

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 May 2007

CASE NO.: 2007-RIS-9

In the Matter of:

U.S. DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
Claimant

v.

NEW DESIGN CONSTRUCTION COMPANY, INC.
Respondent

**DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT**

Complainant, U.S. Department of Labor, Employment Benefit Security Administration (EBSA), moves for summary judgment in this proceeding for a civil penalty assessed § 502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and its implementing regulations. See 29 U.S.C. § 1132(c); 29 C.F.R. §§ 2560.502c-2 and 2570.60-71.

Respondent, New Design Construction Co. requested a hearing with this Office of Administrative Law Judges for waiver or reduction of a civil penalty assessed against Respondent as plan administrator of the Respondent's 401(k) Plan for failure to timely file an acceptable 2004 Form 5500 Annual Report as required by ERISA, § 502(c)(2), 29 U.S.C. § 1132(c)(2). EBSA filed the instant motion for Summary Judgment on April 19 2007. Respondent filed a Protest to Complainant's Motion for Summary Judgment on April 25, 2007 and ESBA filed a Reply to Respondent's Opposition to Complainant's Motion for Summary Judgment on April 30, 2007.

Standard For Summary Judgment

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). In civil penalty proceedings under § 502(c)(2) of ERISA, where "no issue of a material of fact is found to have been raised, the administrative law judge may issue a decision which, in

the absence of an appeal ... shall become a final order [of the Department of Labor].” 29 C.F.R. §§ 2570.67(a)(1) and 2570.61(g).

The standard for granting summary judgment under 29 C.F.R. § 18.40 is the same as that for summary judgment under the analogous Fed. R. Civ. P. 56(e): the moving party must show that there is no material issue of fact and that he is entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Flour v. DOE*, 1993 TSC 1, (ARB Dec. 9, 1994) and cases therein cited.

The party filing the motion for summary judgment has the initial burden to show the absence of evidence to support the non-moving party’s case. *Munoz v. St. Mary-Coran Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000). Once this burden has been met, the non-moving party must establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Elec. Co.*, 2002 CAA 21 (ARB May 28, 2004). At this stage of the summary decision, the non-moving party may not rest upon mere allegations, speculations or denials of the moving party’s pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id. citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Findings of Fact

EBSA has filed a statement of undisputed facts in support of its motion.

1. Respondent is the plan administrator of Plan 001. (EBSA Exhibit No. 1)
2. Under ERISA the plan administrator of an employee benefit plan is required to file an annual report with the federal government within 210 days after the end of the plan year. ERISA § 104, 29 U.S.C. § 1024.
3. Plan 001, as of the beginning of the 2004 plan year, had in excess of 142 participants and held assets in trust. (EBSA Exhibit No. 1).
4. Under ERISA, a plan with more than 100 participants that holds assets in trust is required to have an annual audit performed on the plan and to attach the report of an independent qualified public accountant (IQPA) to the plan’s annual report. 29 CFR § 2520.104-20(b).
5. Respondent filed the 2004 Form 5500 annual report for the Plan on or about July 12, 2005 without an IQPA report. Item 6 of the report stated that the total number of participants in the plan was 142, and items 9a and 9b stated that the plans funding arrangement was trust. (EBSA Exhibit No. 1).
6. EBSA wrote to Respondent on September 1, 2005 stating that the 2004 Form 5500 annual report for the Plan did not contain an IQPA report for the Plan. Respondent was requested to send the missing information within 30 days. (EBSA Exhibit No. 2).

