

Not to Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

JEAN TORGESON,

Plaintiff,

vs.

UNUM LIFE INSURANCE COMPANY
OF AMERICA,

Defendant.

No. C05-3052-MWB

**ORDER REGARDING PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES
AND EXPENSES**

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I. INTRODUCTION AND BACKGROUND

This action involved a claim of failure to pay benefits in violation of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001 *et seq.* More specifically, plaintiff Jean Torgeson, a former “office nurse” with Mason City Clinic, P.C. (MCC), filed this ERISA judicial review action pursuant to 29 U.S.C. § 1132(a)(1)(B) on August 30, 2005, seeking restoration of disability income benefit payments pursuant to a long-term disability (LTD) policy of insurance underwritten by Unum Life Insurance Company of America (Unum) in which employees of MCC were able to participate. Torgeson identified as the basis for her claim for LTD benefits her increasing pain from fibromyalgia, migraine headaches, chronic fatigue, and depression secondary to her chronic pain. On December 6, 2006, in a ruling on trial on the merits on written submissions, this court concluded that defendant Unum breached its fiduciary duty by failing to pay plaintiff Torgeson’s claim for long-term disability benefits. Unum was directed to pay Torgeson benefits under the terms of the policy for the period of September 19, 2003 through August 2, 2004.

This matter is now before the court pursuant to Torgeson’s December 19, 2006, Motion for Attorney Fees and Expenses (Doc. No. 42). Torgeson seeks attorney fees in the amount of \$28,336.25.¹ Specifically, Torgeson seeks reimbursement for 41.58 hours of attorney time at an hourly rate of \$425.00 (\$17,671.50), 6.6 hours of attorney time at an hourly rate of \$125.00 (\$825.00), 62.15 hours of attorney time at an hourly rate of

¹In her brief, Torgeson contends the aggregate total of her requested attorney fees amounts to \$28,397.75. However, the court is at a loss as to how the plaintiff arrived at this figure. Upon adding all the claimed costs, the court, in contrast, arrived at an aggregate sum of \$28,336.25. The court’s total differs from Torgeson’s asserted total by \$61.50. In light of the fact that the court is unable to discern where the additional \$61.50 in fees came from, the court will assume this was a clerical error or oversight and will proceed to use the \$28,336.25 amount as the total amount plaintiff has requested she be awarded for attorney fees.

\$100.00 (\$6,215.00) and 16.20 hours of law clerk time at an hourly rate of \$100.00 (\$1,620.00). In addition, Torgeson seeks 8.9 hours of attorney time at varying rates for work performed in the case by local counsel, Moyer and Bergman, P.L.C., totaling \$2,004.75. Unum filed a resistance to the plaintiff's Motion for Attorney Fees and Expenses on January 5, 2007, asserting myriad challenges to plaintiff's claimed fees (Doc. No. 45). Torgeson filed a reply in further support of her fee application on January 10, 2007 (Doc. No. 49). Neither party requested oral argument. Accordingly, as the matter is now fully submitted, the court will proceed to address the merits of the parties' respective arguments.

II. LEGAL ANALYSIS

A. Entitlement To Fees

Unum first avers that Torgeson is not entitled to attorney fees under 29 U.S.C. § 1132(g). Pursuant to § 1132(g)(1), the court may, in its discretion, allow a reasonable attorney fee and costs to either party under ERISA. 29 U.S.C. § 1132(g)(1). The Eighth Circuit Court of Appeals has explained the proper purposes and pertinent factors to consider in determining whether an award of attorney fees is proper:

[T]his court has previously emphasized the role of ERISA's remedial nature in determining whether to award fees, stating:

ERISA is remedial legislation which should be liberally construed to effectuate Congressional intent to protect employee participants in employee benefit plans. A district court considering a motion for attorney's fees under ERISA should therefore apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts. *Welsh*

v. Burlington N., Inc., Employee Benefits Plan, 54 F.3d 1331, 1342 (8th Cir. 1995) (citations, internal quotations, ellipsis, and brackets omitted). Therefore, although there is no presumption in favor of attorney fees in an ERISA action, a prevailing plaintiff rarely fails to receive fees. See *Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002) (en banc). In exercising its discretion, we have set forth the following list of five non-exclusive factors for consideration:

(1) the degree of culpability or bad faith of the opposing party; (2) the ability of the opposing party to pay attorney fees; (3) whether an award of attorney fees against the opposing party might have a future deterrent effect under similar circumstances; (4) whether the parties requesting attorney fees sought to benefit all participants and beneficiaries of a plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Id.* at 969 & n. 4 (citing *Lawrence*, 749 F.2d at 495-96).

