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ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 11, ISSUE 1, MARCH 2019

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The Disability Insurance Team at Eric Buchanan & Associates helps individuals nationwide who have been denied disability insurance benefits and employee benefits. Our insurance and employee benefits team helps people apply for, or fight denials of, disability insurance benefits, life insurance, health insurance, and similar insurance benefits.

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PLAINTIFFS WHO BRING A GOOD FAITH CLAIM FOR ERISA BENEFITS SHOULD NOT HAVE TO FEAR THE THREAT OF HAVING TO PAY ATTORNEYS' FEES IF THEY LOSE - BY AUDREY DOLMOVICH

INSURANCE PROVIDED THROUGH WORK FALLS UNDER ERISA, WHICH MEANS DIFFERENT RULES APPLY TO THOSE CLAIMS

Many people have insurance coverage through work. Health insurance is common, but people also have long term disability insurance ("LTD"), life insurance, accidental death and dismemberment insurance ("AD&D"), dental insurance, and even long term care insurance. Claims related to insurance provided at work fall under a federal law, the Employment Retirement Income Security Act of 1974 ("ERISA"). ERISA was created to help protect employees' benefits, but over time, much of ERISA has come to benefit insurance companies more than employees.

If an employee benefits claim falls under ERISA, state law no longer controls the claim. ERISA has its own set of federal claims regulations and cases that go to court fall under special rules that apply to ERISA cases. Under ERISA there is no right to a jury trial, the information that goes to court is limited to what was submitted to the insurance company or ERISA plan, and the employee cannot sue for anything other than the benefits due.

ERISA ALLOWS A SUCCESFUL PARTY TO SEEK ATTORNEYS' FEES

One significant difference with ERISA is that, unlike most civil cases, ERISA has a fee shifting provision; a party who has some success on the merits can ask for its attorneys' fees to be paid by the opposing party. This could be a big deal when an employee wants to bring a case, but is worried he or she might have to pay attorneys' fees if he or she loses the case. This is especially important for plaintiffs seeking LTD benefits, because, by definition they have a claim because they have lost income and are not able to work. It would be a huge concern that an LTD plaintiff could ultimately be forced to pay for the insurance company or employer's attorneys' fees, especially considering an LTD plaintiff likely has little to no income and a large amount of medical bills.

The fear of possibly having to pay the insurance company's attorneys' fees should not keep a good faith claimant from filing suit. This article will discuss the rules that apply when a successful party seeks attorneys' fees, with a focus on how the rules make it harder for a successful insurance company to force a good faith plaintiff to pay fees. Because most

of the cases litigated involve LTD claims, this paper will emphasize how the rules apply in LTD cases.

WHEN ONE SIDE HAS SUCCESS ON THE MERITS, COURTS WILL GENERALLY LOOK TO A FIVE-FACTOR TEST WHEN DECIDING WHETHER TO AWARD ATTORNEYS' FEES

The first hoop the party seeking fees has to jump through is proving that it achieved "some degree of success on the merits." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255 (2010). Then, once successful, courts typically use a five-factor test when deciding whether attorneys' fees should be awarded. The factors are the same for an ERISA defendant or an ERISA plaintiff seeking attorneys' fees, but the factors work out differently depending which party is requesting attorneys' fees to be paid. When applied in a case where the plaintiff loses, the five-factors are typically neutral, or favor the plaintiff, making it harder for a defendant to obtain an award of attorneys' fees.

Long before the Supreme Court decided the *Hardt* case, courts had used the five-factor test to determine whether to award fees. *See, e.g., First Trust Corp. v. Bryant*, 410 F.3d 842, 851 (6th Cir. 2005); *Secretary of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). The Supreme Court in *Hardt* held the five-factor is not mandatory, but most courts have continued to apply it once the threshold "success" was established. Also, courts have long held that the five-factors are a flexible approach for the court with no one factor being dispositive. *Bryant*, 410 F.3d at 851.

First Factor: The defendant must establish that plaintiff acted in bad faith or acted culpably in bringing suit.

If the defendant cannot prove the plaintiff acted in bad faith when she brought suit, the court will then look to whether the plaintiff was culpable in bringing suit. However, this factor does not look to whether the plaintiff is culpable at all, but rather it looks to the degree, if any, the plaintiff was culpable in bringing suit. *Tonguette v. DSM Pharma Chemicals North America, Inc.*, 2015 WL 4133238, *3 (6th Cir. 2015). *See also Geiger v. Pfizer, Inc.*, 549 Fed, Appx. 335, 338 (6th Cir. 2013).

Importantly, when the court looks to whether the plaintiff was culpable in bringing suit against the defendant, the fact that the plaintiff's legal argument did not prevail is not enough to constitute culpable conduct. *Tonguette.* 2015 WL at *4; *Warner v. DSM Pharma Chemicals North America, Inc.*, 452 Fed. Appx. 677 (6th Cir. 2011); *Gard v. Blankenburg*, 33 Fed. Appx. 722, 732 (6th Cir. 2002). The Sixth Circuit has reasoned that determining culpability based on who won the case would equate the first factor "with a litigant's success on the merits" and "such conflation would be improper because the law of this Circuit makes clear that these are separate inquiries." *Tonguette*, 2015 WL at *3; Also see *Geiger c. Pfeizer, Inc.*, 549 Fed. Appx. 335, 338 (6th Cir. 2013); *Gard*, 33 Fed. Appx. at 732.