7. Respondent did not reply to the September 1, 2005 letter. (EBSA Exhibit No. 3).
8. EBSA again wrote to Respondent on October 26, 2005 questioning why EBSA did not receive a reply to its September 1, 2005 letter requesting the IQPA report for the plan. (EBSA Exhibit No. 3).
9. EBSA mailed to Respondent on March 21, 2006 by Certified Mail, Return Receipt Requested, a Notice of Rejection (NOR) to Respondent which rejected Respondent's 2004 Form 5500 annual report because of deficiencies including the failure to attach the IQPA report. The letter warned Respondent that it must file an amended 2004 Plan Year Annual Report within forty-five days or risk assessment of civil penalties. The letter also warned that the law does not allow an extension of time to respond to the notice. (EBSA Exhibit No. 4).
10. Respondent did not file the amended 2004 Plan Year Annual Report within forty-five days as required by EBSA's March 21, 2006 Notice of Rejection. (EBSA Exhibit No. 5).
11. EBSA mailed a Notice of Intent to Assess a Penalty (NOI) dated May 30, 2006 by Certified Mail, Return Receipt Requested, again stating that the 2004 Form 5500 annual report for the plan did not include an IQPA report, and proposing that a civil penalty of \$75,750 be assessed. The NOI warned Respondent that it must file a written response within thirty-five days of the date of the NOI to preserve its administrative rights, and that the law does not allow for an extension of time to respond to the NOI. The NOI explained that the written response must be submitted in the form of a Statement of Reasonable Cause containing a declaration of the plan administrator that the Statement is made under the penalties of perjury, as required under Section 25.60.502c-2(e). (EBSA Exhibit No. 5).
12. In response to the NOI, Respondent submitted a Statement of Reasonable Cause dated July 3, 2006 as to why the penalty should be abated. The response stated that the accountant was forwarded the requirements of the audit on June 1, 2005 by Metlife and the audit is in process but not yet complete. The response stated further that, "We will submit this as soon as it is complete. We expect this information within the next 60 days." The response was not submitted under penalty of perjury as required under Section 25.60.502c-2(e). (EBSA Exhibit No. 6).
13. EBSA mailed a notice dated July 20, 2006 by Certified Mail, Return Receipt Requested, to Respondent instructing that within ten days it resubmit the Reasonable Cause Statement with a Declaration that it is made under penalty of perjury. (EBSA Exhibit No. 7).
14. On July 28, 2006, Respondent resubmitted its Reasonable Cause Statement, this time notarized. (EBSA Exhibit No. 8).

15. EBSA issued a Notice of Determination on Respondent's Statement of Reasonable Cause on September 18, 2006. The Notice informed Respondent that, as of that date, the 2004 Plan Year Annual Report was considered satisfactory. The Notice stated further that it was waiving \$70,205 of the penalty because Respondent had now submitted an acceptable IQPA, and EBSA found that the plan administrator took reasonable steps to come into compliance upon receiving the Notice of Intent to Assess a Penalty. The Notice found that there was not reasonable cause to waive \$5,545 of the intended penalty because: A) The plan administrator did not present reasonable cause for his failure to file an acceptable annual report as his original filing or for his failure to correct timely; and B) The plan administrator has the fiduciary responsibility to assure that all reporting requirements are met.

In response to EBSA's motion for summary judgment, Respondent offered three reasons why the motion should be denied. Respondent initially asserts that the date that the plan administrator gave in its July 28, 2006 response to the NOI for when the auditor received audit information from Metlife was incorrect, in that the information was received from Metlife in June 2006 not June 2005 as Respondent mistakenly stated in its response. Respondent reasons that the June, 2005 date had to have been a typographical error as the audit was triggered by the May 30, 2006 letter from DOL. Respondent's second reason is that it responded promptly when the plan administrator received the May 30, 2006 letter as the Auditor was retained and contact was made with a DOL representative, Madeline Oliver, who allowed additional time to submit the information, and the information was transmitted to EBSA and received by EBSA within the time allowed. The third reason is that the plan administrator did not receive notice of the of the deficiency until the May 30, 2006 DOL letter, and prior to receiving the letter the administrator did not know of any problems with the Form 550.

EBSA replied to Respondent's Opposition to Civil Penalty by contending that there are no genuine issues of fact in the case, in that Respondent's allegations of disputed facts are not material. Specifically, EBSA argues that even if the information was received from Metlife in June 2006 rather than in June 2005, as initially stated by the plan administrator, such a difference is inconsequential to whether EBSA is entitled to summary judgment, and Respondent's unsupported statement that Respondent was allowed additional time to submit information by DOL representative, Madeline Olivera, is insufficient to preclude summary judgment in light of the warnings set forth in both the NOR and the NOI.

