

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

EDWARD J. FOLEY, SR.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,	:	
	:	
Defendants.	:	NO. 98-906

Reed, S.J.

December 7, 2000

M E M O R A N D U M

Now before the Court are the motion of defendants John Dougherty and Edward Nielson, in their capacities as officers of the International Brotherhood of Electrical Workers Union Local 98 (“Local 98”), for allowance of attorneys’ fees under the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401, *et seq.* (“LMRDA”) (Document No. 61), and the motion of plaintiff Edward J. Foley, Sr., for attorneys’ fees under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (“ERISA”) (Document No. 80). For the following reasons, the motion of defendants Dougherty and Nielson will be denied, and the motion of plaintiff Foley will be granted.

Background

The facts of this case have been spelled out in greater detail on previous occasions, and therefore, I provide here only a brief outline of plaintiff’s claims. Plaintiff brought this action under LMRDA and ERISA, alleging that he was denied 12.5 years of pension benefits he had accrued prior to a break in service in employment covered that was “covered” by the Local 98

pension plan (employment in the electrical industry). The pension fund trustees had denied plaintiff's request for eligibility under an exception to the plan's break-in-service provision, under which plan members who meet certain criteria may receive credits accrued prior to a break in service.

This Court granted summary judgment in favor of defendants on plaintiff's claim under LMRDA that his free speech rights were violated by the union defendants, including Dougherty and Nielson, but denied summary judgment as to plaintiff's ERISA claims. See Foley v. IBEW Local Union 98 Pension Fund, 91 F. Supp. 2d 797 (E.D. Pa. 2000) ("Foley I"). Following a non-jury civil trial on August 21 and 22, 2000, this Court found that plaintiff was treated differently from all other persons similarly situated in that his petition for eligibility under the break-in-service exception was subjected to a more demanding evidentiary standard and a stricter level of scrutiny than the petitions of those similarly situated to him. See Foley v. IBEW Local Union 98 Pension Fund, 112 F. Supp. 2d 411 (E.D. Pa. 2000) ("Foley II"). The Court therefore concluded that the trustees' decision to deny plaintiff his accrued pension benefits was arbitrary and capricious, and that plaintiff was entitled to a recovery of benefits under ERISA, 29 U.S.C. § 1132 (a) (1) (B), and granted judgment in favor of Foley and against the pension fund in the amount of \$99,624.65. See id. at 416.

Defendants Dougherty and Nielson filed their motion for attorneys' fees under LMRDA following this Court's summary judgment ruling, and plaintiffs filed their motion under ERISA following the trial.

Defendant's Motion

The motion of defendants Dougherty and Nielson is without merit. The LMRDA section

they cite as the basis for their request contains no provision for an award of attorneys' fees. While the Supreme Court has ruled that the attorneys' fees of successful *plaintiffs* may be reimbursed under Title I of LMRDA, see Hall v. Cole, 412 U.S.1, 7-9, 93 S. Ct. 1943 (1973), defendants cite not one case, nor could I discover any case in my own research, in which a successful *defendant* was awarded attorneys' fees under Title I of LMRDA.

The reason for this is that the Supreme Court's stated justification for awarding attorneys' fees under LMRDA was a plaintiff-centered concept called the "common benefit doctrine." The common benefit doctrine applies when "the *plaintiff's* successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" Hall, 412 U.S. at 5 (quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-97, 90 S. Ct. 616 (1970)) (emphasis added). Cases brought under Title I of LMRDA are intended to vindicate a union member plaintiff's right of participation in union affairs, and thus a successful plaintiff "necessarily render[s] a substantial service to his union as an institution and to all its members." See id. at 8. Because an award of attorneys' fees would be paid out of union coffers, the Court held that allowing an award of attorneys' fees would shift the cost of the litigation to the class benefitted by it (the union members) and was a justified use of the Court's equitable power. See id. at 9.

