ahern v. Kencor Inc., No. 94-09488, precludes this court from re-litigating the issue of Plaintiffs' entitlement to unpaid medical benefits.

32. Plaintiffs alleged but failed to prove that Defendants J. Donald Kennedy, Richard Kennedy or William Muehsam could be held individually liable in this action.

33. Plaintiffs failed to prove that damages were incurred due to Maureen Muehsam's failure to provide them with a copy of the plan and, therefore, Plaintiffs are not entitled to any

damages pursuant to ERISA § 502(a)(1)(A). 29 U.S.C. § 1132 (a)(1)(A); Shlomchik v. Retirement Plan of Amalgamated Ins. Fund, 502 F. Supp. 240, 245 (E.D. Pa. 1980), aff'd, 671 F. 2d 496 (3d Cir. 1981).

34. Pursuant to ERISA § 502(g)(1), it is within the Courts discretion to award costs and attorney's fees to either party. 29 U.S.C. § 1132(g).

35. The Third Circuit has promulgated a five factor test to determine whether or not attorney's fees should be awarded under ERISA. Ursic v. Bethlehem Mines, 719 F.2d 670, 675 (3d Cir. 1983). Those factors are:

- (1) the offending parties' culpability or bad faith;
- (2) the ability of the offending party to satisfy an award of attorneys' fees;
- (3) the deterrent [sic] 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.

Ellison v. Shenango Inc. Pension Bd., 956 F.2d 1268, 1273 (3d Cir. 1992)(quoting Ursic, 719 F.2d at 673).

36. I find that Plaintiffs claims conferred no benefit on members of the pension plan as a whole and will have little deterrent effect on the conduct of Kencor.

37. I also find that Kencor acted in bad faith by improperly withholding Plaintiff Kevin Ahern's contributions to

the pension plan and by failing to provide Plaintiffs with a copy of the pension plan, and that Kencor has the ability to satisfy an award of costs and fees in Plaintiffs favor.

38. Additionally, I find that although Plaintiffs claims initially had merit, since they have an absolute right to bring suit in their individual capacities, once the Department of Labor stepped in, there was no need for Plaintiffs to forge ahead with this suit in light of the judgment reached by Judge MacElree in the Chester County Court of Common Pleas. Further, Plaintiffs victory is pyrrhic. Plaintiffs would have recovered their pension benefits by the terms of the consent decree, albeit, at a later time.

39. Out of the five factors, (1) and (2) weigh in favor of Plaintiff, (3) and (4) weigh in favor of Defendant. The fifth factor, the relative merits of the parties, leads to the conclusion that Plaintiffs should not collect fees and costs. Plaintiffs' attorney prosecuted this action in piecemeal fashion by filing three actions when only one was necessary, wasting valuable judicial resources in both state and federal court. This behavior should not be rewarded.

For these reasons, I will enter the following verdict:

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

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KEVIN AHERN and LEE ANN AHERN, h/w,	:	
	:	CIVIL ACTION
	:	
Plaintiffs,	:	
v.	:	NO. 97-295
	:	
KENCOR, INC., J. DONALD KENNEDY,	:	
RICHARD KENNEDY, MAUREEN MUEHSAM,	:	
and WILLIAM MUEHSAM, Individually,	:	
Jointly and Severally,	:	
	:	
Defendants.	:	

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**ORDER**

AND NOW, this 5th day of February 1998, it is hereby  
ORDERED, JUDGED, and DECREED:

1. Judgment is hereby entered in favor of Plaintiffs,  
Kevin and Lee Ann Ahern and against Defendant Kencor Inc. as to  
Count II, the return of unpaid pension benefits;

2. Maureen Muehsam, as trustee of the Kencor pension  
plan, shall distribute the balance of Plaintiff Kevin Ahern's  
pension plan account, plus interest, within 30 days of the date  
of this Order;

3. Plaintiffs are precluded from recovering any sums  
pursuant to the consent judgment entered by this Court in the  
matter known as Herman v. Muehsam, No 97-3395.

4. Judgment is entered in favor of Defendant Kencor  
Inc. as to all remaining counts;

5. Judgment is hereby entered in favor of the  
individual Defendants, J. Donald Kennedy, Richard Kennedy,  
Maureen Muehsam, and William Muehsam, and against Plaintiffs on

all counts; and

6. All parties are to bear their own costs.

BY THE COURT:

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Robert F. Kelly J.