Starr v. Metro Sys., Inc., 461 F.3d 1036, 1040-41 (8th Cir. 2006). Unum argues, generically, that a consideration of these factors does not weigh in favor of an award of attorney fees. However, in its previous December 6, 2006, Memorandum Opinion and Order, this court independently considered the delineated factors at length and concluded, contrary to Unum's assertion, that "the pertinent facts weigh conclusively in favor of awarding attorney fees to Torgeson." *Torgeson v. Unum Life Ins. Co. of Am.*, ___ F.

Supp. 2d ___, No. C05-3052-MWB, 2006 WL 3717380, at *37 (N.D. Iowa Dec. 6, 2006). More specifically, this court stated:

[T]he court finds that Unum's conduct was not merely an abuse of discretion, but suggested culpable or bad faith consideration of Torgeson's claim; Unum is clearly able to pay attorney fees; an award of attorney fees will have a future deterrent effect on cavalier treatment of disability claims based on conditions defined primarily by subjective symptoms and cavalier disregard of treating physicians' opinions; and Torgeson clearly had the more meritorious position. *Id.* (citing these factors as part of a non-exclusive list). The precise amount of any such award, however, must be determined in a subsequent order, after the parties have made the appropriate submissions required under applicable local rules for fee claims.

Id. at *36-37. After conducting another thorough, independent review of the five, non-exclusive factors and their applicability to the facts of this case, it appears to this court that the record is devoid of a compelling reason to reverse its prior holding with respect to this issue. Consequently, having previously determined Torgeson was entitled to an attorney fee award, coupled with the fact that Unum has not even remotely demonstrated a compelling reason for this court to reconsider its previous holding in this respect, and finding no independent reason to do so, the court concludes that Torgeson is entitled to a reasonable attorney fee. Accordingly, the court will turn its discussion toward the merits of the parties' arguments with respect to the precise amount of fees to which Torgeson is entitled.

B. Amount Of The Fee Award

Unum asserts myriad challenges to the amount of Torgeson's claimed attorney fees. Generally, Unum contends that the fees claimed by Torgeson's attorneys are not

“reasonable” in terms of the hours expended or the hourly rate claimed. More specifically, Unum avers the fees Torgeson has requested are excessive and unreasonable to the extent they include fees for work on two motions for summary judgment which were stricken by the court, fees resulting from unreasonable rates and fees for inadequately documented expenses. In addition, Unum contends Torgeson is not allowed to recover fees for work performed at the administrative proceeding. Torgeson concedes that she is not entitled to recover fees for work performed in the pre-suit appeal and acknowledges that the inclusion of one inadvertent entry, dated March 23, 2005, in the amount of \$1,487.50, should be removed. However, with respect to the remainder of Unum’s contentions, Torgeson, not surprisingly, strenuously disagrees. The court will proceed to address each of these issues in turn, following a more generalized discussion of the standards that are applicable to attorney fee awards.

1. General standards applicable to amount of fee award

With respect to Unum’s challenges to the *amount* of attorney fees to be awarded, the Supreme Court has repeatedly recognized that “[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also id.* at 433 n.7 (stating that these standards for determining the reasonableness of a fee to be awarded to a successful plaintiff under 42 U.S.C. § 1988 are “generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party’”). That product, which is known as the “lodestar” figure, is presumed to represent the “reasonable” fee. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). To claim entitlement to the lodestar, the applicant must submit adequate documentation of hours, and “should make a good-faith effort to exclude from [the] fee request hours that are excessive, redundant, or otherwise unnecessary.” *Hensley*, 461

