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## Fee ruling recognizes Law Bulletin columnist as 'leading attorney' on ERISA



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Two tests were traditionally applied by the 7th U.S. Circuit Court of Appeals when deciding whether to award fees in cases under the Employee Retirement Income Security Act of 1974 (ERISA). The first approach asked whether the loser's position was "substantially justified," while the second called for using a five-factor analysis.

The continuing validity of the 7th Circuit's standards was called into question when the U.S. Supreme Court ruled last year that district judges are authorized to award fees in ERISA cases where a litigant achieved "some degree of success on the merits." *Hardt v. Reliance Standard Life Insurance Co.* 130 S.Ct. 2149 (2010).

Ruling on Lanette Holmstrom's request for fees — after the 7th Circuit decided that Metropolitan Life Insurance Co. (MetLife) engaged in arbitrary and capricious behavior when it denied her request for disability benefits, 615 F.3d 758 (2010) — U.S. District Judge Robert M. Dow Jr. concluded the 7th Circuit's traditional tests are still relevant in deciding whether a fee award is appropriate in an ERISA case.

MetLife objected to Holmstrom's request, arguing among other things that 1) she lost a counterclaim and did not prevail on all of her arguments, plus 2) the fee of \$500 per hour requested by Holmstrom's principal attorney, Mark D. DeBofsky — who writes regularly on ERISA for the Chicago Daily Law Bulletin — was too high. Rejecting the second contention, Dow explained:

"The court sees nothing unreasonable about the rate of \$500 per hour that Mr. DeBofsky charged in this matter. Mr.

DeBofsky is one of the leading attorneys in this city among those who practice in the ERISA field. Other courts have recognized Mr. DeBofsky's 'highly specialized knowledge of ERISA law.' *Torgeson v. Unum Life Ins. Co.* 2007 U.S. Dist. LEXIS 9332 (N.D.Iowa Feb. 5, 2007); see also *Dobson v. Hartford Fin. Servs. Group.* 2002 U.S. Dist. LEXIS 17682 (D.Conn. Aug. 2, 2002)."

Applying *Hardt* and the 7th Circuit's traditional guidelines, Dow ordered MetLife to pay Holmstrom \$109,312 for attorney fees and \$1,031 in costs. Even though Holmstrom did not prevail on all of her arguments — and MetLife won

a counterclaim for a setoff based on benefits she received from the Social Security Administration — Dow concluded that the "attorney fee award should not be reduced to reflect her 'unsuccessful' arguments." *Holmstrom v. Metropolitan Life Ins., Co.* No. 07-CV-6044 (May 31, 2011).

Here are highlights of Dow's analysis (with omissions not noted in the text):

Section 1132(g) (1) of Title 29 provides that "the court in its discretion may allow a reasonable attorney fee and costs of action to either party."

In *Hardt v. Reliance Standard Life Insurance Co.*, the Supreme Court recently interpreted ERISA's fee-shifting provision, holding that a court may award fees to an ERISA litigant if she has achieved "some degree of success on the merits." 130 S.Ct. 2149 (2010).

This ruling supplanted this circuit's "prevailing party" standard for awarding fees in ERISA cases.

There is no doubt that the plaintiff here achieved "some degree of success on the merits" as the 7th Circuit reversed this court's judgment, concluded that MetLife's benefits denial was arbitrary and capricious and retroactively awarded the plaintiff benefits.

Once a party has achieved "some degree of success on the merits," a court must exercise its discretion to determine whether an attorney fee should be granted. *Hardt*, 130 S.Ct. at 2158.

Prior to *Hardt*, the 7th Circuit recognized two tests to guide a court's discretion regarding whether a fee award is appropriate under 29 U.S.C. § 1132(g)(1). *Stark v. PPM America.* 354 F.3d 666 (7th Cir.2004) (citing *Quinn v. Blue Cross & Blue Shield Ass'n.* 161 F.3d 472 (7th Cir.1998)).

Both tests essentially ask the same question, "was the losing party's position substantially justified and taken in good faith, or was the party simply out to harass the opponent?" *Stark*, 354 F.3d at 673.

Under the first test "an award of fees to a successful defendant may be denied if the losing party's position was both 'substantially justified' — meaning something more than nonfrivolous, but something less than meritorious and taken in good faith, or if special circumstances make an award unjust." *Herman v. Central States, S.E. and S.W. Areas Pension Fund.* 423 F.3d 684 (7th Cir.2005).

A position is not substantially justified if it is without a "solid basis." *Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.* 954 F.2d 1397 (7th Cir.1992).

