*1999 U.S. App. LEXIS 16982, **

JOE KNICKERBOCKER, Plaintiff-Appellant, v. OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC. RETIREMENT INCOME PLAN FOR NON-UNION EMPLOYEES, and JONATHAN LUCAS, PLAN ADMINISTRATOR, Defendants-Appellees.

No. 98-1319

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 16982

July 20, 1999, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1999 U.S. App. LEXIS 27872. Certiorari Denied February 22, 2000, Reported at: 2000 U.S. LEXIS 1127.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 95-60335. Hackett. 3-6-98.

DISPOSITION: District court's grant of summary judgment to the defendants AFFIRMED. Case REMANDED to the district court for consideration of Knickerbocker's request for an award of attorney fees.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee appealed a judgment of the United States District Court for the Eastern District of Michigan, which granted summary judgment in favor of defendant employer in plaintiff's suit to recover certain pension and heath benefits. The district court also declined to exercise its discretion to impose penalties against defendant administrator pursuant to the Employment Retirement Income Security Act, 29 U.S.C.S. § 1132(c)(1)(B).

OVERVIEW: Plaintiff employee sued, challenging defendant employer's refusal to award him dual pension benefits. The district court granted summary judgment in favor of defendants. On appeal, the court addressed the plaintiff's claims for health benefits, statutory penalties under Employment Retirement Income Security Act, 29 U.S.C.S. § 1132 et seq., and attorney fees. The court found that plaintiff was not entitled to health benefits because he was not a beneficiary of the union contract for such benefits. Further, the district court did not abuse its discretion in failing to impose statutory penalties against defendant administrator because such penalties were merely permitted, not required. However, the court found that plaintiff was entitled to attorney fees pursuant to § 1132(g)(1) because he was the prevailing party in the sense that his lawsuit was a catalyst that prompted defendants to take the desired action. Therefore, the case was remanded in order for plaintiff to move for an appropriate fee award.

OUTCOME: The judgment granting summary judgment in favor of defendant employer and defendant administrator was affirmed because plaintiff employee was not entitled heath

benefits and the district court did not abuse its discretion in failing to impose statutory penalties against defendant administrator. However, the case was remanded for consideration of plaintiff's request for an award of attorney fees.

CORE TERMS: attorney fees, pension, hourly, administrator, salaried, pension benefits, health benefits, disability, impose penalties, beneficiary, retirement, plan administrator's, failure to disclose, dual, benefits plans, statutory penalties, abuse of discretion, abuse of discretion, bad faith, disclosure, promised, estoppel, lawsuit, oral argument, union contract, contract law, prevailing party, equitable estoppel, prejudiced, state-law

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Materiality

HN1 Summary judgment is appropriate only when there are no genuine issues of material fact, so that one party is entitled to a judgment as a matter of law.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > General Overview

HN2 Estoppel against an Employment Retirement Income Security Act, 29 U.S.C.S. § 1132 et seq., plan can never be applied to vary the terms of unambiguous plan documents. Estoppel is available only when the terms of the plan are ambiguous and the participant relies on a misleading interpretation of the ambiguity.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Failures to Respond

HN3 See 29 U.S.C.S. § 1132(c)(1)(B).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Failures to Respond
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Penalties

HN4 Although the Employment Retirement Income Security Act, 29 U.S.C.S. § 1132(c)(1)(B), authorizes penalties for failure to respond to an information request, it does not require them. In fact, the statute expressly commits the decision to impose penalties to the court's discretion. Therefore, the court only reviews the district court's decision whether to impose penalties for an abuse of discretion. The abuse of discretion standard is a highly deferential standard. An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made. Although § 1132(c)(1)(B) does not require prejudice to impose penalties, a district court may consider prejudice in exercising its discretion.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Catalyst Theory

HN5 A plaintiff can be "prevailing party" with respect to awarding attorney's fees without obtaining a final adjudication on the merits, if the lawsuit is a catalyst that prompts the defendants to take the desired action.

COUNSEL: For **JOE KNICKERBOCKER,** Plaintiff - Appellant: Jamil Akhtar, Akhtar & Sucher, Troy, MI.

For OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., JONATHAN LUCAS, Defendants - Appellees: Jennifer A. Zinn, David R. Deromedi, Dickinson, Wright, Moon, Van Dusen & Freeman, Detroit, MI.

For OVAKO-AJAX, INC., AJAX ASSOCIATED COMPANIES, INC., JONATHAN LUCAS, Defendants - Appellees: Thomas G. Kienbaum, Kienbaum, Opperwall, Hardy & Pelton, Birmingham, MI.