U.S. at 434. The court should also take into account the amount of the recovery and the results obtained by the lawsuit. *See Griffin v. Jim Jamison, Inc.*, 188 F.3d 996, 997 (8th Cir. 1999) (ERISA case, noting that these are “certainly relevant factors,” citing *Hensley*). This court has repeatedly held that attorney fees may be reduced for inadequate documentation or poor record-keeping. *See, e.g., Rural Water Sys. # 1 v. City of Sioux Center, Iowa*, 38 F. Supp. 2d 1057, 1063 (N.D. Iowa 1999) (citing *Houghton v. Sipco, Inc.*, 828 F. Supp. 631, 643-44 (N.D. Iowa), *vacated on other grounds*, 38 F.3d 953 (8th Cir. 1994)). The Eighth Circuit Court of Appeals has recognized that it is not necessary for the district court “to examine exhaustively and explicitly, in every case, all of the factors that are relevant to the amount of a fee award,” but the district court should consider what factors, “in the context of the present case, deserve explicit consideration,” which may include, for example, the number of lawyers who had previously declined to represent the plaintiff before he or she found counsel to prosecute the case, whether the plaintiff obtained relief from all of the defendants sued, and the extent of the relief obtained against any particular defendant. *Griffin*, 188 F.3d at 997-98. In the face of arguments that the fees claimed are vaguely described, duplicative, or excessive for the work done, the court should carefully review the documentation supporting the fee request and provide reasons for determination of the amount awarded. *See Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1330 (8th Cir. 1995). Finally, as to the hourly rate, a reasonable attorney fee should be “consistent with market rates and practices” in the community. *See Missouri v. Jenkins*, 491 U.S. 274, 287 (1989). The court will now proceed to apply these standards to Torgeson’s request for attorney fees.

2. Recovery for work on stricken motions

Turning specifically to the hours claimed, Unum first avers that Torgeson’s fee application seeks recovery for hours expended on two ill-fated motions for summary

judgment that ultimately were stricken by the court for failing to comply with the January 13, 2006, Scheduling Order in this case, which provided for submission of the case on a written record and briefs on the merits. Unum contends the court should not award Torgeson fees for this unnecessary work. This court agrees with the proposition that a district court should exclude hours that were not “reasonably expended,” and that time spent on obviously non-compliant motions, generally, would not be considered to be time “reasonably expended.” *See Hensley*, 461 U.S. at 434 (stating that a district court should exclude hours that were not reasonably expended). However, generalities aside, this court notes that there are situations conceivable in which recovery for a portion of the time spent on such non-compliant motions would be warranted. For example, if work done on a non-compliant motion was recycled or re-applied in drafting a more appropriate motion, ultimately such hours were reasonably expended in furtherance of the case. The case at bar, in the opinion of this court, presents such a scenario. Here, although Torgeson did indeed submit two non-compliant motions for summary judgment with this court, she ultimately filed an appropriate brief on the merits that was virtually identical in substance to the briefs she filed in support of her two prior non-compliant motions. Thus, the hours expended on preparing the motions for summary judgment were ultimately of consequence to the case, as the work eventually became valuable upon submission of the appropriate filing. As such, simply because Torgeson’s characterization of the time contains references to the summary judgment proceedings, it does not automatically follow that such hours were not reasonably expended. This conclusion is bolstered by attorney Mark DeBofsky’s declaration that he removed those hours from the fee application that were specifically related to the summary judgment motions. Accordingly, in this respect, Unum’s resistance to Torgeson’s attorney fee request is denied.

3. *Inadequate documentation*

Unum next argues that Torgeson's submitted fee records contain only vague and inadequate descriptions, and that as such, she has failed to comply with the Local Rules and her recovery should be denied in its entirety or substantially reduced. Although such inadequacies, if found, would plainly permit the court to reduce or deny the fees claimed, *see, e.g., Rural Water Sys. # 1*, 38 F. Supp. 2d at 1063, the court is not persuaded by Unum's averments. The individual time record entries are, on the contrary, quite detailed and sufficient to present the court with a fair indication of the nature of the tasks involved and the necessity of those tasks to the prosecution of the lawsuit. Moreover, the court has reviewed the records in their entirety and finds nothing shocking or disturbing in the time allocated to individual tasks. *See Mansker*, 54 F.3d at 1330 (where fees are challenged on the ground that the hours claimed are vaguely described, duplicative, or excessive for the work done, the court should carefully review the documentation supporting the fee request and provide reasons for determination of the amount awarded). Accordingly, Unum's resistance to Torgeson's attorney fees on the ground that her fee request lacks adequate documentation is denied.

