

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

JOHN DEPENBROCK,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 01-6161
	:	
CIGNA CORPORATION and CIGNA	:	
PENSION PLAN,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

MARCH 18, 2005

Presently before this Court is Plaintiff's, John Depenbrock ("Depenbrock"), Motion for Attorneys' Fees and Expenses. Additionally, on February 1, 2005, the United States Court of Appeals for the Third Circuit ("Third Circuit") ordered that Depenbrock's application for attorneys' fees and expenses incurred on his appeal be referred to this Court. Thus, I will consider Plaintiff's request for attorneys' fees and expenses incurred at the District and Circuit Court levels. For the reasons that follow, Plaintiff's request for attorneys' fees and expenses is granted, however, I will slightly reduce the amount requested.

I. INTRODUCTION

The factual predicate underlying this case has been set forth by the Third Circuit. See Depenbrock v. Cigna Corp., 389 F.3d 78 (3d Cir. 2004). However, to put the instant Motion into context, I will briefly recite the factual and procedural history.

As the Third Circuit noted at the outset of its decision, Depenbrock:

claims that his employer, CIGNA Corporation . . . violated the

Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.*, by denying him benefits without the required notice and lawful amendment to the pension plan. Depenbrock also alleges that CIGNA violated ERISA by failing to provide him an opportunity to review pertinent documents relating to his denial-of-benefits claim, and by breaching the fiduciary duty owed as plan administrator.

Depenbrock, 389 F.3d at 79. Plaintiff began working at CIGNA in 1983. CIGNA provided its employees with a generous pension plan. *Id.* at 80. In late 1997, CIGNA proposed an amendment to its plan, the effect of which was to transfer younger employees to a more modest pension plan while older employees would be grandfathered in under the older higher benefits plan. *Id.* at 80. “The proposed amendment included a ‘Rehire Rule’ which stated that long-term employees who left CIGNA and were re-employed after December 31, 1997, would not participate in the Old Plan upon return but instead would be transferred immediately into the New Plan.” *Id.* The “Rehire Rule” was not formally adopted until December 21, 1998.

On January 2, 1998, Plaintiff resigned from CIGNA. However, on November 30, 1998, he was rehired. The Third Circuit found that because the “Rehire Rule” was not adopted until December 21, 1998, the Rule did not apply to him. Additionally, the Third Circuit found that the “Rehire Rule” could not be retroactively ratified because such a “ratification would effect a retroactive reduction of Depenbrock’s accrued benefits under the Old Plan.” *Id.* at 84. Finally, the Third Circuit rejected Defendants’ reliance on a proposed treasury regulation since it was not yet the law and because the current regulations prohibited “plan amendments that directly or indirectly affect accrued benefits.” *Id.* at 85-86.

Pursuant to the Third Circuit’s mandate, I issued an Order granting summary judgment in favor of Depenbrock on Claim One and denying the Defendants’ Motion for

Summary Judgment on January 31, 2005. Subsequently, Plaintiff filed his Motion for Attorneys' Fees and Costs on February 22, 2005.

Throughout the course of this litigation, Plaintiff had two attorneys working on his behalf, namely, Stephen R. Bruce, Esq. ("Bruce") and William M. O'Connell, Esq. ("O'Connell"). Bruce states that the costs and fees he incurred at the District Court level totaled \$140,609.95, of which \$7,134.95 related to his costs and expenses and \$133,475.00 totaled his fees. O'Connell states that the costs and fees incurred by him at the District Court level totaled \$29,593.86, of which \$770.36 related to his costs and expenses and \$28,823.50 totaled his fees. Bruce states that the costs and fees he incurred at the Circuit Court level totaled \$61,131.61, of which \$711.61 totaled his costs and expenses and \$60,420.00 totaled his fees. O'Connell states that the costs and fees he incurred at the Circuit Court level totaled \$14,363.34, of which \$475.34 related to his costs and expenses and \$13,888.00 totaled his fees. Thus, the total amount of costs and fees that Plaintiff seeks is \$245,698.76.¹

II. DISCUSSION

"Attorneys' fees may be awarded to prevailing parties in actions brought under [ERISA]." McPherson v. Employees' Pension Plan of Am. Re-Insurance Co., Inc., 33 F.3d 253, 254 (3d Cir. 1994). However, the ERISA standard for a fee award only states that "the court in its discretion may allow a reasonable attorney's fee and costs of action." 29 U.S.C. § 1132(g)(1).