JUDGES: Before: WELLFORD, SUHRHEINRICH, and MOORE, Circuit Judges. MOORE, Circuit Judge, concurring in part and dissenting **[*2]** in part. HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part.

OPINION

OPINION

PER CURIAM. In the district court, **Joe Knickerbocker** challenged his employer's refusal to award him "dual" pension benefits, which were promised to him but which are not provided by the terms of the benefits plans in which he participated. The parties having resolved the pension issues during the pendency of this appeal, we focus on Knickerbocker's additional claim for medical benefits and his request for statutory penalties based on the plan administrator's failure to disclose information that Knickerbocker requested. The court **AFFIRMS** the district court's grant of summary judgment to the defendants. We **REMAND** this case to the district court for consideration of Knickerbocker's request for an award of attorney fees.

I. BACKGROUND

Knickerbocker's attorney informed us at oral argument that he is no longer pressing any claims pertaining to Knickerbocker's pension benefits, leaving only the claims related to medical benefits. However, Knickerbocker has requested attorney fees, and the resolution of the pension issues is relevant to whether he is the prevailing **[*3]** party. We therefore provide a relatively detailed summary of the original issues in the case.

Knickerbocker began working at the Ajax Rolled Ring Company in 1971 as an hourly employee under a union contract. In 1981, he was asked to move from an hourly position to a salaried one, without any increase in salary. Knickerbocker discussed the terms of this offer with Jim Valrance, president and majority stockholder of Ajax. He was concerned about his pension benefits and about what would happen if he ever became unable to work due to a disability. Valrance ameliorated Knickerbocker's concerns by offering him "dual" pension benefits. At the time, Ajax had a benefits plan for hourly employees and was in the process of establishing one for salaried employees. Valrance stated that Knickerbocker's pension under the Salaried Plan would be calculated using his *entire* length of service with the company but that Knickerbocker would nonetheless receive an additional pension under the Hourly Plan. Valrance also told Knickerbocker that his health benefits would continue for life if he took disability retirement. In 1989, when Ajax was sold and became Ovako-Ajax, Knickerbocker confirmed Valrance's **[*4]** promises with the new management.

Valrance's promises were not consistent with the terms of the Salaried Plan, which went into effect shortly after Knickerbocker accepted his new position. Under the plan, Knickerbocker was entitled to pension benefits based only on his length of service as a salaried employee. Similarly, he was entitled to benefits under the Hourly Plan based on his length of service as an hourly employee. In addition, the Salaried Plan does not provide health benefits to employees who retire before the age of 62, even due to disability. [1] Both plans are governed by the Employee Retirement Income Security Act ("ERISA").

FOOTNOTES

1 The health-benefits provision of the Salaried Plan is not in the Joint Appendix filed for this appeal, and Knickerbocker's attorney informed us at oral argument that it is not in the record. However, the parties seem to agree that its terms are as described.

Knickerbocker stayed with the company until June 6, 1991, when he was forced home by a back injury he had received **[*5]** at work the month before. Ovako filed a worker's compensation claim on his behalf and shortly thereafter laid him off.

When Knickerbocker tried to apply for pension benefits, the plan administrator, Jonathan Lucas, sent him a statement indicating that he was not entitled to a disability pension because he was not an active employee but had been laid off. Lucas failed to respond to Knickerbocker's request for copies of the Salaried Plan and related documents until Knickerbocker's attorney renewed the request for a copy of the plan. In May 1995, an attorney for the plan advised Knickerbocker's attorney that the denial of benefits could be appealed to the company's Retirement Committee. In December 1995, after the Committee had failed to act on the appeal for several months, Knickerbocker filed this lawsuit.

In January 1997, the district court stayed the suit to await the Retirement Committee's decision, which was issued in March of that year. The Committee awarded Knickerbocker pension benefits that are greater than required under the terms of the plans but less than Valrance promised. [2] However, Knickerbocker cannot receive any payments from the Salaried Plan until he has exhausted **[*6]** his eligibility for long-term disability ("LTD") benefits through Ovako's disability insurance program. Thus, for the time being, Knickerbocker can receive only his hourly pension.

FOOTNOTES

2 The Committee departed from the terms of the plans because Ovako was already planning to switch to a more generous method for coordinating hourly and salaried pension benefits and because Knickerbocker had been sent at least one benefits statement based on the new method.

