

ATTORNEYS' FEES IN FLSA CASES - ARE COURTS FOLLOWING THE LAW?

I. INTRODUCTION

A. ***The Statute.*** The Fair Labor Standards Act provides that “The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.” 29 U.S.C. §216(b).¹

B. ***Unique language.*** Three aspects of this provision differ from the most common civil rights fee-shifting provisions, such as 42 U.S.C. §1988.

- Award is mandatory, whereas civil rights statutes provide discretion whether to award fees. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 n. 5, (1978).
- The FLSA mandates fees only to prevailing plaintiffs, not to prevailing defendants: Most courts hold that a defendant may be awarded fees only where the FLSA case is vexatious and has been litigated in bad faith. *Kreager v. Solomon & Flanagan, P.A.*, 775 F. 2d 1541, 1543 (11th Cir. 1985); *EEOC v. Hendrix College*, 53 F.3d 209, 211 (8th Cir. 1995); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 883 (7th Cir. 1994); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 260 & n. 1 (1st Cir. 1986); *Morgan v. Union Metal Mfg.*, 757 F.2d 792, 796 (6th Cir. 1985)
- The statute states that the fees must be “paid by the defendant.”

II. FEES AWARDED BY THE COURT, ABSENT A SETTLEMENT AGREEMENT

A. ***Reasonable Fee.*** The case law as to what is a “reasonable fee” is uniform across all federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Flight Attendants v. Zipes*, 491 U.S. 754, 758, n. 2, (1989).

B. ***A Judgment or Court-approved Settlement is a Condition of a Fee Award.*** *Dionne v. Floormasters Enterprises, Inc.*, --- F.3d ----, 2012 WL 104906 (11th Cir. 2012)(After defendant paid plaintiffs’ claim in full, plaintiff agreed that her claim was moot. Her fee request was rejected); *Gathagan v. Rag Shop/Hollywood, Inc.*, 2005 WL 6504749 (S.D. Fla. May 9, 2005) (Plaintiff’s counsel responded to letter tendering plaintiff’s full back pay claim and liquidated damages by filing motion in court to declare plaintiff the “prevailing party” and award fees.)

C. ***Supreme Court Dogma*** – a “reasonable fee” under all fee-shifting statutes is a fee based upon the “number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,” which is the “lode star” amount. *Hensley v. Eckerhart*, 461 U.S.424 (1983). The Court has rejected introducing any “contingency factors.” *City of*

¹ The same attorneys’ fee provision is applied to cases brought under the Age Discrimination in Employment Act and the Family and Medical Leave Act, both of which adopt the remedial provisions of the FLSA.

Burlington v. Dague, 505 U.S. 557, 562 (1992) (“We have established a ‘strong presumption’ that the lodestar represents the ‘reasonable’ fee.”).

D. **Enhancements.** The Supreme Court has recently acknowledged the theoretical possibility of an upward enhancement to the lode star determination to account for extraordinary circumstances, but held that enhancements were not warranted in the case before it, and has never affirmed an enhanced fee. *Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, 130 S. Ct. 1662, 1672 (2010) (“We reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. ... Instead, there is a “strong presumption” that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.”)

The Court identified three situations that might warrant an enhancement:

- “First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value.” In this circumstance, the trial judge should increase the hourly rate to what he or she would receive in cases not governed by a fee-shifting statute. (*Id.* 1674)
- “Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted.” In this case, the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest. (*Id.* 1674-75)
- “Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees.” (*Id.* 1675) This means unusual “unanticipated delay, particularly where the delay is unjustifiably caused by the defense.” The enhancement should be in the form of an adjustment in the nature of interest on the fees. (*Id.*)

E. **Reductions in Fee Requests.** Several circumstances will counsel a reduction in an attorneys’ fee, even where the FLSA plaintiff is entitled to an award.

- Success on only some claims. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 303 (4th Cir. 2009) (“Even when an award of attorneys' fees is mandatory, the district court may decrease the amount of fees that might otherwise be awarded in order to account for the plaintiff's limited success.”)
- Unreasonable settlement position. *Vocca v. Playboy Hotel of Chicago*, 686 F.2d 605 (7th Cir. 1982) (denial of entire request for attorney's fees due to unreasonable refusal to settle the case earlier); *Goss v. Killian Oaks House of Learning*, 248 F. Supp. 2d 1162, 1169 (S.D. Fla. 2003)
- Disproportionately low recovery. *Lewis v. Kendrick*, 944 F. 2d 949, 958 (1st Cir. 1991) (attorney's fee request of over \$50,000 denied in light of

jury verdict of \$1,000); *Saizan v. Delta Concrete Products Co., Inc.*, 448 F.3d 795 (5th Cir. 2006)(Fees reduced from \$114,000 to \$13,000 due to limited success); *Goss v. Killian Oaks House of Learning*, 248 F. Supp. 2d 1162 (S.D. Fla. 2003)(\$316 damages recovered versus \$16,000 fees requested); *Jackson v. Estelle's Place, LLC*, 2010 WL 3190697 (4th Cir. Aug. 12, 2010)

