No. 09-448

# In The
# Supreme Court of the United States

BRIDGET HARDT,
*Petitioner*,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Respondent Reliance Standard Life Insurance Company hereby discloses that it is a subsidiary of Reliance Standard Life Insurance Company of Texas, which in turn is a subsidiary of Delphi Financial Group, Inc., which is a publicly held corporation.

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## INTRODUCTION

Petitioner is asking this Court to review an unpublished decision of the United States Court of Appeals for the Fourth Circuit which denied her request for attorney's fees. As her primary argument, Petitioner states that certiorari should be granted based on a split in the circuits on whether prevailing party status is required for an award of attorney's fees under § 502(g) of the ERISA statute.[1] For many reasons, this issue does not satisfy the considerations stated in Supreme Court Rule 10 regarding the grant of a petition for a writ of certiorari.

First and foremost, Petitioner's brief overlooks this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89 n.14 (1982). There, the Supreme Court addressed fee awards under the ERISA statute. The Court recognized that in an ERISA action, "attorney's fees are normally awarded only to prevailing parties...." *Id.* There is no reason for the Court to re-visit the issue.

The petition should also be denied because there is no actual split in authority in the various circuits. This is not surprising based on the Supreme Court's pronouncement in *Kaiser Steel*. To the extent that a circuit may have strayed from the holding in *Kaiser Steel*, this still would not justify granting the petition. As stated in Supreme Court Rule 10, "the misapplication of a properly stated rule of law" will "rarely" justify the grant of a petition for a writ of certiorari.

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[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g)(1).

The second basis raised in the petition also does not justify review by this Court. Petitioner argues that there is a split in the circuits on whether a court's remand to the plan for further consideration is sufficient to permit an award of attorney's fees and costs under ERISA. This issue has indirectly been the subject of a decision by this Court. In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), this Court explained that to be eligible for an award of fees, there must be a judgment on the merits or a court-ordered consent decree. A remand to the plan does not satisfy these requirements. For this reason as well, the petition should be denied.

## REASONS FOR DENYING THE PETITION

I. No Considerations Warrant this Court's Review of the Fourth Circuit's Decision that a Party Must Prevail to Recover Attorney's Fees under ERISA.

A. The Supreme Court Has Already Decided the Issue Presented for Review by Petitioner.

As noted, Petitioner asks whether the Fourth Circuit erred when it limited an award of attorney's fees under § 502(g) of ERISA to only a prevailing party. Petitioner overlooks the fact that the Supreme Court has already commented on this issue. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89 n.14 (1982). In *Kaiser Steel*, the district court entered judgment in favor of the respondent and awarded attorney's fees under § 502(g) of ERISA. That decision was affirmed by the

Court of Appeals. For reasons that are not pertinent to this case, the Supreme Court reversed the judgment in favor of the respondent. Turning next to the district court's award of fees, this Court held that "[b]ecause attorney's fees are normally awarded only to prevailing parties, the award of attorney's fees to respondent is also reversed." *Id.*

In the years since *Kaiser Steel* was decided, the Supreme Court has not identified any circumstances which would allow a court to deviate from the general rule that attorney's fees may only be awarded, if at all, to the prevailing party. This is not surprising since an award of attorney's fees is not the norm and the Supreme Court has expressed "a general practice of not awarding fees" even to a prevailing party "absent explicit statutory authority." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975). Petitioner has not stated any basis which would justify this Court revisiting the issue.

The decision of the Fourth Circuit which Petitioner seeks to have reviewed is consistent with the decision of this Court in *Kaiser Steel*. Even if the Fourth Circuit decision was in conflict, it would still not justify the petition. The decision of the Court of Appeals is unpublished and, therefore, is not binding precedent even in the Fourth Circuit. *Great-West Life & Annuity Ins. Co. v. Information Systems & Network Corp.*, 523 F.3d 266, 272 (4th Cir. 2008). Additionally, pursuant to Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of ... misapplication of a properly stated rule of law." To the extent that any Court of Appeals has issued a decision that is inconsistent with *Kaiser Steel*,

it does not justify a grant of certiorari. However, as explained below, the "circuit split" argued by Petitioner does not exist.

### B. There Is No Actual Split in the Circuits Regarding the Prevailing Party Requirement For an Award of Attorney's Fees under ERISA.

According to the petition before this Court, the prevailing party requirement imposed by the Fourth Circuit has been rejected by the Second, Fifth and Eleventh Circuits. This statement is incorrect. Looking first to the Second Circuit, in support of this proposition, Petitioner cites to *Miller v. United Welfare Fund*, 72 F.3d 1066 (2d Cir. 1995). Decisions from the Second Circuit and the district courts within it both prior to and after the decision in *Miller* have recognized a prevailing party requirement for an award of fees under ERISA.