Knickerbocker's pensions are also subject to offsets for worker's compensation benefits, which Knickerbocker received until accepting a final settlement in July 1994, about a year before he applied for his pensions. After the Committee's 1997 decision, Ovako continued to refuse to pay Knickerbocker's hourly pension, apparently on the basis of the worker's compensation-offset rule. In a letter dated December 30, 1998 -- twenty-one months after the Committee's award and ten weeks before the oral argument in this case -- Ovako acknowledged that none of Knickerbocker's **[*7]** worker's compensation benefits were properly offset against his hourly pension. The letter indicated that Ovako would pay that pension retroactive to June 1995.

In July 1997, after the close of discovery in this case, Ovako's attorney wrote to Knickerbocker's. He stated that the plan documents Ovako had sent to Knickerbocker in response to his 1994 and 1995 requests were outdated (and were so at the time they were sent). The attorney enclosed updated copies. Also in 1997, Ovako's attorney at last sent Knickerbocker copies of the plan's IRS Forms 5500 (Annual Return/Report of an Employee Benefit Plan) for 1989 through 1992. This disclosure appears to have satisfied Knickerbocker's 1994 request for "documents filed within the last four years." [3] However, Knickerbocker had also requested the 1993 form, and after receiving the 1989 through 1992 forms, he requested the forms for 1994, 1995, and 1996. Although Ovako apparently disclosed the latter three forms, as of the date of the district court's final judgment in

this case Ovako had not disclosed the 1993 form. J.A. at 35 (Dist. Ct. Op.).

FOOTNOTES

3 The plan's fiscal year runs from May 1 to April 30, and it files its Form 5500 six to ten months after the close of the fiscal year. Thus, the 1993 form would not have been prepared until late 1994 or early 1995, a few months after Knickerbocker's 1994 request for plan documents.

[*8] In this lawsuit, Knickerbocker sought: (1) recovery of his hourly pension benefit, pursuant to 29 U.S.C. § 1132(a)(1)(B) and state contract law; (2) the right to receive full "dual" pension benefits, as promised by Valrance, pursuant to § 1132(a)(1)(B), equitable estoppel under ERISA, and state contract law; (3) penalties for Lucas's failure to disclose plan documents, pursuant to 29 U.S.C. §§ 1024(b)(4) and 1132(c)(1)(B). In addition, the parties and the district court have addressed Knickerbocker's claim that he is entitled -- pursuant to equitable estoppel under ERISA, breach of a collective bargaining agreement, and state contract law, -- to receive health benefits as a retiree, even though health benefits are not mentioned in the complaint. The district court held that the Retirement Committee was within its discretion in refusing to award dual benefits, that equitable estoppel is not available under ERISA when the terms of the plan are unambiguous, and that Knickerbocker's state-law claims are preempted. The district court also declined to exercise its discretion to impose penalties for Lucas's failure to disclose plan documents **[*9]** because the delay was not intentional and did not prejudice Knickerbocker.

Through its December 1998 letter, Ovako has conceded Knickerbocker's first claim. Knickerbocker's attorney indicated at oral argument that he was no longer pursuing the second. [4] Therefore, the issues before us are Knickerbocker's claims for health benefits, statutory penalties, and attorney fees.

FOOTNOTES

4 Knickerbocker's attorney informed us that there were no longer any pension issues in the case. We take this to mean that Knickerbocker is no longer seeking a pension calculated as Valrance promised but is content with the Committee's calculations. In any event, the district court was surely correct that the Committee's decision was not an abuse of discretion, which is the proper standard of review. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989) (holding that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard *unless* the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan") (emphasis added); *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 552 (6th Cir. 1998) (en banc) (holding that the language of an ERISA plan vested the administrator with discretion to make fact-based benefits determinations).

[*10] II. ANALYSIS

A. HEALTH BENEFITS

We apply the same summary judgment standard as the district court and review its decision de novo. *See Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 462 (6th Cir. 1998). *HN1* Summary judgment is appropriate only when there are no genuine issues of material fact, so that one party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c).

Knickerbocker argues that the plan is estopped from denying that he is entitled to health benefits.

We have held that HN2 estoppel against an ERISA plan can never "be applied to vary the terms of unambiguous plan documents." *Sprague v. General Motors Corp.*, 133 F.3d 388, 404 (6th Cir.) (en banc), *cert. denied*, 524 U.S. 923, 118 S. Ct. 2312, 141 L. Ed. 2d 170 (1998). Estoppel is available only when the terms of the plan are ambiguous and the participant relies on a misleading interpretation of the ambiguity. *See id.* As we have mentioned, the health-benefits provision of the Salaried Plan is not before us, which makes it difficult for us to determine whether the plan is ambiguous. We note, however, that the parties seem to agree that the **[*11]** terms of the plan are clear. In addition, we believe the burden is on Knickerbocker to point out any claimed ambiguity in the language of the plan which would justify reliance on Valrance's promise. Because the language of the plan is not before the court, he cannot do so. He therefore cannot prevail under *Sprague*.

Knickerbocker also argues that he is entitled to health benefits from Ovako because after he took a management job, the union to which he formerly belonged negotiated health benefits for union members who take disability retirement. This argument is meritless. Knickerbocker simply is not a party to this contract. He tries to suggest a connection by noting that the union contract incorporates the Hourly Plan, under which he was awarded a pension. Knickerbocker's past participation in the Hourly Plan does not make selected other terms of the union contract applicable to him.

Finally, Knickerbocker's brief appears to argue that there was an "express or implied contract to award him [health] benefits under both the Hourly and Salaried [Plans]." Knickerbocker Br. at 29. [5] State law claims to recover benefits from an ERISA plan are preempted. Knickerbocker's reliance **[*12]** on *Perry v. P*I* E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), is misplaced, as that case does not apply to contract and estoppel claims that are "in essence . . . for the recovery of an ERISA plan benefit." *Fisher v. Combustion Engineering, Inc.*, 976 F.2d 293, 297 (6th Cir. 1992) (internal quotation marks omitted). Because Knickerbocker seeks to enforce an agreement contrary to the written terms of the plan, and obtain benefits which the plan simply does not provide, his state-law contract claims are preempted.

FOOTNOTES

5 The quoted passage actually refers to pension benefits, but the brief incorporates these arguments in its discussion of medical benefits.

B. STATUTORY PENALTIES

Knickerbocker contends that the district court erred by not imposing upon Ovacko's plan administrator, Jonathan Lucas, any statutorily permitted penalty for Lucas's failure to provide him with the plan documents that he requested. ERISA § 502(c)(1)(B) provides in relevant part:

> HN3 Any administrator **[*13]** . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). HN4 Although the statute authorizes penalties, it does not require them. In fact, the statute expressly commits the decision to impose penalties to the court's discretion. Therefore, we only review the district court's decision whether to impose penalties for

an abuse of discretion. *See Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1068 (6th Cir. 1994). The abuse of discretion standard is a highly deferential standard. As this Circuit has stated: "An abuse of discretion **[*14]** standard is a highly deferential standard. As this Circuit has stated: "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *Id.* (citing *In re Bendectin Litigation*, 857 F.2d 290, 307 (6th Cir.1988), *cert. denied*, 488 U.S. 1006 (1989); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (6th Cir.1988)). Although § 1132(c)(1)(B) does not require prejudice to impose penalties, a district court may consider prejudice in exercising its discretion. We note that many courts, in their discretion, have not imposed any penalty under § 1132(c)(1)(B), in the absence of prejudice. *See Bartling*, 29 F.3d at 1068 (citing *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588-89 (1st Cir.1993); *Godwin v. Sun Life Assurance Co. of Canada*, 980 F.2d 323, 328-29 (5th Cir.1992)).

In this case, Knickerbocker requested the district court to impose penalties but failed to persuade the district court to exercise its discretion to do so. Without opining on the unbriefed issue of whether Knickerbocker or Lucas had the burden of persuasion **[*15]** on Knickerbocker's claim for penalties, we find that the district court's conclusion that Knickerbocker was not prejudiced is not an abuse of discretion. Further, in light of common precedent, we do not consider the district court's reliance on the lack of prejudice to Knickerbocker to be improper. Moreover, we do not think that "leniency" in not imposing penalties undermines the intent of Congress, where Congress does not require penalties but merely permits them and even expressly commits the decision to impose sanctions to the discretion of the district court. Finally, we note that this Circuit has held in reviewing the propriety of penalties under § 1132(c)(1)(B) that a district court "would have been acting within its discretion if it had imposed no penalty at all." *Bartling*, 29 F.3d at 1069. Accordingly, we are not "firmly convinced" that the district court made a mistake in not imposing penalties on Lucas.

