

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

MICHAEL CAREY, as trustee, on behalf  
of the PAINTERS UNION LOCAL 802  
HEALTH AND WELFARE FUND, PAINTERS  
LOCAL 802 PENSION FUND, and PAINTERS UNION  
LOCAL 802, APPRENTICESHIP AND TRAINING  
FUND and STEVEN PRICE, as trustee, on behalf  
of the PAINTERS UNION LOCAL 802  
HEALTH AND WELFARE FUND, PAINTERS  
LOCAL 802 PENSION FUND, and PAINTERS UNION  
LOCAL 802, APPRENTICESHIP AND TRAINING  
FUND,

Plaintiffs,

MEMORANDUM AND ORDER

v.

06-C-578-S

JOHN JORGENSEN, JEFF MEHRHOFF,  
PAINTERS UNION LOCAL 802 HEALTH AND WELFARE  
FUND, PAINTERS LOCAL 802 PENSION FUND and  
PAINTERS UNION LOCAL 802, APPRENTICESHIP AND  
TRAINING FUND,

Defendants.

---

Plaintiffs Michael Carey and Steven Price commenced this action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* alleging they were aggrieved by: (1) defendants' violation of Trust Plans and Trust Agreements; and (2) defendants' continued refusal to comply with certain terms of the Trust Agreements of Painters Union Local 802, Painters Union Local 802 Health and Welfare Fund, Painters Local 802 Pension Fund, and Painters Union Local 802, Apprenticeship and Training Fund. On November 3, 2006 the Court denied plaintiffs' motion for a temporary restraining order and preliminary injunction. On

December 15, 2006 defendants Painters Union Local 802 Health and Welfare Fund, Painters Local 802 Pension Fund, and Painters Union Local 802, Apprenticeship and Training Fund (hereinafter the fund defendants) filed a motion for summary judgment. On January 16, 2007 the parties filed a stipulation of dismissal providing for dismissal of the action with prejudice and without taxable costs. Judgment was entered accordingly on January 18, 2007. The matter is presently before the Court on the fund defendants' motion for attorneys' fees and costs.

#### MEMORANDUM

Under ERISA, a court is authorized to award reasonable attorneys' fees to either party in an action by a participant, beneficiary, or fiduciary. 29 U.S.C. § 1132(g)(1). However, such an award is left to the court's discretion. Id. The Seventh Circuit has interpreted this provision as a fee-shifting statute which primarily benefits prevailing plaintiffs. Florin v. Nationsbank of Ga., N.A., 34 F.3d 560, 563 (7<sup>th</sup> Cir. 1994) (citations omitted). However, in "rare cases" prevailing defendants may collect fees from losing plaintiffs. Id.

The parties agree the Seventh Circuit has articulated two tests under which fees may be awarded in ERISA actions. The first test lists five factors for courts to consider in evaluating fee requests under Section 1132(g)(1): "(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 attorneys' fees; (3) whether or not an award of attorneys' fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the [] plan as a whole; and (5) the relative merits of the parties' positions.'" Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 828 (7<sup>th</sup> Cir. 1984) (quoting Janowski v. Int'l Bhd. of Teamsters Local No. 710 Pension Fund, 673 F.2d 931, 940 (7<sup>th</sup> Cir. 1982), vacated on other grounds, 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983)). The second test inquires whether the losing parties' position was "substantially justified." Id. at 830.

However, the Seventh Circuit has since observed that "[w]hichever approach is used, the bottom-line question is essentially the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" Meredith v. Navistar Intern. Transp. Corp., 935 F.2d 124, 128 (7<sup>th</sup> Cir. 1991). While in the end both tests reach the same result, the "substantial justification" test is better suited for application in this action where it is the fund defendants that seek attorneys' fees. See Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1054 (7<sup>th</sup> Cir. 1987) (five-factor test is oriented toward the case where a prevailing plaintiff rather than a prevailing defendant is asking for fees). The Court finds that plaintiffs' claim was substantially justified

such that an award of attorneys' fees to the fund defendants would be inappropriate in this action.

