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**The Employer
Advisory**

Employment Case Analysis You Can Use

SEVENTH CIRCUIT FINDS FOR EMPLOYER ON SEVERANCE PAY IN ERISA PLAN

Attorney John Stark worked for PPM America, Inc. as vice-president and counsel. After ten years, management told Stark they had lost trust in him and he was relieved of his job responsibilities but not fired. Stark was presented with a severance agreement. Two weeks later, the offer was withdrawn because of alleged misconduct by Stark. Stark believed he had been constructively discharged. He retained attorneys who negotiated with PPM, but his demands were not met. Stark filed an action in the United States District Court for the Northern District of Illinois instead of exhausting his administrative remedies, as required by the severance plan. He claimed he was entitled to severance pay and a bonus under the PPM change of control severance plan, which was governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). In addition, Stark argued that since administrative remedies would have been futile, he was not required to exhaust them.

The district court granted summary judgment in favor of PPM finding there was no basis for severance pay or a bonus. The court also awarded PPM attorney fees. Stark filed a motion for clarification. He now argued the district court was powerless to reach the merits on his claim because he had failed to exhaust his administrative remedies. He requested the judge send the case back to the plan administrator for the exhaustion of administrative remedies. The judge issued an order stating the failure to exhaust was excused because the record clearly established plaintiff could not have prevailed on his benefits claim. Stark appealed.

The United States Court of Appeals for the Seventh Circuit affirmed. Exhaustion of plan remedies is favored because the plan's own review process may resolve a certain number of disputes; the facts and the administrator's interpretation of the plan may be clarified for the purposes of subsequent judicial review; and an exhaustion requirement encourages private resolution of internal employment disputes. There are two circumstances in which a failure to exhaust may be excused. The first is when there is a lack of meaningful access to review procedures. The other applies if pursuing internal remedies would be futile. There was no evidence that the plan administrator or the committee would have failed to fulfill their fiduciary duty to consider Stark's claim. Additionally, the court found this to be a situation well suited for private resolution of the dispute given the elaborate exhaustion requirements in this severance plan. There was no reason to waive the exhaustion requirement, and dismissal was proper. Stark could not be allowed to skip the administrative procedure, cause the defendants to incur litigation costs, and then, after losing, be allowed a second bite at the apple.

Next, the court addressed Stark's appeal of the award of attorney fees to PPM. Under ERISA's fee-shifting statute, a district court may, in its discretion, allow a reasonable attorney's fee and costs of action to either party. There is a presumption in favor of awarding fees to the prevailing party, but that presumption may be rebutted. An award of fees to a successful defendant will be denied if the plaintiff's position was both substantially justified and taken in good faith, or if special circumstances make an award unjust. Stark's position was not substantially justified. He made no attempt to exhaust his plan remedies by following the claims procedures. Then when PPM won granted summary judgment, Stark argued the order should be set aside so he could exhaust his plan remedies. His inconsistent positions led the court to find the award of attorney fees was reasonable.

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Stark v. PPM America, Inc., 2004 WL 42496, __ F.3d __ (7th Cir. 2004). Copyright 2004 Schiff & Hulbert. This employer newsletter is for information purposes only and is not intended to constitute or be a substitute for legal advice. If you have a question about a particular situation, please contact us. (DAS)