4. *Work performed at the administrative proceeding*

Unum next contends that Torgeson is not entitled to recover fees for work performed at the administrative proceeding. Specifically, Unum takes issue with two entries. The first is dated March 23, 2005, for 3.5 hours in the amount of \$1,487.50 for editing and redrafting the final appeal. The second is dated August 15, 2005, for 1.5 hours in the amount of \$637.50 for reviewing claim file, posting the appeal and planning and filing the complaint. Unum avers these entries are associated with the administrative proceeding and are, therefore, not properly recoverable.

At least five circuits, including the Eighth Circuit have held that ERISA does not

allow recovery of attorney fees incurred during pre-litigation administrative proceedings. *See Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1010 (8th Cir. 2004); *Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 118-21 (2d Cir. 2002); *Rego v. Westvaco Corp.*, 319 F.3d 140, 149-50 (4th Cir. 2003); *Anderson v. Procter & Gamble Co.*, 220 F.3d 449, 452-56 (6th Cir. 2000); *Cann v. Carpenters' Pension Trust Fund*, 989 F.2d 313, 315-17 (9th Cir. 1993). Torgeson acknowledges that time spent during the administrative proceeding is not recoverable pursuant to 29 U.S.C. § 1132(g) and concedes that the inclusion of the entry dated March 23, 2005, was improper under the holding in *Parke*. However, Torgeson contends that she is entitled to recover the fees for the time spent on August 15, 2005, because the time spent on preparing for litigation is recoverable. This court agrees. The Eighth Circuit's opinion in *Parke* does not stand for the blanket proposition that ERISA does not authorize attorney fees for any work done pre-filing. Rather, *Parke* simply concludes that the term "any action" in 29 U.S.C. § 1132(g)(1) "does not extend to pre-litigation administrative proceedings." *Parke*, 368 F.3d at 1011. Here, the entry dated August 15, 2005, does not seek recovery for work done on the administrative appeals; rather, it appears to this court that the fees sought are for the time expended after the plaintiff had exhausted the administrative appeals process and was preparing to file suit. It is clear that once it is determined that a fee award is appropriate, the winning party is entitled to be compensated for "all hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 465. This encompasses the type of preparatory work Torgeson seeks to recover for drafting the complaint. *See, e.g., Peterson v. Cont'l Casualty Co.*, 282 F.3d 112, 120 n.5 (2d Cir. 2002). Consequently, the court **grants** Unum's objection with respect to the entry dated March 23, 2005, which Torgeson has conceded is improper. Unum's resistance to the entry dated August 15, 2005, is **denied**. The court will accordingly reduce Torgeson's attorney fee award by \$1,487.50.

5. *Non-attorney work*

Unum next argues, in a footnote, that this court should reduce the plaintiff's fee award by \$40.00 for time billed for .4 hours spent creating a table of contents by a law clerk because this task "is the type of clerical, ministerial and administrative activity which is typically included within the professional biller's hourly rate and constitutes overhead." The court agrees with the defendant's assertion that a party is not entitled to reimbursement for expenses that are part of normal office overhead. *See Emery v. Hunt*, 272 F.3d 1042, 1048 (8th Cir. 2001) (citing *Sussman v. Patterson*, 108 F.3d 1206, 1213 (10th Cir. 1997)). However, this court disagrees with Unum's characterization of the disputed entry as being clerical in nature and included in office overhead. Examples of such "clerical tasks" include items such photocopying, mileage, meals and postage. *See Sussman*, 108 F.3d at 1213. The disputed entry, in this court's view, does not appropriately fall under such a classification. Rather, the disputed entry is more aptly characterized as a non-legal task that is delegable in nature to a non-professional assistant. Under this characterization, the plaintiff is entitled to an award of the fee, but at a reduced rate. *See New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co.*, 72 F.3d 830, 835 (10th Cir. 1996). ("[W]hen a lawyer spends time on tasks that are easily delegable to non-professional assistance, legal service rates are not applicable."). Here, however, the contested task was delegated to a law clerk and billed at a rate substantially lower than an attorney's rate. Accordingly, the court finds no reason to disallow Torgeson's fee request in this respect. *See Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1193 (S.D. Cal. 2003) (holding that creation of table of contents should have been billed at a paralegal rate rather than an attorney rate). Unum's resistance in this respect is denied.

