

No. 06-4133

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BLAINE FLINDERS, et al.,

Plaintiffs-Appellants,

v.

WORKFORCE STABILIZATION PLAN OF PHILLIPS PETROLEUM COMPANY,

Defendant-Appellee.

On Appeal From the United States
District Court for the District of Utah
No. 2:04-CV-00541 (Hon. Dale. A. Kimball)

APPELLEE'S PETITION FOR REHEARING

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JULY 30, 2007

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INTRODUCTION

Defendant-Appellee Workforce Stabilization Plan of Phillips Petroleum Company (“the Plan”) respectfully petitions for rehearing under Federal Rule of Appellate Procedure 40.

At least as far as rehearing is concerned, the Plan is not challenging this Court’s primary holding—that the plaintiffs-employees are entitled to receive WFSP benefits. (The Plan has not definitively decided whether to seek Supreme Court review of that issue.) But this Court’s opinion directs “the district court to enter judgment awarding plaintiffs benefits under the WFSP, *including interest.*” Op., at 31 (emphasis added). We respectfully suggest that the Court erred by ordering the award of prejudgment interest—an issue that was not briefed—when the decision whether to award such interest is a discretionary one vested in the district court in the first instance. We accordingly ask the Court to revise the Opinion to provide for a remand to the district court for that determination.

REASONS FOR GRANTING THE PETITION

We acknowledge that the award of prejudgment interest is permissible in ERISA cases. See *Allison v. Bank One—Denver*, 289 F.3d 1223, 1243 (10th Cir. 2002). But as the Seventh Circuit has explained, “[w]hether to award prejudgment interest to an ERISA plaintiff is ‘a question of fairness, lying within the court’s sound discretion, to be answered by balancing the equities.’” *Trustmark Life Ins.*

Co. v. Univ. of Chicago Hosps., 207 F.3d 876, 885 (7th Cir. 2000) (quoting *Landwehr v. DuPree*, 72 F.3d 726, 739 (7th Cir. 1995)). A number of factors affect this determination, including “the presence of bad faith or good will,” *id.*, whether an award of prejudgment interest is necessary to prevent “unjust enrichment,” *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 946 (8th Cir. 1999), and whether an award “serves to compensate the injured party and * * * is otherwise equitable,” *Allison*, 289 F.3d at 1243.

Thus, this Court has held that, at least in this Circuit,

[a] two-step analysis governs the determination of [whether to award prejudgment interest]. The district court must first determine whether the award of prejudgment interest will serve to compensate the injured party. Second, even if the award of prejudgment interest is compensatory in nature, the district court must still determine whether the equities would preclude the award of prejudgment interest.

Caldwell v. Life Ins. Co. of N. Am., 287 F.3d 1276, 1286 (10th Cir. 2002) (internal quotation marks and citations omitted).

As *Caldwell* notes—reasonably enough, given that the issues tied up in whether to award prejudgment interest depend on factual determinations and assessments of credibility and good faith—it is well established that “[t]he award of prejudgment interest is a question of law for the *trial court*.” *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 460 (10th Cir. 1989) (emphasis added); see also *Caldwell*, 287 F.3d at 1286 (“the *district court* must first determine * * *”) (emphasis

added).¹ Here, however, this Court short-circuited the customary process, instead simply ordering the award of prejudgment interest at the same time that the Court held that plaintiffs were entitled to benefits. Moreover, it did so without addressing the considerations that bear on such an inquiry. We submit that such action was inappropriate, for three reasons.

First, determining the issue in the court of appeals as an initial matter violates the legal rule set forth in *Caldwell* and *Kelley*, and we are unaware of any other authority that supports this Court making in the first instance the determination whether to award prejudgment interest.

Second, plaintiffs in this case never *asked* this Court to award them prejudgment interest. Rather, in both their opening brief and their reply brief, plaintiffs requested that this Court “(1) reverse the district court order granting summary judgment in favor of the Plan, and enter partial summary judgment in favor of the Employees, and (2) *return the case to the district court* to determine the amount of benefits that must be paid and *to award prejudgment interest* and attorney’s fees.” Appellants’ Br., at 50 (emphasis added); see also Reply Br., at 31 (same). Thus, plaintiffs themselves sought a remand in which, although the district court would

¹ This court thereafter reviews the district court’s award for an abuse of discretion. *Allison*, 289 F.3d at 1243 (citing *Thorpe v. Ret. Plan of the Pillsbury Co. & the Am. Fed. Of Grain Millers*, 80 F.3d 439, 445 (10th Cir. 1996)); see also *Caldwell*, 287 F.3d at 1286.

merely “*determine the amount* of benefits” (*id.* (emphasis added)), it would decide whether to “*award* prejudgment interest and attorney’s fees” (*id.* (emphasis added)).

Finally, and as a result of plaintiffs’ request for relief, the parties have never briefed the issue of whether an award of prejudgment interest is appropriate here. We respectfully suggest that it is not. As plaintiffs do not deny, the benefits at issue here are simply a windfall because each and every one of them was offered employment by the subsequent owner of the plants immediately after the sale (see Reply Br., at 1 ¶ 7; Appellee’s Br., at 5 ¶ 7). But more to the point, consistent with *Kelley* and *Caldwell*, we respectfully request that the Court defer to the district court in the first instance the determination whether such an award is appropriate in this case.

CONCLUSION

This Court should grant the Workforce Stabilization Plan of Phillips Petroleum Company’s petition for rehearing and amend its opinion to defer to the district court in the first instance the determination whether to award prejudgment interest.

Respectfully submitted,

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JULY 30, 2007

CERTIFICATE OF COMPLIANCE WITH RULES 32 AND 40(b)

I certify that this brief complies with the length limitation contained in Federal Rule of Appellate Procedure 40(b), in that it is less than 15 pages long. I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it has been prepared in using Microsoft Word 2002 in 14 point, Times New Roman font, a proportionately spaced typeface.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that on July 30, 2007, I submitted APPELLEE'S PETITION FOR REHEARING in digital form to the Clerk's Office for the United States Court of Appeals for the Tenth Circuit and to the following attorneys of record:

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I further certify that all privacy redactions have been made and that the version of the foregoing document submitted to the court and counsel are an exact copy of the written document filed with the Clerk of Court.

I also certify that the digital submission has been scanned for viruses using Symantec Antivirus version 10.1.4.4000, which was updated July 30, 2007, and that, according to that virus protection program, the submission is free of viruses.

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CERTIFICATE OF FILING AND SERVICE

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