One of the earliest decision from the Second Circuit which mentions a prevailing claimant in the context of a motion for attorney's fees is *Birmingham v. SoGen-Swiss Int'l Corp. Ret. Plan*, 718 F.2d 515, 523 (2d Cir. 1983). There, the Second Circuit held that "attorney's fees may be awarded to the prevailing party under ERISA in the absence of some particular justification for not doing so." *Id.* The Second Circuit recognized the prevailing party requirement more recently in *Chapman v. ChoiceCare Long Island Long Term Disability Plan*, No. 07-2518-CV, 2009 U.S. App. LEXIS 233 (2d Cir. 2009). District courts within the Second Circuit have also recognized that a party must prevail in order to recover fees under ERISA. *See e.g.*

*Sheehan v. Metropolitan Life Ins. Co.*, 450 F. Supp. 2d 321, 324 (S.D.N.Y. 2006) ("The law of this Circuit makes it plain that an ERISA plaintiff must prevail in his action in order to recover attorney's fees."); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1017 (W.D.N.Y. 1990) (same).

Additionally, the Second Circuit's decision in *Miller* is not as definitive as Petitioner suggests. After the language in *Miller* relied on by Petitioner, the Second Circuit stated that "the district court may in fact determine that Miller is the prevailing party ...." *Miller*, 72 F.3d at 1074. There is no dispute in any circuit that it is within the discretion of a court to award fees to a prevailing party under ERISA.

The Fifth Circuit decision relied on by Petitioner also does not support her argument that there is a split in the circuits. Petitioner cites to *Gibbs v. Gibbs*, 210 F.3d 591 (5th Cir. 2000), as "expressly reject[ing]" the prevailing party requirement." Contrary to this statement, and quoting from an earlier Fifth Circuit decision, the court recognized that ERISA "allows the court to award ERISA beneficiaries, participants, and fiduciaries reasonable attorney's fees when they are the prevailing party." *Gibbs*, 210 F.3d at 503 (quoting *Boggs v. Boggs*, 82 F.3d 90, 94 n.1 (5th Cir. 1996), *rev'd on other grounds*, 520 U.S. 833 (1997)). At issue in *Gibbs* was the "propriety of awarding fees to prevailing defendants, or to other third parties who may have been forced to join in an ERISA action." *Gibbs*, 210 F.3d at 503. According to the Fifth Circuit, its earlier decision in *Boggs* "simply does not speak to" this issue. *Id.* However, *Boggs* does speak directly to the issue in

this case and the Fourth Circuit's decision against Petitioner is consistent with *Boggs*.

More recently, the Fifth Circuit reiterated the prevailing party requirement as stated in *Boggs*. *See Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 543 (5th Cir. 2007). Petitioner attempts to limit the holding in *Wade* to only those cases involving an award of costs. The ERISA statute makes no distinction between a request for fees and one for costs. Section 502(g) of ERISA states that a court "may allow a reasonable attorney's fee and costs of action...." 29 U.S.C. § 1132(g)(1). *Wade* unequivocally imposes a "prevailing party" requirement under "ERISA's fee-shifting provision." *Id.* Accordingly, Fifth Circuit law does not support Petitioner's argument that there is a split in the circuits.[2]

At first glance, Eleventh Circuit law may appear inconsistent with the Fourth Circuit's decision; however, it is not. Petitioner ignores the context in which the Eleventh Circuit stated that the ERISA fee-shifting statute permits an award of fees to either party. The statement relied on by Petitioner appears in decisions in which the Eleventh Circuit has rejected the argument that there should be a presumption in favor of awarding fees to a prevailing claimant. *See Florence Nightingale Nursing Service, Inc. v. Blue*

[2] The decision of the Fifth Circuit in *Wade* is important for an additional reason. To the extent that *Gibbs* can be interpreted in the manner suggested by Petitioner, it would not be binding precedent in the Fifth Circuit due to a conflict with an earlier panel's decision. The Fifth Circuit recognizes that "[w]hen there are conflicting panel decisions, the earliest panel decision controls." *Wade*, 493 F.3d at 543.

*Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1485 (1995); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993). *Dixon v. Seafarers' Welfare Plan*, 878 F.2d 1411, 1412 (11th Cir. 1989). The Eleventh Circuit rejected a presumption in favor of awarding fees to a prevailing claimant because the statute "allows a court to award fees to either party." *Freeman*, 996 F.2d at 1119. This is not the issue that Petitioner is asking this Court to review.

Petitioner also cites to the Eleventh Circuit's decision in *Sharron v. Amalgamated Ins. Agency Services, Inc.*, 704 F.2d 562, 569 (11th Cir. 1983). In *Sharron*, the Eleventh Circuit actually reversed the district court's award of attorney's fee in favor of the plaintiff. This decision was based on the court's conclusion that the defendant was entitled to judgment in its favor and because "ERISA does not apply to this Pension Plan." *Sharron*, 704 F.2d at 569. Clearly, the actual decision in *Sharron* does not support Petitioner. Significantly, Petitioner cannot identify a single case in which the Eleventh Circuit permitted an award of attorney's fees to a non-prevailing party in an ERISA case.