6. Reasonableness of hourly rate

Turning to the hourly rate claimed, Torgeson's lead attorney claims an hourly rate of \$425.00, which Torgeson argues is reasonable. Unum, however, contends that such a rate is unreasonable because it is inconsistent with the prevailing market rate in the community where Torgeson's case was litigated. "Although a counsel's customary rate might be some evidence of a reasonable rate, it is not controlling." *Moysis v. DTG Datanet*, 278 F.3d 819, 828 (8th Cir. 2002) (citing *Jaquette v. Black Hawk County*, 710 F.2d 455, 458 (8th Cir. 1983)). Rather, "[a]s a general rule, a reasonable hourly rate is the prevailing market rate, that is, 'the ordinary rate for similar work in the community where the case has been litigated.'" *Id.* at 828-29 (quoting *Emery*, 272 F.3d at 1047). However, as this court has recognized previously "[t]he state itself may not be a boundary to the determination of a reasonable hourly rate." *Shultz v. Amick*, 955 F. Supp. 1087, 1113 (N.D. Iowa 1997). For example, in *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517 (8th Cir. 1995), the Eighth Circuit Court of Appeals held that the appropriate hourly rate for § 1983 litigation conducted in South Dakota was to be determined by the prevailing rates in the Chicago market for legal services, where the prevailing plaintiff's lawyers were from Chicago, were leaders in the field of law in question, and routinely did the kind of work in question. *Miller*, 70 F.3d at 519. This was so, even though the court agreed with the defendant that competent local counsel could have been found to handle the case and do it well. *Id.* The court of appeals upheld use of the Chicago rate, because it found that the out-of-state attorneys were able to handle the case in a shorter length of time than a local lawyer without comparable experience would have needed. *Id.* The case at bar is virtually identical to the fact scenario that was addressed by the Eighth Circuit in *Planned Parenthood*. While it is true that a fee of \$425.00 an hour is high for Iowa, the affidavits submitted by the plaintiff's counsel

demonstrate that Mr. DeBofsky has not only a nationwide ERISA practice, but also a highly specialized knowledge of ERISA law due to his multitudinous court appearances in ERISA-related litigation, his authorship of myriad articles and treatise chapters on topics relating to ERISA law and his presentation of numerous seminars throughout the United States on ERISA-related issues. In light of the fact that some degree of special expertise is necessary for complex ERISA litigation, it is without a doubt that just as in *Planned Parenthood*, although local counsel could have been found to handle the case and do it well, Torgeson's out-of-state counsel was able to handle the case in a shorter length of time than a local lawyer without comparable experience would have required. Moreover, Torgeson's claimed hourly rate is further rationalized by the fact that ERISA cases involve a national standard. Thus, attorneys practicing ERISA law tend to practice in a wide variety of districts. *See Mogck*, 289 F. Supp. 2d at 1191 (finding attorneys' rates were reasonable because ERISA cases involve a national standard); *see also Polk v. New York State Dep't of Corr. Servs.*, 722 F.2d 23, 24 (2d Cir. 1983) (making an exception to the general rule "upon a showing that the special expertise of counsel from a different district is required"). Consequently, the court concludes that, in light of the plaintiff's attorney's experience and qualifications and the nature of the litigation, an hourly rate of \$425.00 for Mark DeBofsky's services is appropriate.

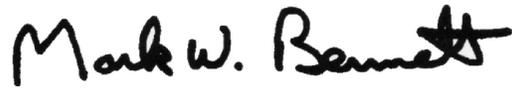
Torgeson has also requested hourly charges of \$125.00 an hour for services performed by a part-time associate attorney and \$100 an hour for services performed by a law clerk and summer law clerk. Unum does not contest these rates, nor does Unum contest the rates claimed by local counsel. After independently reviewing these rates, the court concludes the previously mentioned rates are also reasonable. Finding that all of Torgeson's claimed hourly rates are reasonable, Unum's resistance in this respect is denied.

III. CONCLUSION

In light of the foregoing, the plaintiff **shall be awarded fees** for 38.08 hours at \$425.00 per hour for services rendered by Mark DeBofsky (\$16,184.00); 6.60 hours at \$125.00 per hour for services rendered by a part-time attorney (\$825.00); 62.15 hours at \$100 per hour for services performed by a law clerk (\$6,215.00); 16.20 hours at \$100 per hour for work performed by a summer law clerk (\$1,620.00). In addition, Torgeson will be awarded \$2004.75 for the work performed by local counsel in this matter, for an aggregate total of \$26,848.75 in attorney fees.

IT IS SO ORDERED.

DATED this 5th day of February, 2007.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA