

United States District Court,  
Southern District of New York.

Nickolas **ZERVOS**, Plaintiff,

v.

**VERIZON NEW YORK, INC.** f/k/a Bell Atlantic  
Corporation f/k/a Nynex, Corporation  
f/k/a New York Telephone Company and Empire  
Blue Cross Blue Shield, Defendants.

**No. 01Civ.0685(GBD)(RLE).**

Nov. 13, 2002.

Steven G. Storch, Lita Beth Wright, Storch Amini &  
Munves, P.C., New York, NY, Counsel for plaintiff.

Randy M. Mastro, Gibson, Dunn & Crutcher LLP,  
New York, NY, Counsel for defendants.

## REPORT AND RECOMMENDATION

[ELLIS](#), Magistrate J.

### I. INTRODUCTION

\*1 Nickolas Zervos ("Zervos") filed a complaint and request for a preliminary injunction on January 29, 2001, against Empire Blue Cross Blue Shield ("Blue Cross") and Verizon New York, Inc. ("Verizon") (collectively, "defendants"), alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e et seq.](#), and violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), [29 U.S.C. § 1001 et seq.](#), and the Americans with Disabilities Act ("ADA"), [42 U.S.C. § 12101 et seq.](#) Following a denial of Zervos's request for a preliminary injunction and expedited discovery, a bench trial was held by the Court in October 2001. By decision dated October 22, 2001, the Court ruled in favor of Zervos on his ERISA claim, and ordered defendants to provide another medical appeal for him. On January 28, 2002, the Second Circuit affirmed the district court's ruling, but also ordered defendants to pay for Zervos's medical treatments. On November 21, 2001, Zervos filed this motion pursuant to [29 U.S.C. § 1132\(g\)](#), seeking costs and attorney's fees from defendants in accordance with ERISA provisions. For the reasons which follow, I respectfully recommend that Zervos's motion be GRANTED, and that he be awarded attorney's fees in the amount of \$323,420.62, and costs in the amount of \$35,185.01, for a total award of \$358,605.63.

### II. BACKGROUND

The facts of this case have been set forth in [Zervos v. Verizon New York, Inc.](#), 277 F.3d 635, 639-44 (2d Cir.2002) ("*Zervos IV*"), familiarity with which is assumed. For purposes of this motion, it is important to briefly summarize the procedural history. Zervos filed his complaint and request for a preliminary injunction on January 29, 2001. By decision dated March 14, 2001, the Court denied Zervos's request for a preliminary injunction. See [Zervos v. Verizon New York, Inc.](#), 2001 WL 253377 (S.D.N.Y.2001) ("*Zervos I*"). The Court found that Zervos could not prove that, absent the injunctive relief requested, he would suffer irreparable harm. *Id.* at \*5. The Court also found that Zervos had failed to demonstrate the likelihood of success of any of his causes of action. *Id.* at \*10-12. The decision was affirmed on appeal. See [Zervos v. Verizon New York, Inc.](#), 252 F.3d 163 (2d Cir.2001) ("*Zervos II*"). The parties then engaged in an expedited discovery process. On July 26, 2001, the parties stipulated and agreed that Zervos's gender discrimination claim would be dismissed with prejudice. The Court later granted defendants' summary judgment motion on Zervos's ADA claim, but denied the motion to dismiss the ERISA claims. See [Zervos v. Verizon New York, Inc.](#), 2001 WL 1262953 (S.D.N.Y.2001).

Following a five-day bench trial in October 2001, the Court found that defendants' appeal of Zervos's request for medical treatment was arbitrary and capricious. See [Zervos v. Verizon New York, Inc.](#), 2001 WL 1262941 \*15 (S.D.N.Y.2001) ("*Zervos III*"). The Court ordered that defendants submit Zervos's request to a different outside consultant for review. *Id.* On expedited appeal, the Second Circuit affirmed the district court's ruling insofar as it agreed that defendants' appeal of Zervos's requested treatment was arbitrary and capricious. See [Zervos IV](#), 277 F.3d at 648. However, the Second Circuit granted Zervos's request for injunctive relief and ordered the defendants to provide coverage for his requested medical treatment. *Id.* On November 21, 2001, Zervos filed this motion seeking costs and attorney's fees. This matter was referred to the undersigned on October 3, 2002.

### III. DISCUSSION

#### A. The *Chambless* Test

\*2 [\[1\]\[2\]](#) The Second Circuit has outlined a five-pronged test which courts must consider to determine if an award of attorney's fees in ERISA litigation is merited: "(1) the degree of the offending party's

culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants." Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869, 871 (2d Cir.1987). No one factor by itself is dispositive, and indeed, a plaintiff need not satisfy all five factors in order to recover attorney's fees and costs. *Juliano v. The Health Maintenance Organization of New Jersey*, 2001 U.S. Dist. LEXIS 17066 \*2 (S.D.N.Y.2001). The district court maintains discretion in deciding whether or not to award attorney's fees. Chambless, 815 F.2d at 871. However, this circuit strongly favors awarding reasonable attorney's fees and costs to a prevailing plaintiff absent a "particular justification" or "special circumstances [which] would make it unjust." *Juliano*, 2001 U.S. Dist. LEXIS 17066 at \*3; Enright v. New York City District Council of Carpenters Welfare Fund, 2001 WL 225032 \*14 (S.D.N.Y.2001). Although defendants go to great lengths to point out that Zervos's victory was narrow, the 2-1 decision by the Second Circuit is nonetheless a victory for the plaintiff. Accordingly, this Court now reviews the *Chambless* factors.

#### 1. Culpable Conduct and Bad Faith

Defendants contend that their conduct in denying Zervos's medical coverage was clearly not done in bad faith, nor were they culpable. Zervos, however, points to the *Zervos IV* decision to contradict defendants position. As courts within this district have observed, "[a] party is culpable within the meaning of the *Chambless* test if its conduct is intentional, blameworthy, and results in a breach of a legal duty." *Juliano*, 2001 U.S. Dist. LEXIS 17066 at \*4. Furthermore, "[n]o showing of malice or guilty purpose is required." Priority Solutions, Inc. v. CIGNA, 1999 WL 1057202 \*4 (S.D.N.Y.1999). Indeed, "[a] losing party may be culpable without having acted with an ulterior motive. Such conduct normally involves something more than simple negligence. It implies that the act or conduct spoken of is reprehensible or wrong." T & M Meat Fair, Inc. v. United Food and Commercial Workers, 2002 WL 31202711 (S.D.N.Y.2002).

Although defendants argue that, at worst, their denial of coverage was "mistaken," courts usually find that a party is culpable when they act "arbitrarily and capriciously." *Juliano*, 2001 U.S. Dist. LEXIS 17066

at \*4; Priority Solutions, 1999 WL 1057202 at \*4 (finding that "a party whose conduct is arbitrary and capricious is culpable for the purpose of § 1132(g)(1)."). In deciding for Zervos, both the district court and the Second Circuit found the defendants' actions to be "arbitrary and capricious." See Zervos III, 2001 WL 1262941 at \*15; Zervos IV, 277 F.3d at 648. Therefore, the first factor favors Zervos.

#### 2. Ability to Satisfy Award

\*3 Most courts pay little attention to this factor, and find it to be "of little significance." Enright, 2001 WL 225032 at \*16. In any case, defendants do not contest this factor, and accordingly, this factor also favors Zervos.

#### 3. Deterrence

The third factor in the *Chambless* test "looks to whether an award would tend to deter others from engaging in similar behavior." *Juliano*, 2001 U.S. Dist. LEXIS 17066 at \*8. Among other things, the deterrent effect of attorney's fees may operate to encourage insurance companies to cooperate with insureds. Defendants argue that the deterrence factor favors them because the Second Circuit's decision explicitly makes clear "that [its] holding is limited to the exigent and unique circumstances of this case." Zervos IV, 277 F.3d at 646. However, the Court was referring to its overturning of the district court's remand, and not the determination that the defendants acted arbitrarily and capriciously. The decision in favor of Zervos may still deter other administrators from designing appeals processes which arbitrarily and capriciously deny medical coverage to seriously or terminally ill patients. Furthermore, the deterrent factor can favor the plaintiff even if the deterrent effect is only on the losing defendant and not on other plan administrators. See, e.g., Scalamandre v. Oxford Health Plans (N.Y.), Inc., 823 F.Supp. 1050, 1065 (E.D.N.Y.1993). Clearly, the decisions in *Zervos III* and *Zervos IV*, will deter defendants from arbitrary and capricious conduct in the future. Therefore, albeit narrowly, this factor favors Zervos.

#### 4. Merits of the Case

The fourth *Chambless* factor "looks to the relative merits of the parties' respective positions." *Juliano*, 2001 U.S. Dist. LEXIS 17066 at \*8. Defendants contend that because the case was so closely decided, and because a number of Zervos's initial theories of his case were either withdrawn or dismissed, this factor favors the defendants. Some courts have found

that this factor cuts in favor of the prevailing plaintiff simply by way of their victory. *Id.* Most courts, however, will only find this factor in plaintiff's favor in extreme situations. *See, e.g., Lauder v. First UNUM Life Insurance Company*, 284 F.3d 375, 383 (2d Cir.2002) (noting that this factor weighs in defendant's favor if their position is not "frivolous or improper or anything of that sort."); *Scalamandre*, 823 F.Supp. at 1065 (finding that plaintiff prevailed on the fourth factor because defendant's position was "virtually without merit and plaintiff's case is clearly meritorious."). Indeed, in very close cases, courts have found that this factor should favor defendants. *See Schachner v. Connecticut General Life Insurance Company*, 1994 WL 132143 \*1 (S.D.N.Y.1994) (finding this factor in favor of defendants because the litigation was "closely contested" and plaintiff won only a "narrow victory."). Although defendants' actions were ultimately found to be arbitrary and capricious, their arguments throughout did have some merit. Therefore, this factor favors the defendants by a slim margin.

