IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANNA EDWARDS,

Plaintiff,

v.

KOHLER CO.,

Defendant.

OPINION AND ORDER

11-cv-781-bbc

- -

This case is before the court on two motions brought by plaintiff Anna Edwards, one to enlarge the time for filing a motion for an award of attorney fees and costs, dkt. #37, and one for an award of such fees and costs incurred in litigating her right to have her claim for benefits returned to the administrator of the benefits plan for new consideration. Dkt. #32.

I. MOTION TO ENLARGE TIME

A. Background

Plaintiff prevailed in this case brought under the Employee Retirement Income Security Act to the extent that the matter was remanded to defendant Kohler Co. for further proceedings consistent with the court's opinion. The remand decision contained the following language:

> Plaintiff has asked for attorney fees and costs to be determined after judgment is entered. At the present time, plaintiff has not shown that attorney fees

should be awarded but she is free to file a motion to that effect.

Dkt. #30 at 20.

The parties agree that, following entry of judgment on November 14, 2012, plaintiff talked with defendant's lead counsel about the possibility of agreeing on the amount of the fees and costs to be awarded. Defendant did not respond immediately, but did advise plaintiff's counsel on December 1, 2012 that it was unwilling to make a voluntary payment of fees because it was not persuaded that plaintiff to entitled to any fees. On December 14, 2012, plaintiff filed a motion for an award of fees and costs with the court; plaintiff did not file a motion for an extension of time for the filing until January 9, 2013.

B. Opinion

The court has the authority under Fed. R. Civ. P. 6(b)(1)(B) to extend the time for filing a request for fees if the party has failed to act because of excusable neglect. The question is whether plaintiff's tardiness meets the definition of excusable neglect. In making that determination, a court is to consider the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant and whether the movant acted in good faith. Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. 380, 395 (1993). As a general rule, "inadvertence, ignorance of the rules, or mistakes construing the rules" do not constitute excusable neglect. Id. at 392.

Plaintiff argues that her late filing has not prejudiced defendant; it has had no

detrimental effect on the judicial proceedings; it was based on counsel's mistake about the meaning of the court's discussion of fees in its opinion; and counsel acted in good faith in immediately providing defendant a detailed description of plaintiff's claim for fees and trying to negotiate a settlement of the matter to avoid the expense of litigating the motion. Defendant does not concede that the court's opinion would have reasonably led a person to believe that no timely motion for fees was necessary and it denies that plaintiff meets the other criteria for relief from the time limit.

I agree with defendant that plaintiff's claim of being misled by the court is unpersuasive, but defendant's argument that the late filing created a danger of prejudice is equally unpersuasive. Defendant is correct when it says that one of the purposes of the 14-day deadline in Rule 54(d) is to make sure that the opposing party knows of the claim before the time for appeal has lapsed, but it is no position to assert that it was blindsided by the filing of the fee petition. It does not deny that plaintiff's counsel informed counsel for defendant of plaintiff's intent to file such a petition for fees on the day after the court's decision issued or that it did not respond to plaintiff's offer of settlement until more than 14 days had passed from the date of entry of judgment.

Defendant has shown no reason why the subsequent 15-day delay in filing the fee request prejudiced it. The delay has no adverse effect on the judicial proceedings. I conclude that the late filing is excusable, given plaintiff's effort to settle the matter and defendant's failure to respond to plaintiff's efforts in a timely matter. This conclusion does not mean that counsel can ignore filing deadlines any time they believe they can settle a fee dispute.

All it means is that in this case, the lack of prejudice to defendant and to the judicial proceedings, the minimal delay of 15 days and defendant's failure to respond promptly to the settlement offer do not warrant denial of plaintiff's motion for enlargement of the time for filing her motion for an award of attorney fees and costs.

II. MOTION FOR ATTORNEY FEES AND COSTS

Plaintiff contends that she is entitled to an award of fees and costs because she achieved "some degree of success on the merits." Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149 (2010). She sued defendant Kohler Corporation under 29 U.S.C. § 1132 of the Employee Retirement Income Security Act, seeking an order directing defendant to pay her the accrued benefits and future benefits due her under defendant's Pay Protection Plan, along with her reasonable attorney fees and costs. Cpt., Dkt. #1.

In her brief in support of her motion for summary judgment, plaintiff argued that defendant had acted arbitrarily and capriciously in denying her claim for long term disability benefits. She succeeded in showing that defendant had not given her notice of the actual grounds on which it denied her claim until it decided her final appeal and did not notify her of the information she needed in order to perfect her claim. In addition, defendant did not have the required two independent decision makers evaluate her claim that she met the plan's definition of total disability. Her case was remanded to the administrator "to restore plaintiff to the position she was in before defendant applied its defective procedures." Plt.'s Br., dkt. #30, at 1-2. (The parties have not informed the court of the outcome of the

remand.)

Under Hardt, 130 S. Ct. 2149, a claimant in plaintiff's position can be found eligible for an award of attorney fees even if she would not qualify as a "prevailing party," id. at 2156, so long as she can show some degree of success on the merits, id. at 2158. "Some degree of success" is more than "trivial success on the merits" or a "purely procedural victor[y]"; at a minimum it is shown when "the court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was "substantial" or occurred on a "central issue."'" Id. In holding that courts are not required to find that an ERISA claimant is a prevailing party, the Supreme Court seemed to approve an award of fees and costs to plaintiffs who succeeded in showing that a defendant had acted unfairly or improperly in the way it had handled their claim, whether or not they succeeded in obtaining the money they were seeking. However, the Court added to its opinion comments that suggest it placed some weight on the fact that the district court had found "compelling evidence" that Ms. Hardt was totally disabled and that it would be inclined to rule in her favor on her benefits claim if it did not feel bound to give the benefits plan an opportunity to address the deficiencies in its review process. Although the Court affirmed the district court's remand order, concluding that the plaintiff had achieved far more than trivial success or a merely procedural victory, and upheld the district court's decision to award attorney fees, the Supreme Court added that it need not decide whether a pure remand order by itself would amount to "some success on the merits." Id. at 2159. This comment leaves some question

about the scope of the Court's holding.

In this case, it is not clear whether plaintiff will obtain the benefits she was seeking from defendant. Defendant did not give her the actual, specific reason for denying her claim at a time when she could have responded to it, so she has had no chance to address the determinative issues and present her case. Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 689 (7th Cir. 1992). Nevertheless, I am persuaded that she achieved a legal victory by obtaining a ruling that the plan administrator had failed to comply with ERISA guidelines and had not given her the review to which she was entitled. The questions plaintiff raised were not straightforward, but fairly complex. At the very least, the resolution of the case clarified defendant's obligations under ERISA and should help defendant clarify and strengthen its procedures for similar cases. Accordingly, I find that plaintiff has shown that it achieved some degree of success on the merits of this suit.

With one exception, the five factors outlined in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), are still helpful in deciding whether to award fees and in what amounts. Hensley's first factor, which is bad faith, does not apply to fee awards in ERISA cases in this circuit. Loomis v. Exelon Corp., 658 F.3d 667, 674 (7th Cir. 2011 (language to effect that losing party must have engaged in harassment or other litigated in bad faith to justify attorney fee award "did not survive Hardt"). Hensley's second factor is the ability of the opposing part to satisfy an award of fees. Defendant is a successful company with worldwide sales and has provided no reason to think it could not satisfy such an award. Under the third factor of deterrence, an award of fees would deter other persons acting as defendant

did in this case. Fourth, an award would serve to impress upon defendant the importance of creating and following procedures that will insure the fairness of its treatment of benefits applicants. Finally, in this case, the merits of plaintiff's claim far outweighed any merit in defendant's litigating position.

Defendant argues that many of the issues that arose in the handling of plaintiff's claim were the result of the complexity of the governing regulation, but it overlooks the nature of the specific problems identified in the court's opinion. The plan administrator denied benefits to plaintiff on grounds that had never been communicated to her, in violation of 29 U.S.C. § 1133, never told her what information she need to perfect her claim, in violation of 29 C.F.R. § 2560.503-1(g)(iii)(2), and did not provide a review of the first adverse decision by an independent person, in violation of 29 C.F.R. § 2560.503-1(h)(3)(e) and its own plan. The regulation may be complex but defendant's duties are not. The first two are no more than the basic requirements of a fair hearing.

The next question is the reasonableness of the fees sought. Plaintiff is asking for an award of $65,122.78 in fees and costs. Having examined the request, I believe it is fair. The work done was not excessive in light of what the case required and the fees charged for the work are reasonable fees for the Madison market in a case of this nature and complexity.

Defendant objects to what it calls the "block billing" utilized in numerous entries, but it is not clear what it is objecting to. Most of the entries refer specifically to specific tasks performed. Its objection to billing for telephone calls that do not describe the content of the call is unsupported; the only calls that fall into this category are calls from plaintiff's counsel

to her and are protected from disclosure under the attorney-client privilege. Defendant asserts that plaintiff's counsel engaged in excessive conferences, but a review of the bill does not support the assertion. Overall, I am persuaded that the amount sought is appropriate.

In calculating the fee award, I have added plaintiff's first request of $62,744.50 to its supplemental request of $7,965.00 and subtracted $1200.00 included by mistake in the first bill for a total fee award of $71,850.51. Plaintiff is entitled to fees in this amount and to costs in the amount of $2,378.28.

ORDER

IT IS ORDERED that

1. Plaintiff Anna Edwards's motion for an extension of time in which to file a motion for an award of attorney fees and costs is GRANTED; and

2. Plaintiff's motion for an award of attorney fees and costs is GRANTED; she is AWARDED attorney fees in the amount of $71,850.51 and costs in the amount of $2,378.28.

Entered this 14th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge