

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

CONSTANCE G. LEVESQUE, :
PERSONAL REPRESENTATIVE OF :
THE ESTATE OF DANIEL R. LEVESQUE : CIVIL ACTION
 :
v : NO. 04-4143
 :
KEMPER NATIONAL SERVICES, INC., :
AGERE SYSTEMS INC. SHORT TERM :
DISABILITY PLAN and AGERE :
SYSTEMS INC. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

June 14, 2006

Constance Levesque, the widow of an Agere Systems Inc. employee who was wrongfully denied short-term disability benefits, asks this Court for an award of benefits, interest, statutory damages and attorneys' fees. Because I agree with the argument of Defendant Kemper National Services Inc. that Levesque is not entitled to statutory damages, I will reduce her damages request by \$70,900 and her attorneys' fees by \$2,507.50. The parties agree on the amount of benefits unpaid, \$23,825.64, and the interest due, \$4,511.74.

Levesque brought the successful claim for short-term benefits under Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. The Complaint included a demand for statutory damages of \$100 a day for each day Kemper failed to deliver its claim file and the summary of the benefit plan under 29 U.S.C. § 1132(c)(1)(B).¹

¹Section 1132(c)(1) provides:

(1) Any administrator . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a

Levesque first asked Kemper for his claim file and plan documents on January 14, 2003 and repeated the request until receiving his claim file on June 19, 2003. Kemper delivered a set of plan documents with the wrong company name on August 18, 2003. Levesque only received the proper plan documents on September 17, 2004 after filing suit. Levesque asks for \$70,900.00 in statutory penalties.

The decision whether to grant statutory penalties is entirely within this Court's discretion. *Hennessy v. Fed. Deposit Ins. Corp.*, 58 F.3d 908, 924 (3d Cir. 1995). The Third Circuit strictly construes ERISA requirements. *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1505 (3d Cir. 1994) (finding a letter from an attorney requesting a meeting was insufficient under § 1025(a) to request that certain materials be supplied). Section 1132(c)(1)(B) limits statutory penalties to plan administrators who fail or refuse to comply with a request for information. 29 U.S.C. § 1132(c)(1). ERISA provides that the plan administrator is the “plan sponsor” unless otherwise specified in the plan. 29 U.S.C. § 1002(16)(A)(ii). Only plan administrators are liable for statutory penalties under § 1132(c). *Hiney Printing Co. v. Brantner*, 243 F.3d 956, 960 (6th Cir. 2001). An insurance company, which is not a plan administrator, cannot be liable for statutory damages for failure to comply with an information request. *Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 585 (6th Cir. 2002) (holding an insurance company was not liable for statutory damages for failing to respond to requests for a summary plan description); *VanderKlok*

participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C.A. § 1132 (c)(1)

v. Provident Life & Accident Ins. Co., 956 F.2d 610, 618 (6th Cir. 1992) (same); *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 299 (9th Cir.1989) (holding that insurance company was not plan administrator for purposes of § 1132(c) liability).

In this case, Agere Systems Inc. is the designated Plan Administrator. Agere Systems Inc. Short-Term Disability Plan at ¶ 6.2. Kemper National Services Inc. is identified as the Claims Administrator. Agere Systems Inc. Short-Term Disability Plan at ¶ 6.1. In the Complaint, Levesque identified Kemper as the entity which failed to deliver his claim file and plan documents. This Court construes ERISA provisions strictly. Section 1132(c) applies by its words to any administrator, which is defined in ERISA as “the person specifically so designated” by the plan.² 29 U.S.C. § 1002(16)(A). Agere Systems is the administrator of the plan at issue. Levesque never asked Agere for his claim file or for the plan documents, so Agere was not an administrator who “fail[ed] or refuse[d] to comply with a request” under section 1132(c). Kemper is an insurance company, which cannot be held liable under section 1132(c). *Caffey*, 302 F.3d at 585.

Levesque cites *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982 (3d Cir. 1995), for the proposition liability for statutory damages may be created by apparent authority. In *Taylor*, however,

²(16)(A) The term “administrator” means--

- (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
- (ii) if an administrator is not so designated, the plan sponsor; or
- (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term “plan sponsor” means (i) the employer in the case of an employee benefit plan established or maintained by a single employer

29 U.S.C.A. § 1002 (16)

the agent exercising apparent authority was an employee of the plan administrator and had actual authority. *Taylor*, 49 F.3d at 987. In this case, the deliberate separation of plan administrator and claim administrator avoids creating an agency relationship.

Also at issue are Levesque's attorneys' fees. Agere disputes the attorneys' fee demand on two grounds arguing Levesque prevailed on only one of her three claims and some of the time billed was unreasonable.

ERISA does not require an award of attorneys' fees, but "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); *Martorana v. Bd. of Trs. of Steamfitters Local Union 420 Health, Welfare, & Pension Fund*, 404 F.3d 797, 804-05 (3d Cir. 2005). Absent exceptional circumstances, there is no presumption that a prevailing party will receive such fees. *McPherson v. Employees' Pension Plan of Am. Re-Ins. Co.*, 33 F.3d 253, 254 (3d Cir. 1994) (holding a defendant may be culpable without acting in bad faith). A defendant in an ERISA action ordinarily bears the burden of paying attorney's fees for a prevailing plaintiff. *Brytus v. Spang & Co.*, 203 F.3d 238, 242 (3d Cir. 2000). This Court considers five factors when determining whether to grant attorney fees in ERISA cases: (1) culpability or bad faith; (2) ability to satisfy an award of attorneys' fees; (3) deterrent effect of an award; (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). This Court must consider the *Ursic* factors, *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1011 (3d Cir. 1992), in exercising its discretion. *Fields*, 363 F.3d 275.