The substantial justification test incorporates a "modest presumption" in favor of awarding fees to a prevailing defendant. Bittner, at 830. As such, the fund defendants are entitled to reasonable attorneys' fees unless: (1) plaintiffs' position was substantially justified; or (2) special circumstances make an award of fees unjust. Id. To be substantially justified, a party's position must be more than just non-frivolous. Prod. & Maint. Employees' Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1404 (7<sup>th</sup> Cir. 1992) (citations omitted). However, the position need not be meritorious. Id. Rather, it must present a "'genuine dispute' that is 'justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person.'" Little v. Cox's Supermarkets, 71 F.3d 637, 644 (7<sup>th</sup> Cir. 1995) (quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988)). A position that lacks a "solid basis" is not substantially justified. Bittner, at 830. The special circumstances under which an award of fees would be unjust need not be explored because the Court's analysis of the first-prong of the "substantial justification" test disposes of the fund defendants' motion.

Plaintiffs' position was not meritorious but it was substantially justified. Plaintiffs based their complaint in part

on the assertion that they were elected to serve as Trustees of the fund defendants by members of Local 802 which rendered their removal unlawful. Plaintiffs' attorney represents that they had witnesses who could attest to the election of trustees by the Local Union. However, plaintiffs' attorney likewise represents that during discovery he reviewed documents in possession of the fund defendants which tended to support defendants' assertion that trustees were appointed after the 2003 affiliation between Painters Local 802 and the District Council. Accordingly, it appears there was a "'genuine dispute'" on the issue of whether trustees were appointed or elected. Little, at 644 (quoting Pierce, at 565, 108 S.Ct. at 2550).

Additionally, the record demonstrates that plaintiffs attempted to proceed with their action in a manner that would not disrupt the affairs of the fund defendants. For example, the Court's November 3, 2006 Preliminary Pre-Trial Conference Order reflects that at the preliminary injunction hearing plaintiffs withdrew their request to have the resolutions and actions of the fund defendants "taken while Defendants John Jorgensen and Jeff Mehroff illegally serves as trustees" declared null and void.

Further, plaintiffs were willing to amend their complaint so as to effectively remove the fund defendants from the litigation. In support of their motion for attorneys' fees, the fund defendants submitted the affidavit of Ms. Anne Willis Reed. Attached to said

affidavit is Exhibit C entitled "Stipulation and Order to Amend Complaint." Said stipulation and order was plaintiffs' response to the fund defendants' proposed stipulation and it provides as follows:

The undersigned parties stipulate that paragraph 12 of Plaintiffs' Complaint, and Paragraphs E and F of the relief requested in the Complaint in this matter, are withdrawn. The plaintiffs do not ~~and will not~~ seek any ruling from this Court which would affect or alter any past actions or resolutions of defendants Painters Union Local 802 Pension Fund, Painters Union Local 802 Health and Welfare Fund, or Painters Union Local 802, Apprenticeship and Training...

~~Likewise, the plaintiffs do not and will not seek any ruling from this Court which would restrict or direct any future actions or resolutions of the Fund Defendants, with the sole exception that the plaintiffs ask the Court to replace Messrs. Jorgensen and Mehrhoff as trustees.~~

At the present time, the Plaintiffs solely seek the reinstatement of Messrs. Carey and Price as trustees. However, the withdrawal of paragraph 12 of the Complaint and paragraphs E and F are without prejudice and may be refiled at such time as the Plaintiffs seek to alter or reverse a specific decision of the trustees.

Accordingly, Exhibit C establishes that plaintiffs were willing to withdraw the portion of their complaint that concerned the actions of the fund defendants. While plaintiffs requested that such withdrawal be granted without prejudice, their willingness to compromise demonstrates that they did not file the action merely to harass the fund defendants. Meredith, at 128. As such, the Court finds that the fund defendants are not entitled to attorneys' fees because plaintiffs' position was substantially justified. Bittner, at 830.

ORDER

IT IS ORDERED that defendants Painters Union Local 802 Health and Welfare Fund, Painters Local 802 Pension Fund, and Painters Union Local 802, Apprenticeship and Training Fund's motion for attorneys' fees and costs is DENIED.

Entered this 20<sup>th</sup> day of March, 2007.

BY THE COURT:

s/

---

JOHN C. SHABAZ

District Judge