Moreover, the court's decision should not be based on the success as to the plaintiff's claim, but instead the court should look to the fact that the plaintiff did not initiate her claim "in bad faith or with vexatious intent." *Greene v. Drobocky*, 2015 WL 1737772, *5 (W.D. Ky. April 16, 2015). The plaintiff did not initiate her claim with bad faith or with vexatious intent if she had a reasonable basis for bringing suit. For instance, in *Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, the plaintiff's counsel submitted an affidavit that detailed why he and the plaintiff thought they had a reasonable basis for bringing suit. 618 Fed.Appx. 246, 259 (6th Cir. 2015).The court reviewed the affidavit and explained that although the plaintiff's claim was not well plead, it still required some thought by the court and the affidavit showed that plaintiff and her counsel believed she had a reasonable basis for bringing suit. *Id.* Therefore, the court reasoned that plaintiff had a reasonable basis to file suit. *Id.*

If the defendant is not able to show that the plaintiff acted in bad faith or acted culpably in bringing suit, then this factor weighs in favor of the plaintiff and in favor of denying defendant's motion for attorneys' fees.

Second Factor: The court looks to the plaintiff's ability to pay an award of attorneys' fees.

In the court's analysis of the second factor, the court looks to the plaintiff's ability to satisfy an award of attorneys' fees, and the defendant's financial status. *Huizinga v. Genzink Steel Supply and Welding Co.*, 984 F.Supp.2d 741, 746 (W.D. Mich. Nov. 25, 2013). This is significant because most ERISA defendants are corporations that are doing well financially, while most ERISA LTD plaintiffs have little to no income. Therefore, the Sixth Circuit has reasoned that this factor is

more for exclusionary rather than inclusionary purposes. *Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, 618 Fed, Appx. 246 (6th Cir. 2015).

The weighty truth in the scenario when a defendant insurance company asks for the plaintiff to pay defendant's attorney fees, is that the defendant insurance company, who just successfully got out of paying the plaintiff benefits it arguably should have, and has left the plaintiff with little to no income, now the wants that plaintiff to pay its hefty attorneys' fees. For example, in *Huizinga v. Genzink Steel Supply and Welding Co.*, the court stated that the defendant company "by its own testimony, is doing very well financially," and is seeking "recovery from an individual accountant who maintains part-time employment" and "the award sought reflects three times Huizinga's annual salary while employed at Genzink Steel and an even larger multiple of his current salary." 984 F.Supp.2d 741, *746 (W.D. Mich. Nov. 25, 2013). Therefore, the court stated that this factor weighed against an award for attorneys' fees. *Id*. The plaintiff in *Huizinga* was fortunate enough to be able to work some and the court reasoned that the amount in attorneys' fees was still too great.

In *Moon v. Unum Provident Corp.*, the court reasoned that the large insurance company defendant, Unum, was "certainly able to satisfy the requested attorney fee amount" and the court stated that "[e]ven Unum acknowledges, in their brief to this Court, that this factor weighs against them, stating that '[t]he District Court properly recognizes that this factor favors plaintiff because Defendant, a large insurance company, is certainly able to satisfy the requested attorneys' fees.'" 461 F.3d 639,*644 (6th Cir. 2006).

Incidentally, when a Plaintiff wins, this is also a significant factor. The story is reversed when a winning plaintiff requests attorneys' fees from the corporation who can not only afford the attorneys' fees, but who also denied the ERISA plaintiff's benefits and forced her to go to court in the first place.

Third Factor: The court looks to whether the award of attorneys' fees would have a deterrent effect on other plaintiffs in similar circumstances.

The Sixth Circuit explained that this factor has to include more than just a deterrent effect on the current plaintiff. *Patrie Const. Co.*, 618 Fed, Appx. at 259. So, this factor weighs the deterrence effect on other persons under similar circumstances as the plaintiff. *Patrie Const. Co.*, 618 Fed, Appx. at 259.

Moreover, the Sixth Circuit reasoned that this factor carries more weight when there is culpable conduct. *Tonguette*, 2015 WL at *4. When a case does not include bad faith, a fee award is even less appropriate for deterrent purposes. *Patrie Const. Co.*, 618 Fed, Appx. at 259. Additionally, the Sixth Circuit stated that a fee award has not shown major deterrence in a case where there was not deliberate misconduct. *Foltice v. Guardsman Products, Inc.*, 98 F.3d 933, 937 (6th Cir. 1996).