#### 5. Common Benefit

\*4 The final factor in the *Chambless* test is to examine whether or not the plaintiff's victory will have a beneficial effect on other insureds. As courts have noted, "[a]lthough benefits decisions tend to be made on a case-by- case basis, [if the Court's decision] will impact on defendant's decisionmaking, both with respect to other patients ... and potentially more generally with respect to the procedures that defendants use in denying care," this factor favors the plaintiff. *Juliano*, 2001 U.S. Dist. LEXIS 17066 at \*10. Defendants attempt to minimize the decisions of both courts by stating that *Zervos IV* turns on one answer to one question by one doctor. However, a more accurate reading of *Zervos IV* reveals that the Second Circuit, as did the district court, found defendants' appeals process to be arbitrary and capricious. *See Zervos IV*, 277 F.3d at 648. Furthermore, even if defendants' reading of *Zervos IV* is correct, the defendants have not changed their testimony at trial that, because of Mr. Zervos's suit, they were considering revamping their appeal process. Therefore, this factor favors the plaintiff.

Although one factor favors the defendants, this Court finds that a weighing of all of the *Chambless* factors favors awarding Zervos attorney's fees and costs.

#### B. Calculation of Attorney's Fees and Costs

[3][4][5][6] It is well established in this circuit that a

district court determining an award of attorney's fees and costs should calculate a lodestar figure based upon the number of hours reasonably expended by counsel on the litigation multiplied by a reasonable hourly rate. *See Luciano v. Olsten Corporation*, 109 F.3d 111, 115 (2d Cir.1997). As the Second Circuit has noted, "[t]he 'lodestar' figure should be in line with those rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* (citation omitted). Determination of the lodestar figure, however, does not end the inquiry. *Id.* at 116. The lodestar determination can be adjusted based upon a non-exclusive list of considerations, including: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *United States Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir.1989) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974)). When a party advocates that the lodestar amount be reduced, he or she bears the burden of establishing that a reduction is justified. *Id.* at 413. Once a court determines that a lodestar figure should be reduced, the reduction can come in the form of a calculation of hours or an across-the-board reduction. *Luciano*, 109 F.3d at 117.

\*5 [7] In the case before this Court, Zervos seeks attorney's fees in the amount of \$363,331.25 and costs in the amount of \$39,094.46. Defendants do not challenge the billing rates or amount of hours spent as unreasonable. Defendants argue that the fees should be dramatically reduced because of Zervos's limited success, and because the majority of claims initially brought in Zervos's complaint were either voluntarily dismissed or dismissed by the Court. However, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Therefore, defendant's contention that Zervos enjoyed limited success is flawed because "[t]he result is what matters." *Id.*

Although a number of Zervos's claims did not survive, the end result, getting his treatment covered by his medical insurance, is what he was seeking, and the relief ultimately awarded. Therefore, a reduction is not merited simply because the Title VII claim was voluntarily dismissed and the ADA claim ultimately failed. See [United States Football League, 887 F.2d at 414.](#)

[8] Any reduction of attorney's fees will necessarily be dependant upon the relatedness of the claims. See [Algie v. RCA Global Communications, Inc., 891 F.Supp. 875, 890 \(S.D.N.Y.1994\).](#) "Related claims include those based upon common facts or similar legal theories." [Sugarman v. Village of Chester, 213 F.Supp.2d 304, 313 \(S.D.N.Y.2002\).](#) In this case, while it is true that some of plaintiff's theories were unsuccessful, the time sheets do not reveal an inordinate amount of time spent on those claims. Moreover, because of the common factual matters, this is not the kind of case where some hours may be factored out as unreasonable. In addition, while there are inefficiencies, they do not merit significant deductions in the lodestar. Some of the inefficiencies include duplicative efforts and attorneys performing non-lawyers tasks (such as helping to carry documents to court). Therefore, I recommend a 10% across-the-board reduction in the requested attorney's fees and costs.

#### IV. CONCLUSION

For the foregoing reasons, this Court recommends that Zervos' motion for award of attorney's fees and costs be GRANTED, and Zervos be awarded \$323,420.62 in attorney's fees and \$35,185.01 in costs, for a total award of \$358,605.63.

Pursuant to [Rule 72, Federal Rules of Civil Procedure](#), the parties shall have ten (10) days after being served with a copy of the recommended disposition to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable George B. Daniels, 40 Centre Street, Room 410, and to the chambers of the undersigned, Room 1970. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See [Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 \(1985\); Small v. Secretary of Health and Human Services, 892 F.2d 15, 16 \(2d Cir.1989\) \(per curiam \); 28 U.S.C. § 636\(b\)\(1\) \(West Supp.1995\);](#)