¹ I note that this total amount is higher than the fee actually requested by Plaintiff in his proposed order accompanying his Motion. In his proposed order, Plaintiff requested a total of \$244,418.42 which is \$1280.34 less than the total amount of the attached exhibits. The \$1280.34 discrepancy arises from Plaintiff's failure to use O'Connell's most recent and updated client bill and ledger for fees and expenses at the Circuit Court level. As this appears to be no more than a clerical error, I will consider the \$245,698.76 figure rather than the \$244,418.42 figure found on Plaintiff's proposed order.

Thus, the Third Circuit has enunciated five factors that a district court must consider before awarding attorneys' fees in this context. Specifically, the factors a district court must consider are:

- (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, 33 F.3d at 254 (quoting Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983)). It is mandatory for a district court to consider and analyze all five factors. See Fields v. Thompson Printing Co., 363 F.3d 259, 275 (3d Cir. 2004)(citing McPherson, 33 F.3d at 254). I will now engage in that analysis.

A. APPLICATION OF THE URSIC/McPHERSON FACTORS

The first factor "favors an award to the prevailing party not only in cases involving 'bad faith' but in other cases as well." McPherson, 33 F.3d at 256. Indeed, if a losing party is deemed to be culpable, that will weigh in favor of granting attorneys fees and costs for the plaintiff. Id. While bad faith connotes an ulterior motive, a party may be culpable without having acted with such an ulterior motive. Id.

In a civil context, culpable conduct is commonly understood to mean conduct that is "blameable; censurable; . . . at fault; involving the breach of a legal duty or the commission of a fault Such conduct normally involves something more than mere negligence [On the other hand, it] implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose."

Id. at 256-57 (quoting Black's Law Dictionary (6th ed. 1990)). However, “a party is not culpable merely because it has taken a position that did not prevail in litigation.” Id. at 257. Thus, while the Defendants were ultimately unsuccessful, that does not end the inquiry under this factor.

While the Third Circuit noted that CIGNA's CEO had the authority to amend the plan and adopt the “Rehire Rule,” it found that the CEO did not amend the plan until December 21, 1998, the date the written amendment was executed and formally adopted. Depenbrock, 389 F.3d at 82-83. Thus, the amendment to the plan did not take place until three weeks after Depenbrock had been rehired. Id. at 83. Additionally, the Defendants' retroactive ratification argument failed since:

reliance on the doctrine of ratification is misplaced because ratification would effect a retroactive reduction of Depenbrock's accrued benefits under the Old Plan. Given that the amendment was not formally adopted until December 21, 1998, Depenbrock acquired rights in the interval before affirmance – namely, the right to receive benefits under the Old Plan – and retained his right to accrued benefits, instead of having to settle for the more modest benefits provided under the New Plan.

Id. at 84. The Third Circuit noted that the Defendants' assertion that the amendment did not reduce Depenbrock's accrued benefits “was premised on an unsubstantiated interpretation of ERISA's anti-cutback rule” and was predicated on a proposed treasury regulation that was not yet the law. Id. at 84-85. Thus, based upon the findings of the Third Circuit, I find that Defendants actions in this case rise to the level of culpability so as to weigh in favor of granting a fee award. Defendants actions reduced Depenbrock's accrued benefits contrary to the amendment procedures, and Defendants relied upon unsubstantiated interpretations of the applicable law. The Defendants did not execute the “Rehire Rule” until after Depenbrock returned to CIGNA in

November of 1998, and Defendants retroactive ratification argument was contrary to the applicable law.²

The second factor to consider is the Defendants ability to satisfy the award of attorneys' fees and costs. In this case, the Defendants concede that they have the ability to pay Plaintiff's request for attorneys' fees and costs. Therefore, this factor favors awarding such fees and costs.

The third factor I must consider is the deterrent effect an award of attorneys' fees will have against the Defendants. I find that this factor weighs in favor of awarding fees and costs. Awarding of attorneys' fees and costs will deter Defendants from disregarding the amendment procedures that have the effect of reducing one's benefits. Additionally, by granting attorneys' fees, I find that it will deter the Defendants from attempting to retroactively reduce benefits that have been accrued as well as act contrary to the amendment procedures.

The fourth factor this Court must consider is the benefit conferred on the members of the pension plan as a whole. Defendants state that this factor weighs against the granting of an award since it only affects the 178 employees who were rehired between January 1, 1998 and December 21, 1998. Thus, Defendants argue that since the CIGNA pension plan has approximately 25,000 participants, Plaintiff cannot argue that it will benefit members of the pension plan as a whole. Defendants' argument is unpersuasive under the fourth factor. In McPherson, the Third Circuit agreed with the District Court's application of this factor by noting

² Throughout the course of Defendants' Response Brief, they continually cite to my Memorandum Opinion dated July 31, 2003. However, I find that such reliance is misplaced as I must view this case through the prism of the Third Circuit's reasoning and decision rather than my own.

the following:

[t]he fourth factor requires consideration of the benefit, if any, that is conferred on others by the court's judgment . . . McPherson's suit thus held out no possibility of benefit to other similarly situated Plan members because there were, and would be, no other similarly situated Plan members.

33 F.3d at 256. In this case, there are approximately 178 similarly situated Plan members who might be affected by the decision in this case. This case might have an effect on the benefits owed to numerous similarly situated Plan members and, mas such, the fourth factor weighs in favor of my granting a fee award.

Finally, I will consider the fifth factor, namely, the relative merits of the parties' positions. As with the first factor, "the fact that the defendants' positions have not been sustained does not alone put the fifth factor in the column favoring an award. Nevertheless . . . there will be cases in which the relative merits of the positions of the parties will support an award even in the absence of bad faith litigating." *Id.* at 258. Based upon the Third Circuit's decision, I find that this factor also weighs in favor of awarding attorneys' fees and costs. As I stated in my analysis under the first factor, Defendants failed to follow the established procedures so as to effect the "Rehire Rule." Additionally, the Third Circuit found that Defendants' retroactive ratification arguments were misplaced because such a retroactive ratification would reduce Depenbrock's accrued benefits, violate the anti-cutback rule and were, in part, premised on a proposed treasury regulation that was not the law. *Id.* at 83-84. Thus, based upon the Third Circuit's decision, I find that this factor weighs in favor of Plaintiff since his claims had greater

relative merit than Defendants' positions based on the applicable law.³

After reviewing the five factors, I conclude that the factors weigh in favor of awarding attorneys' fees and costs. Additionally, while I have found that all five factors weigh in favor of awarding attorneys' fees and costs, I note that "the Ursic/[McPherson] factors are not requirements in the sense that a party must demonstrate all of them in order to warrant an award of attorneys' fees, but rather they are elements a court must consider in exercising its discretion." Fields, 363 F.3d at 275. Thus, even if one of the factors was deemed to be neutral or weighing against such an award, I would still be inclined to grant attorneys' fees and costs in this case because of the weight of the remaining factors. See Smith v. Contini, No. 97-2692, 2003 WL 22734320, at *4-5 (D.N.J. Aug. 19, 2003)(granting attorneys' fees where only three factors weigh in favor of a fee award and two factors are neutral). Having determined that the Ursic/McPherson factors balance in favor of an award, I will now examine the reasonableness of the requested attorneys' fees and costs.

B. REASONABLENESS

Defendants make three arguments in seeking to reduce Plaintiff's request for fees and costs. First, Defendants assert that Plaintiff successfully litigated only one of his five Counts, and thus, any fee award should be reduced accordingly. Second, Defendants assert that all of O'Connell's fees should be eliminated from any fee award because the time he spent working on this case was duplicative of Bruce's time. Third, Defendants assert that Bruce's time

³ Under the fifth factor, the Defendants additionally argue that because I granted summary judgment on all five counts of the Complaint in favor of Defendant, and because the Third Circuit found it necessary to reach only Count I, Defendants' positions had greater merit. However, as I will discuss in supra Section II.B.1, such argument is unconvincing.

spent working on other potential “rehire” employees should be excluded from any fee award. I will consider each of these arguments in turn.⁴

1. Plaintiff’s Success

Plaintiff’s Complaint contained five Counts. While I granted summary judgment to Defendants on all five Counts, the Third Circuit only discussed my decision as to Count I. Thus, Defendants assert that since Plaintiff was only “successful” on one Count, any fee award should be reduced accordingly. I find this argument unpersuasive for the following reasons.

The United States Supreme Court has noted:

[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In this circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit . . . Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)(internal citation and footnote omitted). In this case, Plaintiff has obtained excellent results so as to allow him to recover a full fee. In fact, because Plaintiff’s result under Count I was so excellent, the Third Circuit deemed it unnecessary to even reach the remaining claims. See Depenbrock, 389 F.3d at 81, 86 (stating it will not reach other claims since court determined that the amendment adversely affects Depenbrock). Thus, the Third Circuit’s decision in choosing not to discuss Plaintiff’s other claims does not lead to the conclusion that Plaintiff’s fees should be reduced, particularly where Plaintiff has received

⁴ The Defendants do not contest the hourly rate that Bruce and O’Connell charged.

such excellent results.

