IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KATHLEEN WILKES,

ORDER

Plaintiff,

01-C-182-C

v.

UNUM LIFE INSURANCE
COMPANY OF AMERICA,

Defendant.

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In an order entered on January 29, 2002, I granted plaintiff Kathleen Wilkes' motion for summary judgment and her motion for an award of attorney fees and costs. Plaintiff was given until February 20, 2002, in which to file an itemization of (1) all long-term disability benefits that she is owed from April 1, 2000, the date on which defendant terminated her benefits, until the day this order was entered, January 29, 2002, and (2) attorney fees and cost incurred in prosecuting this suit. Defendant was given until March 6, 2002, in which to file objections to the amounts sought.

On February 20, 2002, plaintiff submitted an itemization of long-term disability benefits owed to plaintiff and a petition for award of attorney fees and costs. After being

granted an extension by the magistrate judge, defendant filed its objections

A. Itemization of Long-Term Disability Benefits

Plaintiff states that her benefits were discontinued as of April 1, 2000. At the time, she was receiving long-term disability benefits in the amount of $2,425.00 a month. From April 1, 2000, through the end of January 2002, plaintiff is owed $53, 350.00 ($2,425.00 times 22 months).

Plaintiff is also seeking prejudgment interest on this amount because defendant has had the benefit and use of the owed money. By the same token, plaintiff has not had the benefit and use of the funds: she had to withdraw funds from her retirement account to finance this lawsuit, incurring a penalty; she missed the opportunity to open an individual retirement account; and she has not been able to contribute to her grandson's college fund.

In Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 696 (7th Cir. 1991), the Court of Appeals for the Seventh Circuit noted that federal common law governs the award of prejudgment interest for a federal law violation. (citing Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 436 (7th Cir.1989) ("[P]rejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay.")). It is well settled that "[p]rejudgment interest is an element of complete compensation." West

Virginia v. United States, 479 U.S. 305, 310-11 (1987); see also General Motors Corp. v. Devex Corp., 461 U.S. 648, 655-56 (1983). The growing recognition of the time value of money has led the court of appeals to rule that "prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay." Gorenstein, 874 F.2d at 436. This presumption in favor of prejudgment interest awards is applicable to cases arising under ERISA. Rivera, 921 F.2d at 696 (citing cases).

Plaintiff asserts that the prejudgment interest that she is due should be calculated at the simple interest rate of 12%. In support of this rate, plaintiff relies on Wis. Stat. § 628.46, which sets a 12% simple interest rate on insurance claims that are not paid timely. There is no federal statutory interest rate on prejudgment interest. In contrast, 28 U.S.C. § 1961 fixes the post judgment interest rate for federal cases as the rate on 52-week Treasury bills at the last auction of those bills before the judgment was entered. Because there is no default risk with Treasury bills, this rate does not take into consideration the risk of default and in general is lower than the prime rate. Because prejudgment interest is governed by federal common law, courts are free to adopt a more discriminating approach in determining prejudgment interest, such as basing the interest rate on the prime rate. Gorenstein, 874 F.2d at 437 (affirming use of prime rate to calculate prejudgment interest).

In April 2000, the month in which defendant first discontinued benefits payments

to plaintiff, the prime rate was 9.0%, then rose to 9.5% for several months. Since April 2001, the prime rate has declined dramatically; it is now sitting at 4.75%. See http://www.stls.frb.org/fred/data/irates/prime. Although defendant has not filed any objections to plaintiff's requested interest rate of 12%, I find that the rate set out in the Wisconsin Statutes would surpass the goal of making the plaintiff complete, West Virginia, 479 U.S. at 310-11, and would result in a windfall for plaintiff. Instead, I find that a simple interest rate of 9% would both compensate plaintiff for the fact that she did not have the benefit and use of the money owed her and avoid creating a windfall for plaintiff to the detriment of defendant. Accordingly, I conclude that plaintiff is owed prejudgment at the simple interest rate of 9%, or $8,802.75 ($53,350 times 9% times 22/12 months).

Plaintiff asserts that defendant should reimburse her for two additional sums that she expended as a result of the denial of her long-term disability benefits. She states that she used the services of her accountant when defendant suggested a lump sum payment and a private mediation process. The accountant's bill totals $152.88. Plaintiff also states that defendant agreed to reimburse her $100.00 for misfiling her state taxes with California instead of Wisconsin, but has not done so. Because defendant has not taken issue with these amounts and they are reasonable, I conclude that plaintiff is owed them.

B. Petition for Award of Attorney Fees and Costs

Plaintiff also submitted a petition for attorney fees and costs, which were awarded to her as the prevailing party pursuant to 29 U.S.C. § 1132(g)(1). In order to calculate a reasonable fee in cases such as this, the number of hours reasonably expended is multiplied by a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Once this lodestar figure is calculated, the court may adjust it by considering other factors, such as the time and labor required, the skill required to perform the legal service properly, the customary fee, whether the fee is fixed or contingent and the experience, reputation and ability of the plaintiff's attorney. Tolentino v. Friedman, 46 F.3d 645, 642 (7th Cir, 1995).

Plaintiff requests attorney fees in the amount of $52,858.00 (203.3 hours at $260 an hour) for the time of her attorney, Sally Stix. Plaintiff also seeks law clerk fees in the amount of $2,420.00 (48.4 hours at $50 an hour). Plaintiff asserts that these lodestar figures are consistent with her lawyer's experience, expertise, the nature of her practice, the difficulty and complexity of the issues and the market rate for the services. In support of these amounts, plaintiff has submitted affidavits of other civil rights attorneys practicing in the community, all of whom indicate that the requested hourly rate and number of hours are consistent with community standards. In addition, defendant has not filed any objections to these amounts. Accordingly, I find these figures for attorney fees to be reasonable.

Plaintiff requests costs in the amount of $3,038.08. This amount is based on filing fees, photocopies, facsimiles, telephone and postage expenses, for which plaintiff provided

receipts and to which defendant does not object. I find the amount requested for costs to be reasonable.

ORDER

IT IS ORDERED that defendant UNUM Life Insurance Company owes plaintiff Kathleen Wilkes $53,350.00 in back benefits from April 1, 2000, through the end of January 2002, $8,802.75 in prejudgment interest and $252.88 in reimbursements. FURTHER, IT IS ORDERED that defendant owes plaintiff attorney fees and costs in the amount of $58,316.08.

Entered this 25th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge