

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.

March 3, 1998

On October 16, 1997, after a two day bench trial, this Court granted judgment 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 under § 510 of ERISA, 29 U.S.C. § 1140 (1985). Asprino v. Independence Blue Cross/Pennsylvania Blue Shield, 1997 WL 634522 (E.D. Pa. Oct. 16, 1997). The defendant has now moved for an award of attorneys fees and costs in the amount of \$52,395.89. For the reasons set forth below, the Court will deny the defendant's request for attorneys fees and costs.

I. BACKGROUND

The plaintiff, Ms. Asprino, was working as a senior secretary in the executive offices of defendant Independence Blue Cross/Pennsylvania Blue Shield ("IBC") in 1994 when she was injured in an automobile accident. After receiving treatment for

a fractured ulnar bone and dislocated elbow, Asprino did not return to work. She received short term disability benefits from IBC for six months, and then filed for long term disability benefits. She was conditionally approved for long term disability benefits for one month, but inadvertently received benefits for eight months. In May, 1995, IBC's long term disability carrier informed Asprino of its mistake and demanded reimbursement in the amount of \$1,821.40. Asprino appealed her denial of benefits through the appropriate administrative procedures but received a final denial in May, 1996.

Asprino then challenged the denial of her long term disability benefits by filing a complaint in the Court of Common Pleas of Philadelphia County alleging claims under ERISA and state law. Named as defendants were her employer, IBC; her employer's long-term disability insurance program; and the administrator of the insurance program. Just before filing her lawsuit, Asprino contacted IBC about returning to work. A human resources employee informed her that her position had been filled, but that she could "post" for other internal positions within thirty days. However, soon after she filed her lawsuit which named IBC as a defendant, Asprino received notice from IBC that she was terminated immediately. In a letter dated November 8, 1996, IBC explained that its human resources employee had erroneously told Asprino that she could apply for internal positions, and that Asprino should have been terminated in May, 1996 when she exhausted all of her administrative appeals for

disability benefits.

The defendants removed Asprino's lawsuit to this Court, where the plaintiff's state law claims were dismissed as being preempted by ERISA. Asprino v. Independence Blue Cross/Pennsylvania Blue Shield, 1997 WL 255675 (E.D. Pa. May 8, 1997). Asprino then amended her complaint to include two ERISA claims: her original claim for recovery of long term disability benefits and a new claim for retaliatory discharge on the basis that she had been discharged in retaliation for filing her original complaint in this action. The matter was sent to arbitration pursuant to Local Rule 53.2 because the plaintiff was seeking only money damages in an amount not in excess of \$100,000, and a trial de novo before this Court was then requested. Just before trial, however, Asprino dismissed her claim for recovery of benefits as well as all claims against each defendant except her former employer, IBC. By Order dated August 15, 1997, the Court then denied defendant IBC's motion for summary judgment and scheduled a non-jury trial on the plaintiff's claim of retaliatory discharge under § 510 of ERISA.

The Court held a non-jury trial on September 8 and 9, 1997. On October 16, 1997, the Court awarded judgment in favor of defendant Independence Blue Cross/Pennsylvania Blue Shield and against plaintiff Jeannine P. Asprino. As set forth in the Court's findings of fact and conclusions of law on October 16, 1997, the Court determined that Asprino had failed to establish a prima facie case of retaliatory discharge under § 510 of ERISA

because she had not shown that IBC acted with specific intent to discharge her for filing an ERISA complaint or for the purpose of interfering with her rights under ERISA. Asprino, 1997 WL 634522, at *5. The Court further determined that even if Asprino had established a prima facie case of retaliatory discharge, she had not rebutted IBC's legitimate, nondiscriminatory reason for discharging her; namely, that she had been absent from work for two years despite a finding by IBC's insurance carrier that she could have returned to work after her accident. Id. at *6.

Asprino presented two lines of evidence at trial in an attempt to demonstrate that IBC's articulated reason for terminating her was fabricated or pretextual. First, she introduced her termination letter which referenced her lawsuit, contending that the letter showed that IBC had terminated her in retaliation for filing the lawsuit. Second, Asprino claimed that she overheard a conversation on a telephone speaker phone in which IBC's chief executive officer stated that Asprino had been terminated for filing the lawsuit. At trial, the IBC executive testified that he never made such a comment. After considering all of the evidence, the Court determined that IBC's explanation for terminating the plaintiff was simply more credible than Ms. Asprino's. Id. at *7. The Court therefore awarded judgment in favor of the defendant and against the plaintiff. No appeal was taken.

II. DISCUSSION

Defendant IBC has moved for an award of attorneys fees and costs pursuant to § 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1) (1985). That provision provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Id. Although the statute gives no standards for awarding fees and costs, the Third Circuit has set forth five factors that must be considered: (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 v. Employees' Pension Plan of American Re-insurance Co., 33 F.3d 253, 254 (3d Cir. 1994) (citing Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir.1983)). Courts have awarded attorneys fees and costs to prevailing defendants under appropriate circumstances, but fees and costs are never automatically awarded. Id.; Monkelis v. Mobay Chemical, 827 F.2d 935 (3d Cir. 1987); Tobin v. General Electric Co., 1996 WL 730551, No. 95-4003 (E.D. Pa. Dec. 11, 1996), recon. denied, 1998 WL 31875 (E.D. Pa. Jan. 27, 1998) (Van Artsdalen, J.). Upon consideration of the five factors set forth by the Third Circuit, the Court will deny the defendant's request for attorneys fees and costs.