2. O'Connell's Fees

The Defendants next argue that all of O'Connell's fees should be excluded from any fee award because his work on the case was duplicative of Bruce's work. I find such an argument by the Defendants extraordinary in light of the record in front of this Court, and I will not reduce the fee award based on this argument.

At the outset, I note that this case is somewhat unique in that the record contains a motion for attorneys' fees filed from both sides, albeit at different stages of the litigation. The Defendants filed a motion for attorneys' fees and costs after I entered summary judgment in their favor.⁵ In Defendants' motion, they estimated that their attorneys' fees and costs incurred until July 31, 2003 totaled approximately \$250,000. I note that this request for fees and costs included only those fees and costs incurred while the case was before this Court. While Defendants allege that they incurred approximately \$250,000 in fees and costs at the District Court level, Plaintiff has requested a total award of \$170,203.81 for work and expenses incurred before this Court, and \$75,494.95 for work and expenses incurred before the Third Circuit on appeal. This totals \$245,698.76. Thus, Plaintiff's total request, including his fees and costs incurred on appeal, is *less than* the amount that the Defendants sought for work completed just at the District Court level.

Regarding O'Connell's fees and expenses, I find that O'Connell's fees and expenses were not merely duplicative of Bruce's fees and services. After reviewing O'Connell's

⁵ I denied that motion without prejudice pending the outcome on appeal to the Third Circuit.

description of his services, it is clear that he and Bruce worked together and collaboratively in this case. Thus, I will not exclude O'Connell's requested fees from the award. I note that the sole case Defendants rely on, W.Va. Hosp. v. Casey, 898 F.2d 357, 365 (3d Cir. 1990), is distinguishable. In Casey, the Third Circuit excluded the fees incurred by local counsel for attending oral argument, but allowed a fee award for the two principal attorneys who were present at oral argument. O'Connell's services in this case were much more than that of simply serving as local counsel, therefore, Defendants' reliance on Casey is unavailing, and I will allow O'Connell's fees and expenses to be included in the award.

3. Other "Rehires"

Finally, the Defendants object to the time expended by Bruce on other "rehires." In Bruce's fee request, he includes the time he spent on potential employees, other than Depenbrock, who were rehired between January 1, 1998 and December 21, 1998. The total amount of fees requested from such work totals \$3,420. This case was never a class action brought by similarly situated employees. Rather, it was a case involving Depenbrock's claims that his benefits were unlawfully reduced by the Defendants. While the decision in this case has the potential to effect other rehired employees during the relevant period, I will not allow Plaintiff's counsel to receive a fee award for other potential plaintiffs when this case was not a class action. As such, the work completed by Bruce involving other "rehires," totaling \$3,420, will be reduced from the fee award.

III. CONCLUSION

I have properly analyzed whether Plaintiff should receive attorneys' fees and costs under the five factor Ursic/McPherson test. I have concluded that the factors balance in favor of

such an award. I have also specifically analyzed the three objections the Defendants made as to the reasonableness of the requested fee award. I have found that Plaintiff has received excellent results based upon the Third Circuit's decision so as to merit a full compensatory fee award. Furthermore, I have found that O'Connell's work in this case was not duplicative, but rather was collaborative so as to allow me to include O'Connell's fees in the award. Finally, I have concluded that Bruce's work on other "rehires" should not be included in the fee award since this case involved a single plaintiff seeking benefits owed to him and him alone. Therefore, I will award Plaintiff \$242,278.76 in attorneys' fees and costs.

An appropriate Order follows.

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

JOHN DEPENBROCK,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 01-6161
	:	
CIGNA CORPORATION and CIGNA	:	
PENSION PLAN,	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 18th day of March, 2005, upon consideration of Plaintiff's Motion for Attorneys' Fees and Costs (Doc. No. 65), the Response and Reply thereto, it is hereby

ORDERED that:

1. Plaintiff's Motion is **GRANTED**; and
2. Defendants shall pay Plaintiff \$242,278.76 for the attorneys' fees and expenses of his counsel, including for the fees and expenses incurred on appeal.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly Sr. J.

