

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

SHARON WOLF,

Case No. 98-6939 CIV-MIDDLEBROOKS  
Magistrate Judge Brown

Plaintiff,

v.

DELTA FAMILY-CARE DISABILITY  
AND SURVIVORSHIP PLAN, a foreign  
corporation.

Defendant.

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**PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR ENTITLEMENT TO  
ATTORNEY'S FEES AND INTEREST**

Plaintiff, Sharon Wolf, by and through undersigned counsel, hereby files her Reply to Defendant Delta Family-Care Disability and Survivorship Plan's (hereinafter "Delta") Memorandum of Law in Opposition to Plaintiff's Motion for Entitlement to Attorney's Fees and Interest (hereinafter "Response") as follows:

**I. Introduction**

Delta has opposed Ms. Wolf entitlement to attorney's fees and interest based on two major arguments. Its first argument is that Ms. Wolf was not the prevailing party in this action and, therefore, not entitled to attorney's fees and interest. Delta has mistakenly confused the issues of what constitutes an appealable final order and who is the prevailing party for attorney's fees purposes. When the correct law is applied to this case, it is apparent that Ms. Wolf has achieved prevailing party status and is entitled to an award of attorney's fees and interest.

Delta's second argument is that Ms. Wolf has not satisfied the five part test used to determine whether an ERISA litigant is entitled to attorney's fees. The crux of this argument is that Delta did not act in bad faith by terminating Ms. Wolf's benefits. Its argument only emphasizes the bad faith of Delta regarding this claim and reveals the futility of remanding this case to the plan administrator. Delta's arguments regarding the other four factors are equally deficient and only strengthen Ms. Wolf's position that she is entitled to attorney's fees and interest.

## II. Ms. Wolf was the Prevailing Party in this Action

Delta has reasoned that Ms. Wolf is not the prevailing party in this action "because she has not received a judgment reinstating her benefits<sup>1</sup>." A judgment is not necessary for a party to achieve prevailing party status. See e.g., Curry v. Contract Fabricators Inc. Profit Sharing Plan, 744 F.Supp. 1061, 1068 (M.D. Ala. 1988). A party need only prevail on an issue to achieve prevailing party status. For example, this Court awarded attorney's fees to Delta during this case because Delta prevailed on its two motions. There had not been a judgment entered against Ms. Wolf. Ms. Wolf prevailed on the issue of whether Delta's decision to terminate her benefits was proper which was the substantial issue of the litigation. Ms. Wolf is the prevailing party in this action and this Court should exercise its discretionary authority to award attorney's fees to Ms. Wolf as the prevailing party as it has done at other times during the course of this litigation.

"[T]he 'prevailing party' is the party who prevails as to the substantial part of the litigation."

Testa v. Village of Mundelein, 89 F.3d 443, 447 (7<sup>th</sup> Cir. 1996); accord, DeShiro v. Branch, 183 F.R.D. 281, 285 (M.D. Fla. 1998)("to qualify as a prevailing party requires that one must have prevailed on the . . . substantial rights of the parties").

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<sup>1</sup> Response, p. 4.

Delta further argues that Ms. Wolf is not the prevailing party because the Court's remand order is not final, citing Shannon v. Jack Eckerd Corp., 55 F.3d 561, 563 (11<sup>th</sup> Cir. 1995)<sup>2</sup>. Delta has confused two separate issues. Shannon holds that a remand order is non-appealable, not that the Court lacks authority to award attorney's fees to an ERISA plaintiff who was successful in obtaining a remand order. A remand order is all that is required to achieve prevailing party status.

“In obtaining the [ ] remand Plaintiff has substantially prevailed with her assertion that the [defendant's] denial of disability benefits was not supported by substantial evidence. To achieve ‘prevailing party’ status requires nothing else from Plaintiff after Melkonyan.”

Furthermore, under the typical definition of prevailing party, used in other types of cases where attorney's fees can be awarded, Plaintiff is a prevailing party because she altered the legal relationship among the litigating parties. See, Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792, 103 L.Ed. 2d 866, 109 S.Ct. 1486 (1989). Prior to the remand there was no chance that Plaintiff could receive disability benefits because the [defendant] had already denied her petition. After the remand, Plaintiff again has a chance to be awarded benefits.”

Higdon v. Sullivan, 810 F.Supp. 1265, 1269 (N.D. Ga. 1993)<sup>3</sup>.

Delta's final argument regarding prevailing party status is that Ms. Wolf relates to the calculation of interest. Delta asserts that the interest cannot be calculated because “no award of benefits has been entered by the Court (or on remand by the Administrative Committee)<sup>4</sup>.” Delta fails to point out that the monthly benefit amount is a liquidated figure which needs only be multiplied by the number of months Ms. Wolf has not been

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<sup>2</sup> Delta has also cited LaBrache v. American Maritime Officers Pension Plan, 45 F.Supp. 2d 1335, 1340 (M.D. Fla. 1999) and stated that this case stands for the proposition that “plaintiff not a prevailing party where plaintiff's benefit claim had not been finally determined.” Response, p. 5. This is just dead wrong. LaBrache did not award attorney's fees to the plaintiff in that case because the Court denied his motion for summary judgment. The Court ruled that plaintiff was not the prevailing party because he lost his motion. The case had no reasoning regarding the final determination of the benefit claim as Delta stated.

<sup>3</sup> Cases construing Social Security disability provisions should be used as guidance in ERISA cases. Helms v. Monsanto Co., Inc., 728 F.2d 1416, 1420 (11<sup>th</sup> Cir. 1984).

<sup>4</sup> Response, p. 5.

paid. The amount due Ms. Wolf is a liquidated amount. The fact that the Administrative Committee has not awarded this amount to Ms. Wolf nearly two months after the Court remanded her claim is irrelevant to her prevailing party status and, as will be discussed *infra*, only proves the extent of Delta's bad faith and the futility of the remand.

III. Ms. Wolf has Satisfied the Five Part Test for an Award of Attorney's Fees

**(1) Bad Faith**

Delta initially premises its lack of bad faith on the fact that it granted Ms. Wolf an additional four months of benefits after the first decision to terminate her benefits. Delta had even a weaker case when it initially terminated benefits. It was acting in a more egregious form of bad faith when it initially terminated her benefits. The fact that it paid her for four months before it terminated her again does not change the fact that the decision which was litigated was also made in bad faith. This is akin to saying that a burglar who returns some of the stolen goods should not be prosecuted which is illogical. Delta "failed to honestly interpret all the evidence before it"<sup>5</sup>. Delta lied in order to terminate Ms. Wolf's benefits. Lying is by definition bad faith.

Delta's second premise that it did not act in bad faith only proves that it will continue to act in bad faith during the remand. For example, Delta continues to assert that "the Plan reasonably believed that Dr. Wender's report was not relevant since it did not show that she was disabled as of July 25, 1995"<sup>6</sup> even though the Court ruled that it was unreasonable to find the report irrelevant<sup>7</sup>. It has been almost two months since this Court determined that Delta's decision was arbitrary and capricious and remanded the case. Since that time Delta has done not done anything with respect to Ms. Wolf's claim.

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<sup>5</sup> October 19, 1999 Order, p. 10.

<sup>6</sup> Response, p. 7-8.

Delta still thinks that it was justified in terminating Ms. Wolf's benefits and the decision of this Court has had no effect<sup>8</sup>. Delta's failure to cure a past wrong is bad faith in and of itself. An award of attorney's fees will emphasize the fact that its actions were wrong and that the decision was made in bad faith.

### **(2) Deterrence**

Delta states that every claim is unique, so there can be no deterrent effect, citing Freeman v. Continental Ins. Co., 996 F.2d 1116, 1120 (11<sup>th</sup> Cir. 1993) for this rule of law. Freeman held that there would be no deterrent effect due to the uniqueness of his disability. Id. Freeman suffered from an unusual condition; that case could never be repeated. In this case, Delta failed to perform a proper investigation and failed to honestly interpret the information submitted<sup>9</sup>. This is evidence of a general business practice that is not unique to Ms. Wolf's case. Delta can continue to improperly investigate a claim and dishonestly interpret information. An award of attorney's fees will deter this type of behavior.

### **(3) Benefit to All**

Delta claims that Ms. Wolf did not resolve a significant legal issue<sup>10</sup> regarding the ERISA standard of review because she lost that issue. It does not matter whether a party wins or loses an issue so long as a significant issue is resolved.

“[W]hile Plaintiff's position was not adopted by the court, it was certainly not a frivolous one; to the extent that her action resolved an unclear issue regarding the preemptive effect of Pennsylvania law on the terms of the Fund's plan, the action has benefited both the Fund itself and other plan

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<sup>7</sup> October 19, Order, p. 11 (“Defendant . . . unreasonably discounted much of the record evidence.”).