Assuming that Respondent is correct that it contacted Olivera and received additional time to submit the IQPA, such a fact would still not preclude summary judgment in light of the warnings set forth in bold print in the NOR and the NOI that no extension would be allowed as the law does not allow for extensions of time to respond. EBSA also argues that Respondent's contention that it did not receive notice of the problem until the May 30, 2006 Notice is merely a contention as it is unsubstantiated.

Assessment of Civil Penalty

ERISA is a comprehensive statute which is remedial in nature and designed to protect employee benefit plans. *Alessi v. Raybestos, Inc.*, 451 U.S. 504, 510 (1989); *Brink v. Dalesio*, 667 F.2d 420, 427 (4th Cir. 1981) To accomplish its stated purpose, ERISA includes extensive reporting and disclosure provisions.

In a nutshell, Respondent is arguing that it was unaware of the requirement to provide an IQPA with the plan's annual report until it received the May 30, 2006 Notice of Intent to Assess a civil penalty and upon receipt of the notice the plan administrator moved promptly to ask EBSA for additional time to submit the report, and did, in fact, produce the IQPA report.

When EBSA supported its motion for summary judgment by facts showing an absence of evidence to support the Respondent's case, the burden shifted to the Respondent to establish the existence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325 (1986). Respondent may not rest upon mere allegations, speculations or denials of EBSA's pleadings, but must set forth specific facts showing that there is a genuine issue of fact for hearing. Respondent cannot merely argue in its opposition to the motion that it did not receive notice of the need for the IQPA, it must reference some evidence of same. Particularly since Respondent had not previously referenced lack of notice in its Statement of Reasonable Cause or request for hearing. The May 30, 2006 NOI asserted that Respondent was subject to a \$75,750 civil penalty because it failed to respond to the NOR, yet the Statement of Reasonable Cause submitted by Respondent in response did not mention lack of receipt of the NOR. Nor did Respondent mention lack of notice in its reasons for requesting the hearing. Moreover, EBSA offered evidence that the March 21, 2006 NOR was sent by Certified Mail Return Receipt Requested. *See* Exhibit 1 to Complainant's Opposition to Respondent's Opposition to Complainant's Motion for Summary Judgment.

Accordingly, the record supports a finding that Respondent is the plan administrator of an employee benefit plan that is required to have an annual audit performed on its plan and is required to attach the report of an independent qualified public accountant to the plan's annual report, and that Respondent did not submit the annual audit with the independent qualified public accountant's report attached thereto within 210 days after the end of the plan year as required by § 104(a)(4) of ERISA, and further that Respondent did not file a written response within 45-days of Notice of Rejection of its report and did not file a response that included a declaration by the plan administrator that the response is made under oath within 35-days of the date of the Notice of Intent to file a civil penalty.

Thus, Respondent is liable for the assessment of a civil penalty for failure to file the annual report required under 29 C.R.R. § 2560.502c. At issue then is the reasonableness of the amount of the civil penalty, that is, the initial \$75,750 penalty abated to \$5,545.

Reasonableness of Civil Penalty

In 1987, Congress amended ERISA, adding § 502(c)(2), 29 U.S.C. § 1132(c)(2), which grants the Secretary the discretionary enforcement authority to assess civil penalties up to \$1,000.00 per day from the date of a plan administrator's failure or refusal to file an annual report. When the Secretary rejects an annual report under ERISA § 104(a)(4), that rejected annual report is to be treated as if it had not been filed. ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2). Assessment of the penalty under § 502(c)(2) is guided by the regulations set forth at 29 C.F.R. § 2560.502c-2. The plan administrator is responsible for filing an annual plan report meeting the requirements of ERISA § 101(b)(1) and bears the liability for civil penalties assessed by EBSA for failure or refusal to file a compliant annual report. 29 C.F.R. § 2560.502c-2(a). EBSA is to consider "the degree and/or willfulness" of the administrator's failure or refusal in filing the annual report. § 2560.502c-2(b)(1).

Upon the issuance of the notice of intention, part or all of a penalty may be waived upon a showing by the plan administrator, within 30 days of the service of the notice, that there was reasonable cause for the failure to file a compliant annual report. 29 C.F.R. § 2560.502c-2(e). The regulations provide that the statement of reasonable cause must be made in writing, under penalty of perjury, and must "set forth all the facts alleged as reasonable cause for the reduction or non-assessment of the penalty." After a review of all of the facts alleged in support of penalty waiver, EBSA is to notify the administrator in writing of its determination. 29 C.F.R. § 2560.502c-2(g).