C. ATTORNEY FEES

Knickerbocker requests attorney fees pursuant to 29 U.S.C. § 1132(g)(1). Because Knickerbocker has abandoned his claim for "dual" pensions once his long-term disability benefits expire, he is not the prevailing **[*16]** party on that issue, nor has he prevailed on the issue of the statutory penalty. However, Knickerbocker's lawsuit and appeal may have been a catalyst to Ovako at last admitting that Knickerbocker was entitled to his hourly pension. *Cf. Perket v. Secretary of Health & Human Servs.*, 905 F.2d 129 (6th Cir. 1990) (holding that HN5 a plaintiff can be "prevailing party" under the Equal Access to Justice Act without obtaining a final adjudication on the merits, if the lawsuit is a catalyst that prompts the defendants to take the desired action). Knickerbocker may move the district court on remand to consider making an appropriate fee award. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983) (holding that a plaintiff must achieve "some success on the merits" to be eligible for fees under the Clean Air Act); *Cattin v. General Motors Corp.*, 955 F.2d 416, 427 (6th Cir. 1992) (noting with approval the Seventh Circuit's application of *Ruckelshaus* in an ERISA case); *see also Schwartz v. Gregori*, 160 F.3d 1116 (6th Cir. 1998) (discussing appellate attorney fees in ERISA cases), *cert. denied*, **[*17]** 143 L. Ed. 2d 788, 119 S. Ct. 1756 (1999); *O'Bryan v. County of Saginaw, Michigan*, 722 F.2d 313, 314-15 (6th Cir. 1983) (holding that requests for appellate attorney fees should be considered in the first instance by the district court).

III. CONCLUSION

We **AFFIRM** the district court's holdings that Knickerbocker is not a beneficiary of the union contract and that he cannot bring an estoppel claim or a state-law contract claim against the Salaried Plan. We **AFFIRM** the district court's refusal to impose penalties for Ovako's failure to disclose plan-related documents. However, we **REMAND** this case for consideration of Knickerbocker's request for attorney fees.

CONCUR BY: MOORE (In Part); HARRY W. WELLFORD (In Part)

DISSENT BY: MOORE (In Part); HARRY W. WELLFORD (In Part)

DISSENT

MOORE, Circuit Judge, concurring in part and dissenting in part. Under ERISA, any plan administrator

> who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) **[*18]** by mailing the material requested . . . within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). We review for abuse of discretion the district court's refusal to impose penalties under this section. *See Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1068 (6th Cir. 1994).

In deciding whether to impose penalties, a district court may consider whether the failure to provide requested information was intentional, reflected bad faith on the part of the administrator, or prejudiced the participant in any way. *See Bartling*, 29 F.3d at 1068-69; *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588 (1st Cir. 1993). Often, a court will account for the lack of prejudice or bad faith by imposing a reduced daily penalty, *see, e.g., Moothart v. Bell*, 21 F.3d 1499, 1506 (10th Cir. 1994) (stating that thirty-dollar per day penalty reflected "the lack **[*19]** of injury and the limited prejudice involved"), but the court is generally free to impose no penalty at all. *See Bartling*, 29 F.3d at 1068-69; *but see Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494-95 (11th Cir. 1993) (holding that penalties were mandatory, despite lack of prejudice, in light of unexplained twelve-month delay). The courts should not, however, be so lenient as to undermine Congress's intent. I do not understand why plan administrators are reluctant to share information with participants, compelling Congress to enact § 1132(c)(1)(B). But, apparently, reluctant they are, and Congress's attempt to promote disclosure will be defeated if the courts enforce the statutory requirements only when the employee can demonstrate substantial prejudice.

The statutory language provides for penalties when an administrator "*fails* or refuses" to provide required information. 29 U.S.C. § 1132(c)(1)(B) (emphasis added). Thus, the district court should not have been so quick to deny penalties because Knickerbocker "has not shown that his rights were harmed or otherwise prejudiced by the delay in his receipt of the requested **[*20]** information, nor has he demonstrated bad faith or intentional delay on Lucas's part." J.A. at 36-37 (Dist. Ct. Op.). In addition, I believe the district court erred by imposing the burden of persuasion on Knickerbocker. The Eleventh Circuit has held that the burden is on the administrator to demonstrate the lack of prejudice or bad faith. *See Daughtrey*, 3 F.3d at 1494. This holding is consistent with our decision in *Bartling*, which cited affirmative evidence of the administrator's good faith in affirming a relatively light penalty. *See Bartling*, 29 F.3d at 1065-66 (describing negotiations between plaintiffs and administrator over what should be disclosed). Because the failure to disclose requested documents is a violation of ERISA, the burden should be on the administrator to explain the failure to do so.