The window the Supreme Court opened in Hall for reimbursement of attorneys' fees under Title I was quite a small one, and it is clear that the defendants Dougherty and Nielson cannot fit through it. Hall permits only plaintiffs to recover attorneys' fees under ERISA, and Dougherty and Nielson were defendants here. No right of participation was vindicated by this

Court's grant of summary judgment in defendants' favor on plaintiff's LMRDA claim, and an award of attorneys' fees in this case would not shift the cost of the litigation to a person or class that was benefitted by dismissal of the LMRDA claims; rather, it would come out of the pocket of the plaintiff, who was not benefitted by the dismissal of his LMRDA claims. Thus, the common benefit doctrine does not apply in a case in which the defendant prevails, and a defendant may not recover attorneys' fees under Title I of LMRDA.

Accordingly, the motion of defendants Dougherty and Nielson for allowance of attorneys' fees is denied.

Plaintiff's Motion

Plaintiff's motion travels a better-worn path than defendants'. Under to ERISA, a court may, in its discretion, award "reasonable" attorneys' fees to either party. See 29 U.S.C. § 1132 (g) (1).¹ While the statute itself offers no criteria to guide a court's exercise of its discretion, the Court of Appeals for the Third Circuit has used the following five-factor test for determining whether an award of fees to a prevailing party is warranted under § 1132 (g) (1):

- (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' positions.

See Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). The court of appeals has instructed that "there is no presumption that a successful plaintiff in an ERISA suit should

¹ The statute provides, "In any action under this subchapter ... by a participant ... the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132 (g) (1).

receive an award in the absence of exceptional circumstances.” McPherson v. Employees’ Pension Plan of Am. Re-Insurance Co., Inc., 33 F.3d 253, 254 (3d Cir. 1994) (citing Ellison v. Shenango, Inc. Pension Bd., 956 F.2d 1268, 1273 (3d Cir. 1992)). Furthermore, according to the court of appeals, district courts must articulate their analyses and conclusions as to each of the five factors. See Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1012 (3d Cir. 1992).

1. Culpability or Bad Faith

The first factor does not require a finding of bad faith or ulterior or sinister purpose. See McPherson, 33 F.3d at 256-57. A court can find against a party on the first factor when the conduct at issue involved blameable conduct that constituted “something more than simple negligence.” Id. at 257. Thus, this Court’s prior finding that the fund trustees acted in good faith, see Foley II, 112 F. Supp. 2d at 415, is not dispositive of the first factor.

The conduct at issue in this case was the disparate treatment plaintiff received at the hands of the defendant pension fund. Documents generated by and for the pension trustees at the time plaintiff’s application for benefits was considered reflected that plaintiff’s application was being subjected to a stricter evidentiary standard than any other similar application. See Foley II, 112 F. Supp. 2d at 413, ¶¶ 17-21. Uncontroverted testimony at trial established that, in the time before and after plaintiff’s application was considered, no other pension plan participant was required to produce the quantum of evidence that the plan trustees demanded of plaintiff. See id. at ¶¶ 33-36. The conduct was arbitrary and capricious and violated the plan’s assurance to its union members “that all ... interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated.” See id. at 416, ¶ 49. This Court concluded that the subjective, good faith belief of the fund trustees did not alter the fact that plaintiff was treated differently

from all other individuals similarly situated. See id. at 414, ¶ 31. Thus, I conclude that the conduct of the pension fund was sufficiently culpable to warrant a finding in plaintiff's favor on the first factor.

These circumstances are much like those the Court of Appeals for the Third Circuit faced in McPherson. There, a plan committee denied the plaintiff's request for a lump-sum distribution of his benefits. The plan committee's stated reasons were that lump-sum payments would threaten plan stability, that the plan had never distributed lump-sum payments to anyone under 62, and that the plan language disfavored such payments. See McPherson, 33 F.3d at 257. The district court found that in fact the plan was flush with funds and lump-sum payments would have had no impact on its stability; that at least two individuals under 62 had been given lump-sum payments prior to plaintiff; and that the plan explicitly provided for such distributions. See id. Furthermore, the district court found that a significant amount of time elapsed (six years), during which the plan had ample opportunity to reevaluate its untenable position, but the plan failed to do so. See id. Under such circumstances, the Court of Appeals for the Third Circuit held, a court could find in the plaintiff's favor on the first factor. See id.