Unless EBSA has acted in an arbitrary, capricious, or unreasonable manner, an administrative law judge generally will not disallow a penalty assessed for failure to file an IQPA report in a timely manner. *See Dep't of Labor, PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-00062, at 3 (ALJ Mar. 29, 1995); 5 U.S.C. § 706(2).

It is determined that the assessment of a civil penalty of \$5,545.00 in this case does not constitute an arbitrary action. Initially, Respondent, as plan administrator, has the responsibility for an accurate and timely filing of the annual report. Respondent's annual report was due by July of 2005 but a fully compliant annual report was not filed until September, 2006. Respondent contends in its Protest to Complainant's Motion for Summary Judgment that it did not receive notice of a deficiency with its annual plan until the May 30, 2006 Notice of Intent to Assess a Civil Penalty. However, as noted by EBSA in its motion for summary judgment, the letters of September 1, 2005 and October 26, 2005 describing the deficiency and requesting that it be corrected, as well as the Notice of Deficiency and the Notice of Intent to File a Civil Penalty were all mailed to the same address, the address provided by the annual plan. Also, as previously stated herein, the Notice of Rejection was mailed by EBSA by Certified Mail with a return receipt. Moreover, it is noteworthy that the Respondent never raised the issue of lack of notice prior to its opposition to the motion of summary judgment.

In its request for hearing Respondent set forth two reasons why no civil penalty should be assessed. Respondent initially argues that the auditor's statement had not been required previously, and the plan participants were not prejudiced since as soon as the requirement was

identified, the auditor was retained and the required report was generated without any need for adjustments to the Form 5500. Respondent's second argument is that, "[i]t is not reasonable to expect the Plan Administrator to understand this very complex reporting procedure. When deficiencies were discovered they were corrected without adverse impact to the plan or plan participants." However, Respondent's argument that a compliant plan was filed as soon as the requirement was identified does not square with the record for reasons previously set forth. Moreover, the plan administrator is under an obligation to comply with the disclosure and reporting requirements. If a plan administrator does not understand the requirements he should seek the advice of an expert; otherwise, the plan administrator is not acting "with the care, skill, prudence, and diligence" required by his fiduciary responsibilities. ERISA § 404(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

EBSA's assessment of a civil penalty \$5,545 and waiver of the \$70,205 of civil penalty took into consideration the arguments that Respondent offers here. In its September 18, 2006 Notice of Determination on Statement of Reasonable Cause, EBSA states that it took into consideration that the IQPA report and related financial statements submitted in response to the Notice of Intent to Assess a Penalty were found to be acceptable, and that the plan administrator "took reasonable steps to come into compliance" upon receiving the Notice of Intent. The fact that EBSA refused to waive the \$5,545 in light of the timing of the submission of the report – 14 months late, and submitted in the face of the assessment of a \$75,205 civil penalty – can not be found to be arbitrary. The proper and timely filing of a plan's annual report is an essential device in achieving the objectives of ERISA.

Based on the foregoing, it is determined that the civil penalty imposed by the EBSA is supported by the record as reasonable. EBSA is therefore entitled to summary decision in its favor.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion for Summary Judgment filed by Complainant, U.S. Department of Labor, Employment Benefit Security Administration, is granted;
2. Respondent, Plan Administrator, New Design/Ideal Fencing 401K Plan, New Design Construction Company, Inc., shall pay to the U.S. Department of Labor, a civil penalty in the amount of \$5,545 within 45 days of the date of this Order. Respondent's payment shall be sent to the U.S. Department of Labor, ERISA Civil Penalty, P.O. Box 70942, Charlotte, NC 28272-0942;
3. Any portion of this penalty that is not paid by that date shall be subject to such penalties and interest as ERISA and its implementing regulations have provided.

4. The hearing scheduled in this matter for May 8, 2007 in Denver, Colorado is cancelled.

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THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 29 CFR § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of issuance of this Decision and Order or this decision will become the final agency action within the meaning of 5 U.S.C. § 704.