A. Plaintiff's Bad Faith and Culpability

The Court must first consider whether the losing party, in this case the plaintiff, acted with bad faith or culpability. Bad faith or culpability does not necessarily require that the plaintiff acted with an ulterior motive, only that her pursuit of the lawsuit is blameworthy or censurable. McPherson, 33 F.3d at 256-57. In the instant case, the Court entered judgment in favor of the defendant and against the plaintiff after a two day bench trial. As set forth in the Court's findings of fact and conclusions of law, the weight of the evidence led this Court to conclude that IBC had not discharged the plaintiff in retaliation for her filing a lawsuit against the company. The fact that the plaintiff lost, however, does not mean that she acted with bad faith or culpability in pursuing her lawsuit against IBC. As the Third Circuit has noted, "[a] party is not culpable merely because it has taken a position that did not prevail in litigation." Id. at 257.

The plaintiff's termination letter having referenced her lawsuit, it may well be that she believed that IBC discharged her in retaliation for filing the lawsuit even if the evidence presented at trial did not legally support her theory under § 510 of ERISA. Moreover, IBC had no clear, written policy regarding the hiring or termination of employees returning from disability leave, and the company representatives who testified at trial gave different explanations of how employees seeking to return from disability leave were supposed to be treated. Finally, the fact that the plaintiff dismissed Count I of her complaint for

recovery of disability benefits after the arbitration trial reflects only her strategy for trial de novo, not the lack of merit of that claim as the defendant contends. Accordingly, the "bad faith and culpability" factor weighs against an award of attorneys fees and costs to the defendant.

B. The Losing Party's Ability to Pay

The Court must next consider the losing party's ability to satisfy an award of attorneys fees and costs. The plaintiff, Ms. Asprino, is the losing party in this action. Defendant IBC's ability to pay its own attorneys fees and costs is irrelevant. Tobin, 1996 WL 730551, at *4. However, as some courts have recognized, a losing plaintiff's inability to satisfy an award is a sufficient basis in itself for denying a defendant's fee request. Id.

In the instant case, Ms. Asprino has not worked in a similar paying position since leaving her employment as a senior secretary at IBC. The plaintiff testified at trial that she works as a hostess several days each week at a Philadelphia restaurant and is attending school to become a court reporter. Furthermore, in response to the defendant's motion for fees and costs, the plaintiff's counsel summarized the plaintiff's current financial condition as follows: Ms. Asprino has no assets. She lives at home with her parents, attending court reporter school five days a week and working as a hostess at night when needed. She does not own a car or other property. Her checking account

has an average balance of \$50.00, and she has a retirement account of about \$7,000. Under these circumstances, it is clear that the plaintiff cannot afford to satisfy even a small award of attorneys fees and costs. Accordingly, the "losing party's ability to pay" factor weighs against an award of attorneys fees and costs to the defendant.

C. The Award's Deterrent Effect

The Court must also analyze the deterrent effect of an award of attorneys fees and costs against the losing party. As heretofore discussed, the Court has determined that the plaintiff's ERISA claims had at least some merit. Awarding fees and costs to the defendant in this action would only serve to deter other meritorious ERISA suits by plaintiffs, and would therefore be improper. Accordingly, the "deterrent effect" factor also weighs against an award of attorneys fees and costs to the defendant.

D. Benefit to Other Plan Members

The fourth factor which the Court must consider is the benefit conferred on others by the Court's judgment. This factor generally comes into play when the prevailing party is the plaintiff, although a prevailing defendant may benefit other ERISA beneficiaries by clarifying a significant issue of law. Tobin, 1996 WL 730551, at *5. In this action, the Court based its judgment on its weighing of the evidence as presented by both

parties. The defendant's reason for discharging the plaintiff was more credible than the plaintiff's theory of unlawful discharge. No significant areas of ERISA law were clarified. Accordingly, the fourth factor also weighs against an award of attorneys fees and costs to the defendant.

E. Relative Merits of the Parties' Positions

The final factor the Court must consider is the relative merits of the parties' positions. This factor is closely related to the first factor above. "As with the first factor, the fact that the [losing party's] positions have not been sustained does not alone put the fifth factor in the column favoring an award." McPherson, 33 F.3d at 258. Although the plaintiff did not prevail, her claim that she was discharged in retaliation for filing a lawsuit naming her employer as a defendant had some factual basis. Accordingly, this factor -- like each of the previous four -- weighs against an award of attorneys fees and costs to the defendant.

III. CONCLUSION

The Court has considered the five factors enumerated by the Third Circuit for determining whether to award attorneys fees and costs to the prevailing party under § 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1) (1985). For the foregoing reasons, each of the factors weighs against an award of attorneys fees and costs to the defendant in this action. Accordingly, the defendant's

motion for attorneys fees and costs will be denied.

An appropriate Order follows.

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

ORDER

AND NOW, this 3rd day of March, 1998; upon consideration of the defendant's motion for attorneys fees and costs and the plaintiff's response thereto; and for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED: The motion of defendant Independence Blue Cross/Pennsylvania Blue Shield for attorneys fees and costs (Document No. 43) is DENIED.

RAYMOND J. BRODERICK, J.