Here, the factors favor an award of attorney's fees for Levesque. First, while there is no specific evidence indicating bad faith, this Court has found culpability on Agere's part. Agere has

has the ability to pay attorney's fees. The facts of Levesque's claim establish Agere failed to recognize the degree to which Levesque was disabled by multiple sclerosis and an award of attorneys' fees might serve to make Agere more mindful in the future. Finally, this Court's entering judgment in favor of Levesque demonstrates his position was the stronger of the two. All five factors favor an award of attorneys' fees.

A calculation of attorneys' fees begins with the "lodestar," the product of the appropriate billing rates for the attorneys involved multiplied by the number of hours those attorneys reasonably expended on the action. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 703 (3d Cir. 2005) (citing *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). A party seeking attorneys' fees bears the burden of showing its requested hourly rates and the hours it claims are reasonable. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

Levesque's attorneys have submitted hourly billing records, affidavits as to prevailing rates in the area and affidavits regarding their individual skill levels, satisfying the requirements of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Agere objects to details of the billing records with the specificity required to trigger an examination. *Rode*, 892 F.2d at 1183. In reviewing a fee application, a district court must conduct "a thorough and searching analysis." *Evans v. Port Auth. of N.Y. & N.J.*, 273 F.3d 346, 362 (3d Cir. 2001).

Agere asks this Court to deduct any hours Levesque's attorneys spent on his unsuccessful claim for statutory penalties. "The focus of this analysis is on the relief actually obtained rather than on the success of the legal theories." *Inst. Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910 Id. (citing *Abraham v. Pekarski*, 728 F.2d 167, 175 (3d Cir. 1984)). An award of attorney fees under ERISA does not require a party to prevail; this court has discretion to award attorney fees to either

party. 29 U.S.C. § 1132(g)(1).

I will disallow the hours spent on Levesque’s fruitless Motion to Amend and the hours conceded by Levesque’s attorney at oral argument. In all other respects I find Levesque’s attorneys’ fees reasonable.

During the representation of Levesque, James M. Smith, Esq., moved from a law firm to private practice. While Smith was at Roland and Schlegel PC, five attorneys, three paralegals and a second-year law clerk worked on Levesque’s case. After Smith’s move to sole practice, his were the only hours billed.³

³The billing is:

Jerry R. Richwine, Esq.	Attorney	1.30 hours	\$200/hr.	\$ 260.00
Debbie A. Sottosanti, Esq.	Attorney	2.20 hours	\$180/hr.	\$ 396.00
S. Whitney Rahman, Esq.	Attorney	2.70 hours	\$178/hr.	\$ 534.00
Kathryn A. Rightmyer, Esq.	Attorney	0.20 hours	\$165/hr.	\$ 33.00
James M. Smith, Esq. (While at Roland and Schlegel, Smith billed at \$145 an hour and then \$155 an hour. The \$152 rate is an average)	Attorney	253.70 hours	\$152/hr.	\$38,507.00
Mary E. Iasaman	Paralegal	7.40 hours	\$ 75/hr.	\$ 555.00
Marcy A. Morris	Paralegal	8.60 hours	\$75/hr.	\$ 645.00
Andrea W. Thomas	Paralegal	.30 hour	\$75/hr.	\$ 22.50
Dante C. Cutrona	Law clerk	6.00 hours	\$65/hr.	\$ 390.00
Subtotal		282.40 hours		\$41,342.50
James M. Smith Esq.	Attorney	86.00 hours	\$155/hr.	\$ 13,330
Costs				\$ 6,233.84
TOTAL				\$60,906.34

Agere asks me to disallow six instances in which the billing is identified as pertaining to Levesque's unsuccessful bid for statutory penalties. This I will do in part. Smith billed 6.9 hours on March 8, 2005 to "review file; letter to opposing counsel; letter to client; legal research on damages related to violation of ERISA Section 1132(c)(1) and (c)(3); draft request for production of documents; draft interrogatories." Pl.'s Br., Ex. C at 6. I will attribute half the time to the unsuccessful claim and allow 3.45 hours at \$155, disallowing the same. On June 30 and July 1, 2005, Smith billed 2.7 hours at \$155 and hour to draft requests for admissions. Agere persuades me that request was directed at Kemper and applies only to the statutory penalties. I will disallow \$418.50. Smith's billings of a total of 6.4 hours on February 16 and 27, 2006 regarding the Motion to Amend Judgment is unreasonable and I will disallow \$992.00. Agere also asks me to disallow 2.5 hours on March 2, 2006 as related to the Motion to Amend. Because I find some of the time, that devoted to a telephone call to the client, calculating interest and writing to opposing counsel and client, reasonable I will disallow only half the billing or \$143.75. The total of fees I find unreasonable is \$2,089.00. At oral argument, Smith conceded deductions for an hour and a half for secretarial/paralegal work, totaling \$232.50; an hour for time spent learning the Court's electronic filing system, totaling \$155.00; and, two-tenths of an hour, costing \$31.00, for preparing living wills. The concession total is \$418.50. I find attorneys' fees of \$58,398.84 reasonable.

The parties agree on the amount of unpaid and owed benefits and the interest on that judgment. An appropriate order follows.