This case shares key elements in common with McPherson. First, plan decisionmakers denied plaintiff's request while granting the request of others who were plainly similarly situated. Second, here, as in McPherson, the proffered reasons of the plan for denying the request do not hold up under scrutiny and the plan does not require the conclusion the decisionmakers reached. Third, just as in McPherson, significant amounts of time elapsed between the plan decisionmakers' original denial of plaintiff's request and its final denial, and thus plan decisionmakers had plenty of time (more than two years) to revisit their decision, but failed to do

so.²

In light of McPherson, I conclude that there is sufficient culpability here on the part of the fund to find in plaintiff's favor on the first element.

2. Ability to Pay

There is no question that the Local 98 plan has sufficient funds to pay the attorneys' fees requested in this case. The plan has more than \$130,000,000 in its coffers, and plaintiff has requested just over \$130,000. Defendants concede this point, and I find it weighs in plaintiff's favor.

3. Deterrent Effect

An award of attorneys' fees in this case would have a deterrent effect on the Local 98 pension fund. The fund trustees undoubtedly will consider applicants for benefits under the provisions at issue in this case and under other provisions in the wake of this case, and an award of attorneys' fees would call attention to their responsibility to follow the plan mandate to treat similarly situated applications in a similar manner. See McPherson, 33 F.3d at 258 (deterrence of conduct that did not rise to the level of bad faith furthers the objectives of ERISA and may be considered under the third factor). Therefore, I conclude that this factor weighs in plaintiff's favor.

4. Benefit to Plan Members

An award of attorneys' fees in this case will have little or no effect on other plan members, with the exception of the above-mentioned deterrent effect on future applications.

² Arguably, the denial in this case was more serious, and the culpability therefore greater, than in McPherson, because the plaintiff here was denied 12 ½ years of pension credits outright, whereas the plaintiff in McPherson was merely denied the method of payment he preferred.

Thus, this factor weighs in neither party's favor.

5. Relative Merits

This was not a close case. The documentary and testimonial evidence in the case decisively supported plaintiff's allegation that he was treated differently from every other person who sought refuge under the plan's break-in-service exception. See Foley II, 112 F. Supp. 2d at 413-15, ¶¶ 15-36. ERISA's prohibition against arbitrary and capricious conduct clearly prohibits such dramatically disparate treatment. See Foley I, 91 F. Supp. 2d at 805. Thus, the facts and the law weighed heavily in plaintiff's favor, and this factor weighs heavily in favor of awarding attorneys' fees and costs.

My consideration of the five factors reveals that the first, second, third, and fifth factors each support plaintiff's motion for attorneys' fees and costs. Therefore, plaintiff's request for attorney's fees under § 1132 (g) (1) will be granted.

Amount of Award

Defendants object that plaintiff should not be awarded attorney fees for the non-ERISA claims on which judgment was granted in favor of the defendants, and that plaintiff should not recover for time spent bringing trial counsel Daniel McElhatton up to speed on the case or for the time original counsel, Edward J. Foley, Jr.,³ spent in trial while Mr. McElhatton tried the case. I disagree with the first of defendants' contentions,⁴ but agree with respect to the duplication of

³ Edward J. Foley, Jr., is the son of the plaintiff, and the Court and counsel agreed that plaintiff would be best served if counsel other than plaintiff's son tried the case.

⁴ First, plaintiff's counsel states in his affidavit that he deducted the hours spent on non-ERISA claims from the billing records submitted. (Plaintiff's Exhibit 5, Affidavit of Edward J. Foley, Jr., at ¶ 8). Second, court need not deduct time spent on non-ERISA claims where the non-ERISA claims arise out of the same common nucleus of operative fact and involve similar claims for relief and similar legal theories. See Egert v. Connecticut General Life Ins. Co., 768 F. Supp. 216 (N.D. Ill. 1991) (prevailing plaintiffs were not required to deduct time spent on

effort between Mr. McElhatton and Mr. Foley, Jr. The billing records submitted by counsel do not provide clear delineations as to the amount of time spent on claims other than ERISA, and the amount of time spent educating Mr. McElhatton about the case. Nevertheless, I must make a reasonable estimate based on the information provided by the plaintiff.

