

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **04-cv-02042-LTB-OES**

NELSON B. PHELPS,

Plaintiff,

vs.

QWEST EMPLOYEES BENEFIT COMMITTEE,

Defendant.

**PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES
and FOR IMPOSITION OF ERISA Section 502(c)(1)(B) PENALTY**

For the following reasons, Plaintiff NELSON B. PHELPS hereby moves for an order compelling Defendant Qwest Employees Benefit Committee to answer an interrogatory and produce requested documents. In addition, Plaintiff seeks imposition of a daily penalty pursuant to ERISA Section 502(c)(1)(B). By Order dated December 2, 2005, this Court ruled Defendant is required to provide certain documents to Plaintiff pursuant to § 104(b)(4) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1024(b)(4). In view of this Court's determination that Defendant should have honored Plaintiff's January 9, 2004 written request for the Investment policies/guidelines, Defendant should now be compelled to respond to an interrogatory, produce the requested documents and pay the ERISA statutory penalty.

1. On January 21, 2005, PHELPS served on Defendant Qwest Employees Benefit Committee some interrogatories and document requests. Defendant responded on March 28, 2005. In view of the Court's December 2, 2005 Order, there are two major areas of discovery dispute.

Motion to Compel Answer to Interrogatory No. 3

2. Defendant QWEST EBC objected to answering Interrogatory No. 3 as follows:

INTERROGATORY NO. 3: Identify the authors of each version of the Plan's Investment Policy and Investment Guidelines drafted, created and used during the period 1999 to the present, state the date the document was drafted and the date it was adopted or approved for the PLAN. This request for documents includes the documents that are the subject matter of Plaintiff's First Claim for Relief in the Complaint.

QWEST's RESPONSE: Defendant objects to Interrogatory No. 3 on the grounds it is overly broad by time frame, is vague and ambiguous and seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, and specifically reserving same, Defendant responds as follows:

Plaintiff's First Claim for Relief asks, as does this interrogatory, for the Plan's "Investment Policy and Investment Guidelines." The Qwest Pension Plan does not have a Statement of Investment Policy or other comparable "Investment Policy Guidelines" and therefore, there are no authors or drafting or adoption dates to identify.

3. Defendant's response is disingenuous, somewhat dishonest, and belied by the position *subsequently* taken in its motion for summary judgment briefing which motion was denied. Qwest admits that instead of there being a *single* investment policy/guideline, there are several portfolio specific guidelines. PHELPS's interrogatory No. 3 is calculated to uncover admissible evidence. When arguing its position for summary judgment, Defendant submitted an affidavit by Karen Frame wherein she contended she thought the several investment guidelines had been amended from time to time. But, Ms. Frame gave no specifics. The interrogatory seeks that specific information and it is not propounded in bad faith.

Motion to Compel Responsive Production to Document Request No. 2.

4. Defendant QWEST EBC objected to producing documents responsive to Document Request No. 2, as follows:

DOCUMENT REQUEST NO. 2: A copy of each version of the PLAN's Investment Policy Guidelines drafted, created and used by PLAN fiduciaries during the period 1999 to the present. This request for documents includes the documents that are the subject matter of Plaintiff's First Claim for Relief in the Complaint.

QWEST's RESPONSE: Defendants objects to Request For Production No. 2 on the ground that it is overly broad by time frame, is vague and ambiguous and seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, and specifically reserving same, Defendant states that the Qwest Pension Plan does not have a Statement of Investment Policy or a comparable "Investment Policy Guideline".

5. Again, Defendant's response is both disingenuous, somewhat dishonest, and belied by the position taken several months later in the briefs supporting Defendant's motion for summary judgment which motion was denied. Qwest admits that instead of there being a single investment policy/guideline, there are several portfolio specific guidelines. Plaintiff's document request No. 2 is calculated to uncover admissible evidence. The document request is not propounded in bad faith. As this Court stated in its December 2 Order, "[t]hat the Committee has chosen to adopt several documents to govern investment of Plan assets rather than one is reason to require it to produce all, not none, of those documents that come within the statute."

6. Efforts under Local Rule 7.1 to resolve differences have been unsuccessful.

On December 5, 2005, a *draft* of this motion was served via email and fax on QWEST's counsel with an advisement that, should there not be compliance by December 12, this motion would be submitted to this Court. The undersigned counsel wrote to defense counsel, "Please email me a note stating whether or not Defendant will fully comply with the discovery requests." To date, a week later, there has been no response from Defendant's counsel. Accordingly, there is an impasse which requires the Court's intervention.

7. ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(B), provides that if the administrator fails to comply with a written request for instruments under which a pension plan is established or operated within 30 days of the written request, a federal court is authorized to award damages to such participant or beneficiary in the amount of up to \$110 a day from the date of such failure or refusal, or order other such relief as the court deems proper.

8. It is undisputed that Defendant is the plan administrator for the Qwest Pension Plan. (See Answer to Complaint ¶ 11). Further it is undisputed that on January 9, 2004, Plaintiff made a written requests to the plan administrator for the Investment polices/guidelines in effect throughout year 2001. (See Answer to Complaint ¶ 16). Defendant, by and through its Attorneys Karen DuWaldt and Cynthia Delaney, deliberated and chose not to produce the requested Investment policies/guidelines. (See Answer to Complaint ¶ 18). Therefore, nothing was produced within the 30 day period or by February 9, 2004. As of this date, the requested Investment policies/guidelines have not been produced and **673** days have passed. At the daily maximum rate of \$110, the ERISA statutory penalty as of December 12, 2005 totals **\$74,030.00**.

WHEREFORE, Plaintiff NELSON B. PHELPS, pursuant to Fed.R.Civ.P., Rule 37, requests an order directing Defendant Qwest Employee Benefits Committee promptly to answer Interrogatory No. 3 and promptly to produce all responsive documents to Document Request No. 2. In addition, Plaintiff requests this Court to exercise its discretion in favor of Plaintiff's request for imposition of the ERISA Section 502(c) daily penalty of \$110.00 and assess a total penalty of **\$74,030.00** as of December 12, 2005, going forward. Finally, Plaintiff seeks leave to submit a separate motion for an award of reasonable attorney's fees and costs, pursuant to ERISA Section 502(g)(1), 29 U.S.C. Section 1132(g)(1).

DATED: December 12, 2005. /s/ Curtis L. Kennedy
Curtis L. Kennedy
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2005, a true and correct copy of the above and foregoing **PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES and FOR IMPOSITION OF ERISA Section 502(c) PENALTY** was delivered via email to:

Beth Doherty Quinn, Esq.
BAIRD LAW FIRM, LLC
2036 E. 17th Avenue
Denver, CO 80206
Tele: 303-322-5334 direct
Fax: 303-813-4501
E-mail: bquinn@bairdlawfirm.com

Also, copy of the same was delivered via email to Plaintiff Nelson B. Phelps, Executive Director, ASSOCIATION OF U S WEST RETIREES, nbphelps@worlnet.att.net

/s/ Curtis L. Kennedy