Under the second test, the court looks to the following five factors to determine whether a fee award is appropriate: 1) the degree of the offending parties' culpability or bad faith; 2) the degree of the ability of the offending parties to satisfy personally an award of attorney fees; 3) whether or not an award of attorney fees against the offending parties would deter other persons acting under similar circumstances; 4) the amount of benefit conferred on members of the pension plan as a whole; and 5) the relative merits of the parties' positions. *Quinn*, 161 F.3d at 478.

When employing the five-factor test, not all factors need be present to conclude that an award of fees is appropriate; rather, "the five-factor test involves a weighing of the relevant factors as they apply to the facts of a particular case." *Lockrey v. Leavitt Tube Employees' Profit Sharing Plan.* 1991 WL 255466 (N.D.Ill. Nov.22, 1991).

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The five-factor test is used to “structure or implement, rather than to contradict” the substantially justified test. *Lowe v. McGraw-Hill Cos.* 361 F.3d 335 (7th Cir.2004).

Both the 7th Circuit and the Supreme Court have questioned the five-factor test’s continued vitality. See *Sullivan v. William A. Randolph, Inc.* 504 F.3d 665 (7th Cir.2007) (noting that the five-factor test “adds little to the simpler test and perhaps has outlived its usefulness”); *Hardt*, 130 S.Ct. at 2158 (observing that because the five-factor tests used by a number of circuits “bear no obvious relation to § 1132(g)(1)’s text or to our fee-shifting jurisprudence, they are not required for channeling a court’s discretion when awarding fees under this section”).

And following *Hardt*, courts in this district have questioned the ongoing utility of either test. [FNI. *Raybourne v. Life Insurance Company of New York*. 2011 WL 528864 (N.D.Ill. Feb.8, 2011); *Young v. Verizon’s Bell Atlantic Cash Balance Plan*. 2010 WL 4226445.]

Most recently, in *Huss v. IBM Medical and Dental Plan*, 2011 WL 1388543 (7th Cir. April 13, 2011), a recent unreported case, the 7th Circuit opined that “even after an eligibility determination under *Hardt*, courts still must consider whether an award of attorney fees is appropriate.”

The 7th Circuit concluded that even after *Hardt*, application of its “traditional” twin tests was still relevant to “inform the court’s analysis” regarding whether an award of fees is appropriate. *Id.*

And, although the district courts discussed in footnote one acknowledged that the continued application of the twin tests is an open question, those courts applied the tests anyway.

This court will do the same.

Here, it is without question that the plaintiff is entitled to her attorney fees regardless of which tests are applied.

The defendants argue that the plaintiff is “not entitled to fees for claims in which MetLife and the plan prevailed.” Specifically, the defendants argue that MetLife asserted a counterclaim against Holmstrom and ultimately prevailed on that counterclaim — obtaining a judgment for overpaid benefits in the amount of \$70,107.

The defendants also argue that certain of Holmstrom’s arguments and motions failed. Namely, Holmstrom argued that the standard of judicial review of the benefits denial should be de novo and not arbitrary and capricious and that Holmstrom pursued a motion for preliminary injunction that the court denied.

The court concludes that the plaintiff’s attorney fee award should not be reduced to reflect her “unsuccessful” arguments.

A fee award “should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.” *Hensley v. Eckerhart*. 461 U.S. 424 (1983) (“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.”).

It is appropriate to consider the litigation

as a whole, rather than viewing the specific claims atomistically, if “the plaintiff’s claims of relief involve a common core of facts or are based on related legal theories,” such that “much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.” *Ustrak v. Fairman*. 851 F.2d 983 (7th Cir.1988).

In *Kitchen v. TTX Co.*, 2001 WL 40803 (N.D.Ill. Jan.17, 2001), Judge Wayne R. Andersen considered a near-identical argument to the one that the defendants here make. The losing party there argued that “the time spent preparing the motion and hearing for the failed preliminary injunction and the unsuccessful discovery disputes should be excluded.” *Id.*

Citing *Hensley and Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir.1988), Judge Andersen reasoned as follows:

“The contested motions informed the court and were reasonable both in terms of content and time spent. Because the plaintiffs prevailed in the overall lawsuit and the motions were reasonable, we will not deduct the time spent on the plaintiffs’ unsuccessful legal efforts.”

The court finds Andersen’s reasoning to be persuasive and adopts it.

The issues on which the plaintiff failed were part of and related to the claim on which they succeeded — in that they involved “a common core of facts” and were “based on related legal theories.” *Hensley*, 461 U.S. at 435. Accordingly, work performed on these issues is compensable.