Petitioner next argues that other circuits also may not require prevailing party status for an award of attorney's fees. Cases from these other circuits also do not support this contention. One circuit identified by Petitioner is the Sixth Circuit. However, in *Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 534 (6th Cir. 2008), the court suggested that "a district court would always abuse its discretion by awarding attorney fees to a losing party, or to a claimant who has yet to obtain the sought after award of benefits." *Id.* The court did not

need to reach a decision on this issue, however, due to other errors by the district court. In other cases, the Sixth Circuit has recognized that fees may be awarded to the prevailing party under ERISA. *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006); *Fleming v. Ayers & Associates*, 948 F.2d 993, 999 (6th Cir. 1991) (holding that the claimant was entitled to reasonable attorneys fees "[a]s a prevailing party on her ERISA claim.").

Next, Petitioner argues that there is conflicting authority in the First Circuit. To the contrary, that court has consistently stated that attorney's fees are only available to a prevailing party. *Cook v. Liberty Life Assur. Co. of Boston*, 344 F.3d 122, 123 (1st Cir. 2003); *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 61 (1st Cir. 1999). The same is true in the other circuits referenced by Petitioner. *See Laborer's Pension Fund v. Lay-Com*, 58 F.3d 602, 615, 616 (7th Cir. 2009) (concluding that the claimants were still entitled to fees even though the decision of the district court was reversed in part because they were "prevailing parties"); *Tate v. Long Term Disability Program*, 545 F.3d 555, 557 (7th Cir. 2008) (affirming the district court's denial of the motion for attorney's fees because the claimant did not attain "prevailing party status"); *Rittenhouse v. UnitedHealth Group Long Term Disability Insurance Plan*, 476 F.3d 626, 633 (8th Cir. 2007) (reversing the award of attorney's fees because the claimant was no longer a "prevailing party" after the court reversed the judgment of the district court); *Dillards Liberty Life Assur. Co. of Boston*, 456 F.3d 901, 903 (8th Cir. 2006) (vacating the award of attorney's fees because the claimant was no longer the prevailing party); *Jackson v. Metro. Life. Ins. Co.*, 303

F.3d 884, 890 (8th Cir. 2002). Once again, Petitioner has not identified a single case in which a court actually awarded attorney's fees to a non-prevailing party under ERISA.

As further justification for review by this Court, Petitioner argues that the Fourth Circuit's decision conflicts with the reasoning in prior decisions by this Court. There is only one decision in which the Supreme Court discussed an award of fees under ERISA. In *Kaiser Steel*, the Court stated that under ERISA, "attorney's fees are normally awarded only to prevailing parties." *Kaiser Steel*, 455 U.S. at 89 n. 14. The Fourth Circuit's decision against Petitioner is consistent with *Kaiser Steel*. Petitioner fails to even mention the Court's decision in *Kaiser Steel*, let alone distinguish it. Simply stated, there is no split in the circuits. Therefore, certiorari is not justified.

## II. The Supreme Court Has Already Addressed in *Buckhannon* the Second Issue Presented by Petitioner.

Relying on this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), the Fourth Circuit concluded that a remand to the plan for further review of the claim does not allow for the recovery of attorney's fees under ERISA. As noted by Petitioner, *Buckhannon* involved a request for fees under different federal fee-shifting statutes. However, this distinction is irrelevant. The statutes at issue in *Buckhannon* required a plaintiff seeking fees to prevail just as this Court has required under the ERISA statute. *Kaiser Steel*, 455 U.S. at 89 n. 14. The Supreme Court held in

*Buckhannon* that a party "prevails" only when there is a (1) a judgment on the merits or (2) a court-ordered consent decree which creates a material alteration of the legal relationship between the parties. *Buckhannon*, 532 U.S. at 604. Neither of these conditions precedent for a motion for fees is present when a court simply remands the claim for further review by the plan and the claim is then settled.

Petitioner cites to a handful of decisions from a few circuits in support of her statement that there is a split in the circuits on whether a remand is sufficient for an award of fees. Nearly all of these decisions pre-date *Buckhannon*. One case decided after *Buckhannon* that is cited by Petitioner is *Peterson v. Continental Casualty Co.*, 282 F.3d 112 (2d Cir. 2002). Petitioner incorrectly states that *Peterson* conflicts with the decision of Fourth Circuit. In *Peterson*, the court entered judgment in favor of the claimant on the claim for benefits after the court-ordered remand. Thus, he was clearly a prevailing party. Those facts are not present in this case. No court entered judgment in favor of Petitioner awarding her benefits. Unlike *Peterson*, it was Respondent who concluded that Petitioner was eligible for benefits during the remand. Even if a court has issued a decision contrary to *Buckhannon*, it would not justify granting the petition. When a court misapplies "a properly stated rule of law" it will "rarely" justify certiorari. Supreme Court Rule 10. The issues raised in the unpublished Fourth Circuit decision in this case do not warrant further review by this Court.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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