- Failure to maintain contemporaneous time records. *Scott v. City of New York*, 626 F.3d 130 (2nd Cir. 2010)(FLSA case – Except in the rarest of cases, fee requests disallowed if contemporaneous time records are not maintained and submitted)

F. ***Courts use lodestar outside of settlement context.*** When a Court determines an attorneys' fee in FLSA cases, outside of the context of a settlement agreement that provides for the fees, the courts uniformly use the lodestar approach, with adjustments, as discussed above and as seemingly required by Supreme Court precedent. *E.g.*, *Galdames v. N & D Inv. Corp.*, 2011 WL 2496280 (11th Cir. June 23, 2011); *Perez v. Carey Intern., Inc.*, 2010 WL 1408288 (11th Cir. Apr. 9, 2010); *Saizan v. Delta Concrete Products Co., Inc.*, 448 F.3d 795 (5th Cir. 2006); *Spencer v. Central Services, LLC*, 2012 WL 142978 *1 (D. Md. Jan. 13, 2012); *Davis v. Footbridge Engineering Services, LLC*, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)(Rejected *defendant's* argument that a percentage of the recovery should be applied)

G. ***The Johnson Factors***². These factors continue to be referenced as informing the courts' judgment in determining the lodestar amount, even though the Supreme Court has recently expressed skepticism as to their utility because of their subjectivity and the minimal guidance they provide. *Perdue v. Kenny A. ex rel. Winn*, ---U.S. ----, ----, 130 S. Ct. 1662, 1672 (2010)

- (1) The time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.
- Recent examples of courts referring to Johnson factors. *Faught v. Am. Home Shield Corp.*, 661 F.3d 1040, 1049 (11th Cir. 2011); *McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 380–81 (5th Cir. 2011); *Jackson v. Estelle's Place, LLC*, 2010 WL 3190697 (4th Cir. Aug. 12, 2010); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 303 (4th Cir. 2009). *See Spencer v. Central*

² Referring to the seminal case on attorneys' fees under the Civil Rights statutes, *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)

Services, LLC, 2012 WL 142978 *1 (D. Md. Jan. 13, 2012)(noting limited relevance of Johnson factors); *Jin v. Pac. Buffet House, Inc.*, 2010 WL 2653334 * n. 2 (E.D.N.Y. 2010)(same)

III. ATTORNEYS' FEES AS PART OF SETTLEMENT AGREEMENTS

A. Court Approval. A valid settlement of a claim under the Fair Labor Standards Act requires Department of Labor supervisor or court approval. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) A settlement concluded without such approval is not enforceable. *Id.*³, *Etzel v. Brinker Intern. Payroll Co., L.P.*, 2012 WL 95266 *2 (M.D. Fla. Jan. 10, 2012). A request for approval must include evidence to demonstrate that there was a genuine case or controversy about minimum wages or overtime pay; the amount paid to the plaintiff is reasonable, and the amount of fees is reasonable, or the court will not approve the settlement. . *Gambrell v. Weber Carpet, Inc.*, 2012 WL 162403 (D. Kan. Jan. 11, 2012)(Declining to approve a settlement because evidence was not filed to allow a determination of these factors)

- ***Fees must be approved, even if not disputed.*** This process requires a finding by the court that the amount to be paid to the plaintiffs' attorneys is reasonable; *Altier v. Worley Catastrophe Response, LLC*, 2012 WL 161824 (E.D. La. 2012)(“As part of its fairness determination, the court must determine independently that the proposed attorney's fees and costs to be awarded to plaintiffs' counsel are reasonable.); *Etzel v. Brinker Intern. Payroll Co., L.P.*, 2012 WL 95266 at *3 (M.D. Fla. Jan. 10, 2012) (“In order for the Court to determine whether the proposed settlement is reasonable, counsel for the claimant(s) must first disclose the extent to which the FLSA claim has or will be compromised by the deduction of attorneys' fees, costs or expenses. ...When a plaintiff receives less than a full recovery, any payment (whether or not agreed to by a defendant) above a reasonable fee improperly detracts from the plaintiff's recovery.”)
- Courts have noted the potential for unfairness in settlements, especially where the agreement provides that the defendant will not contest the attorneys' fees. See *Sanderson v. Unilever Supply Chain, Inc.*, 2011 WL 5822413 (W.D. Mo. Nov. 16, 2011)(“Such agreements deprive the court of a full record and benefits of the adversary process. They encourage plaintiffs' counsel to maintain inadequate contemporaneous time records and to submit fee requests on records which cannot withstand the adversary process. They promote a lackadaisical approach to fee litigation—regrettably forcing the Court to act as adversary to plaintiffs' counsel in examining fee applications. They can lead to unreasonable fee