<sup>8</sup> This fact also proves the futility of the remand.

<sup>9</sup> October 19, 1999 Order, p. 10.

<sup>10</sup> This factor does not require the resolution of a legal question as long as there is a benefit to the plan. This is signified by the use of “or” in the cases as opposed to “and”.

participants. The court is not certain that the deterrence of actions such as the captioned one is a wise judicial goal.”

Travitz v. Northeast Dept. ILGWU Health and Welfare Fund, 818 F.Supp. 761, 771 (M.D. Penn. 1993).

Which standard of review is to be applied to a decision is a threshold question regarding ERISA itself that must be answered before any further analysis can begin. This question regards ERISA itself because no other type of case has different standards of review. This type of analysis is only done in ERISA cases which makes it a question regarding ERISA itself. Delta citation to Freeman is misplaced because this issue was never discussed by the Court.

“Freeman does not dispute the district court’s finding that the case involves no significant ERISA issues.”

Id at 1119, fn 4.

The proper standard of review was also a significant question which is evidenced by the fact that the Court took three pages to decide this issue<sup>11</sup>. Ms. Wolf has satisfied this factor.

In addition, Ms. Wolf also benefited the entire plan by resolving the issue regarding the proper standard of review, which was an issue of first impression regarding this plan. Ms. Wolf further benefited the plan as a whole by exposing its bad faith actions, discussed *supra*. Ms. Wolf has met both prongs of this factor even though she only needed to meet one of the prongs.

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<sup>11</sup> October 19, 1999 Order, p. 6-9.

#### (4) Merit

Delta asserts that its position had merit because “its denial specifically referenced medical evidence in the record that the Administrative Committee believed supported its decision<sup>12</sup>.” However, there were only “two single exhibits in evidence which could be construed to support their decision<sup>13</sup>.” There can be no merit to complete reliance on two single exhibits when the rest of the evidence supports a claim of disability. As discussed *supra*, Delta acted in bad faith and pushed a meritless position.

#### (5) Ability to Pay

Delta admits that it can satisfy an award<sup>14</sup>. The remainder of its discussion regarding Ms. Wolf’s ability to pay is untrue and irrelevant<sup>15</sup>.

#### IV. The Proper Interest Rate

Delta states that Ms. Wolf “errs as to the pre-judgment interest rate to be utilized<sup>16</sup>” because of her reliance on a Southern District of California case. After further research on this issue, Plaintiff agrees that its reliance on this case regarding the interest rate was misplaced. The Eleventh Circuit has determined the proper interest to be applied in ERISA cases.

“[A]s a matter of federal common law arrived at by analogy, this court concludes that 1.5% per month is the proper interest rate to be applied.”

Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476, 1484 (11<sup>th</sup> Cir. 1995).

The Court should apply the 1.5% rate to this case and it should be applied from the date that the benefits were improperly withheld. Delta’s argument to the contrary is

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<sup>12</sup> Response, p. 10.

<sup>13</sup> October 19, 1999 Order, p. 13.

<sup>14</sup> Response, p. 10.

without authority. Ms. Wolf filed her claim within the statute of limitations and Delta has earned interest on this money. It would be inequitable to allow a party at fault to keep the proceeds from its wrongdoing.

V. Conclusion

Ms. Wolf was the prevailing party in this action. She won the substantial portion of the litigation. Delta acted in bad faith in deciding this claim and it pushed a meritless position by litigating this case. This case resulted in the resolution of a significant ERISA question that benefited the plan as a whole. Delta has the ability to pay Ms. Wolf's attorney's fees and the payment of these fees will deter Delta from continuing with this *modus operandi*. The Court should award Ms. Wolf her attorney's fees and interest.

***Respectfully submitted,***  
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<sup>15</sup> Delta insinuates that she is rich because of a \$300,000 settlement. It fails to realize that when this amount is spread out over the remainder of her life, she is barely above the poverty line.

<sup>16</sup> Response, p. 11.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing served via U.S. mail and facsimile this \_\_\_\_ day of December, 1999 to: Hunter R. Hughes, Esq. And J. Timothy McDonald, Esq., Rodgers & Hardin, 2700 International Tower, Peachtree Center, 229 Peachtree Street, N.E., Atlanta, Georgia 30303 and David L. Ross, Esq. And Gustavo J. Lamelas, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131.

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