When asked to explain this violation at oral argument, Ovako's response defied the statutory purpose in requiring disclosure. Ovako argued that there was no need to disclose the Form 5500 to Knickerbocker because it is "fairly complex" and would have helped Knickerbocker understand his benefits only "if [he] were an actuary." According to Ovako, **[*21]** if Knickerbocker wanted to know his rights under the plan, he should have looked at the benefits statement provided by

Lucas. Of course, that statement incorrectly informed Knickerbocker that he was not entitled to any benefits. Ovako's argument ignores the reason Congress required disclosure of these documents. Knickerbocker was not required to rely on Lucas's statement of his benefits. Rather, he was entitled to hire his own actuary or attorney to review the documents and determine whether he was receiving his due. Ovako's continuing insistence that Knickerbocker had no need or right to see these documents underscores the willfulness of its noncompliance with ERISA, as does the fact that it somehow managed to convince the district court that its violation was not intentional despite failing to disclose some documents right up to the date of the district court's judgment. The company has no explanation for much of the delay other than its disagreement with Congress's conclusion that plan participants have a right to see these documents. While for various reasons the full hundred-dollar-per-day penalty would certainly not be desirable in this case, no penalty at all is equally inappropriate. **[*22]** I would therefore vacate the refusal to impose penalties and direct the district court to reconsider this matter on remand.

HARRY W. WELLFORD, Circuit Judge, **concurring in part** and **dissenting in part**:

In all but section II.C. of the opinion dealing with attorney fees, I concur in the decision on that complex claim by plaintiff, **Joe Knickerbocker,** against his former employer. I respectfully dissent from the remand on attorney fees. I would hold that the district judge did not abuse his discretion in denying attorney fees.

In his forty-six page appellate brief to this court, plaintiff submitted one paragraph on the attorney fee issue. In the one attorney fee case cited in that brief, *Foltice v. Guardsman Products, Inc.*, 98 F.3d 933 (6th Cir. 1996), *cert. denied*, 520 U.S. 1143 (1997), we affirmed the denial of attorney fees, stating:

> Lest there be any misunderstanding, however, we take this opportunity to reiterate that neither the American Rule nor the opposing "English Rule" governs attorney fee questions in ERISA cases of this type. When Congress wants to provide that the loser shall pay the winner's attorney fees, it knows how **[*23]** to say so. *See* 29 U.S.C. § 1132(g)(2). Congress has not done that here. Neither has Congress seen fit to create any kind of statutory presumption regarding the payment of attorney fees in cases of this type. Congress having chosen to leave the matter for the courts to decide, in the exercise of their decision, case-by-case, we think it would ill-behoove us to limit judicial discretion by creating a non-statutory presumption either for or against the award of attorney fees.

Id. at 939. We discussed the factors set out in *Secretary of Labor v. King*, 775 F.2d 666 (6th Cir. 1985), in reaching the decision in *Foltice*.

This court's fleeting reference in *Cattin v. General Motors Corp.*, 955 F.2d 416, 427 (6th Cir. 1992), to *Bittner v. Sadoff and Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984), certainly does not indicate approval of *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983), principles in this type of ERISA claim in contradistinction to the *Foltice* rationale. *Cattin*, moreover, involved a *denial* of claimed attorney **[*24]** fees under ERISA. Furthermore, *Cattin*, 955 F.2d at 427, and *Schwartz v. Gregori*, 160 F.3d 1116, 1118 (6th Cir. 1998), *cert. denied*, 143 L. Ed. 2d 788, 119 S. Ct. 1756 (1999), [1] established abuse of discretion as the standard to be applied in actions with respect to attorney fee claims in ERISA cases.

FOOTNOTES

1 *Schwartz* also involved our affirmance of a denial of attorney fees in an ERISA case.

In my view, the district court did not abuse its discretion in denying attorney fees in this case.

Plaintiff has set out no authority justifying a remand for further consideration in this issue, and I am not persuaded by the authority cited by the other panel members for a remand on this question.

Accordingly, I dissent as to that part of the decision which directs a remand "for consideration of Knickerbocker's request for attorney fees."

Source: **Legal > Federal Legal - U.S. > Find Cases > Federal Courts by Circuit > Federal Cases By Circuit > 6th Circuit - US Court of Appeals Cases**
Terms: **"Joe Knickerbocker"** (Suggest Terms for My Search)
View: Full
Date/Time: Saturday, October 4, 2014 - 11:34 AM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.