It is reasonable to conclude that the hours Mr. McElhatton spent on the case prior to the filing of his appearance (prior to July 5, 2000) constituted the time during which he educated himself about the case and considered taking the case.⁵ Furthermore, it is reasonable to conclude that the time spent by Mr. Foley meeting with and otherwise communicating with Mr. McElhatton prior to his appearance constituted time spent educating Mr. McElhatton about the case. Such time is duplicative and would not have been necessary if plaintiff had, at the outset of the case, selected counsel who could take the case to trial, and therefore the amount of plaintiff's award of counsel fees will be reduced by such time. As for Mr. Foley's participation in the trial itself, I conclude, based on the billing records and my own observations, that while Mr. Foley performed a number of functions in trial preparation, his role in the trial itself was minuscule.⁶ Therefore, plaintiff's fee request will be reduced by the amount of time Mr. Foley spent in trial.

I have reviewed plaintiff's request and supporting documents carefully, and believe

unsuccessful, non-ERISA claims where such claims sought similar relief, arose out of a common core of operative facts, and were based on related legal theories). Second, it appears from counsel's billing records that the ERISA claims were the core of plaintiff's claims against defendants and that counsel devoted very little time to the non-ERISA claims.

⁵ My calculations reflect that Mr. McElhatton spent a total of 23.8 hours on matters related to the case prior to the filing of his appearance on July 5, 2000, (Document No. 66). At Mr. McElhatton's hourly rate of \$250, that constitutes \$5,950, which will be deducted from Mr. McElhatton's total fee request.

⁶ Counsel Foley billed a total of 6.9 hours meeting with and speaking with Mr. McElhatton prior to the filing of Mr. McElhatton's appearance, and a total of 13.7 hours at trial. At Mr. Foley's hourly rate of \$175 per hour, that is a total of \$3,605, which will be deducted from Mr. Foley's total fee request.

plaintiff's remaining attorneys' fees reflect reasonable compensation for the efforts of counsel. Plaintiff has submitted affidavits from both of his attorneys detailing their professional backgrounds, explaining the time spent on the case, and justifying their hourly rates. (Plaintiff's Exhibits 5 and 6.) Accompanying those affidavits are detailed billing records reflecting the time counsel spent on the case, and I find those billing records to indicate reasonable efforts on their client's behalf. The rates charged by both counsel appear to be well within the range of the rates charged by individuals with comparable legal experience in Philadelphia. (See Plaintiff's Exhibits B and C.) Furthermore, plaintiff itemizes the costs associated with the litigation, including deposition transcript expenses and filing fees, and I conclude these are reasonable. Defendant does not assail the reasonableness of the rates charged by the attorneys, nor does it contest the amount of hours spent on the case or the costs, beyond the objections already addressed. Therefore, I find that, subject to the above-discussed deductions, plaintiff's request for attorneys' fees is reasonable and shall be granted.⁷

An appropriate Order follows.

⁷ Plaintiff's request was for a total of \$132,159.49. As discussed above, I will deduct from that amount what I consider to be duplicative fees in the amount of \$9,555.00 (\$5,950 from Mr. McElhatton, \$3,605 from Mr. Foley). The result is an award of \$122,604.49.

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

EDWARD J. FOLEY, SR.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
INTERNATIONAL BROTHERHOOD OF	:	
ELECTRICAL WORKERS LOCAL	:	
UNION 98 PENSION FUND, et. al.,	:	
	:	
Defendants.	:	NO. 98-906

ORDER

AND NOW this 7th day of December, 2000, upon consideration of the motion of defendants John Dougherty and Edward Nielson, in their capacities as officers of the International Brotherhood of Electrical Workers Union Local 98 (“Local 98”), for allowance of attorneys’ fees under the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401, *et seq.* (“LMRDA”) (Document No. 61), and the motion of plaintiff Edward J. Foley, Sr., for attorneys’ fees under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (“ERISA”) (Document No. 80), and having concluded, for the reasons stated in the foregoing memorandum, that defendants Dougherty and Nielson are not entitled to attorneys’ fees under LMRDA, and that plaintiff is entitled to attorneys’ fees under ERISA, **IT IS**

HEREBY ORDERED that

- (1) the motion of defendants Dougherty and Nielson is **DENIED**; and
- (2) the motion of plaintiff is **GRANTED**, and the Local 98 pension fund shall reimburse plaintiff in the amount of \$122,604.49.

LOWELL A. REED, JR., S.J.