The Sixth Circuit has specifically expressed its concern on the "chilling effect that awarded attorneys' fees against an ERISA plaintiff may have on future good faith claimants." *Huizinga*, 984 F.Supp.2d at 747. In *Huizinga*, the court did not find that the plaintiff was culpable or brought the suit in bad faith, and the court stated that this was not a case that an award of attorneys' fees would be necessary to "discourage other litigants from relentlessly pursuing groundless claims." *Id*. The court reasoned that because the case was not brought in bad faith or culpability, the deterrent effect of an award of attorneys' fees "would be to discourage good faith ERISA claimants from bringing claims in good faith." *Id*. The court explained that this "chilling effect" is a concern that may be considered by the court. *Id*.

In addition, the Sixth Circuit specified that it is unlikely that a case with "unusual" facts would deter other ERISA plaintiffs from bringing similar suits. *Basham v. Prudential Ins. Co. of America*, 2014 WL 7076363, *4 (W.D. Ky. Dec. 15, 2014). The court in *Basham* reasoned that it could find no other case with the same facts as they were presented which made the deterrent value debatable. *Id*. Without more information on how an award of attorneys' fees could possibly deter other persons in similar circumstances as the plaintiff, this factor weighs in favor of not awarding the defendant attorneys' fees. *Tonguette*, 2015 WL at *5.

Furthermore, the Sixth Circuit stated that even if the defendant could show that there are other plaintiff's in similar circumstances, the defendant's win on the merits would be enough to deter other plaintiffs from bringing suit. *Gard v. Blankenburg*, 33 Fed.Appx. 722, 732 (6th Cir. 2002). Therefore, an award of

attorneys' fees would provide "no significant extra deterrence." *Id.*

Fourth Factor: The court does not have to weigh whether or not Plaintiff sought to confer a common benefit on all participants or beneficiaries of an ERISA plan or sought to resolve significant legal questions regarding ERISA because this factor is irrelevant when a defendant is the party asking for an award of attorneys' fees.

The Sixth Circuit held that the fourth factor does not apply in a case where attorneys' fees are requested by a defendant because the defendant did not bring suit. *Dublin Eye Assocs., P.C. v. Mass Mt. Life Ins. Co.*, 2014 WL 1217664, *1 (E.D. Ky. Mar. 24, 2014); *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*, 2018 WL 453762, *7 (E.D. Mich. Jan. 17, 2018); *Greene v. Drobocky*, 2015 WL 1737772, *5 (W.D. Ky. 2015). However, when a plaintiff is asking the defendant for attorneys' fees this factor would be relevant and the plaintiff would need to show that by bringing suit she sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve legal questions regarding ERISA.

Fifth Factor: The court looks to the relative merits of the parties' positions.

The Sixth Circuit explained that fifth factor does not weigh in favor of awarding attorney fees just because one party ultimately prevailed. *Patrie Const. Co.*, 618 Fed, Appx. at 259. The Sixth Circuit noted the parties will always disagree regarding the merits of the other party's case and therefore it is not an abuse of discretion for the District Court to find the factor neutral where the issue was contested and bad faith was not evident. *Id.* However, if one side prevailed "cleanly, unequivocally, and absolutely," then this factor weighs in favor of awarding attorneys' fees against the other party. *First Trust Corp. v. Bryant* , 410 F.3d 842, 854 (6th Cir. 2005).

Conclusion

The court is not required to use this five-factor test in its analysis of whether or not to award attorneys' fees, but most courts have chosen to use it in their analysis. When a defendant is requesting attorneys' fees, the five-factors are mostly neutral or favor the plaintiff. This helps protect a good faith ERISA plaintiff from having to take on the burden of paying the insurance company's attorneys' fees.

ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the following events:

- **March 26, 2019 - 2019 Solution Series in Chattanooga, TN**
  Topic: ERISA—What you Need to Know for 2019

- **May 2, 2019 - National Association of Insurance & Financial Advisors and National Association of Health Underwriters Insurance Leaders Forum in Lincoln, NE**
  Topic: How to be a Hero to Your Clients: How to be the "Good Guy" when claims are denied. Issues that occur when health, life, and disability claims are denied and end up in litigation, and how brokers and insurance sales people can best set it up so their customers are protected and the insurance agent/broker is the "good guy."

- **May 3, 2019 - Nebraska Association of Trial Attorneys Subrogation Workshop in Lincoln, NE**
  Topics: ERISA subrogation, health care, long term disability and other ERISA benefits

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates, PLLC are available to speak to your organization regarding ERISA long-term disability, group long-term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

Eric Buchanan & Associates, PLLC is a boutique plaintiffs' firm located in Chattanooga, Tennessee. We help individuals nationwide obtain disability insurance benefits and other ERISA employee welfare benefits (such as life, health or disability benefits offered through work). Attorneys are our number one source of cases. If you have a client who could use our help, we would appreciate your referral.

Eric's disability and benefits team can help!

- ERISA Long-Term Disability
- Group Long-Term Disability
- Private Disability Insurance
- ERISA Benefits
- Denied Health Insurance Claims
- Life Insurance Claims
- Long-Term Care Claims

We appreciate the opportunity to work with you on any of these cases.
Contact our Intake Team at intaketeam@buchanandisability.com.

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