³ There is some dispute as to whether an FLSA claim can be compromised without court approval, so long as there was a bona fide dispute. Compare *Martinez v. Bohls Bearing Equip. Co.*, 361 F.Supp.2d 608 (W.D.Tex.2005)(A private settlement is enforceable) and *Dees v. Hydradry, Inc.*, 706 F.Supp. 2d 1227 (M.D. Fla. 2010) (requires court approval).

requests. To top it off, such stipulations have no apparent benefit to plaintiffs. The only beneficiaries are plaintiffs' counsel ... who would insulate their fee requests from scrutiny through the adversary process.”); *Bruner v. Sprint/United Management. Co.*, 2009 WL 2058762, (D. Kan. July 14, 2009)(same);

B. *Contingent Fees in FLSA Cases Have been Criticized.* The FLSA is explicit in stating that the attorneys’ fees shall be “*paid by the defendant.*” A typical contingent fee agreement is inconsistent with this directive. See *Skidmore v. John J. Casale, Inc.*, 160 F.2d 527, 531 (2d Cir. 1947) (“We have considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that an employee's recovery should be net....”); *Madrix v. Dize*, 153 F. 2d 274, 275-76 (4th Cir. 1946)(“Obviously Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs. ... nor would one expect to find a limitation in the statute that would free a defaulting employer from liability for any part of the services rendered by the attorney in order to secure his client's rights.”); *Silva v. Miller*, 2009 WL 73164 at **2 (11th Cir. Jan. 13, 2009)(“That Silva and Zidell entered into a contingency contract to establish Zidell's compensation if Silva prevailed on the FLSA claim is of little moment in the context of FLSA. FLSA requires judicial review of the reasonableness of counsel's legal fees to assure both that counsel is compensated adequately and that no conflict of interest taints the amount the wronged employee recovers under a settlement agreement. FLSA provides for reasonable attorney's fees; the parties cannot contract in derogation of FLSA's provisions.... To turn a blind eye to an agreed upon contingency fee in an amount greater than the amount determined to be reasonable after judicial scrutiny runs counter to FLSA's provisions for compensating the wronged employee.”); *Etzel v. Brinker Intern. Payroll Co., L.P.*, 2012 WL 95266 at *3 (M.D. Fla. Jan. 10, 2012)(“Where there is a compromise of the amount due to the plaintiff, the Court should decide the reasonableness of the attorneys' fees provision under the parties' settlement agreement using the lodestar method as a guide. In such a case, any compensation for attorneys' fees beyond that justified by the lodestar method is unreasonable unless exceptional circumstances would justify such an award.”); *Walker v. Dovetails, Inc.*, 2010 WL 5878336 (E.D. Va. Nov. 30, 2010) (“A court may not ignore the lodestar approach in favor of a contingency-fee arrangement when determining an appropriate award of fees under FLSA.”)

C. *What is the standard for FLSA fees when the parties have settled?* The predominant method adopted in agreements settling FLSA collective actions, unlike the method used outside of the settlement context, is a percentage of the recovery method.

- *Altier v. Worley Catastrophe Response, LLC*, 2012 WL 161824 (E.D. La. 2012)(25% of recovery, reflecting a 2.17 multiplier over the lode star); *Prescott v. Prudential Ins. Co. of America*, 2011 WL 6662288 (D. Me. 2011)(percentage of the fund “mimics” the market); *Morris v. Affinity Health Plan, Inc.*, 2011 WL 6288035 (S.D.N.Y. 2011) (33 1/3 of \$2.5 million fund preliminarily approved without discussion of method); *Matheson v. T-Bone Restaurant, LLC*, 2011 WL 6268216 **7-8 (S.D.N.Y. Dec. 13, 2011)(Awarded 33 1/3% of fund, stating that

“Although the Court has discretion to award attorneys' fees based on the lodestar method or the percentage-of-recovery method, in wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award.”); *Johnson v. Brennan*, 2011 WL 4357376 (S.D.N.Y. September 16, 2011)(33 1/3 % of recovery, stating “In wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award.”); *In re Milos Litigation*, 2011 WL 6015705 (S.D.N.Y. 2011)(33 1/3%); *Williams v. Aramark Sports, LLC*, 2011 WL 4018205 (E.D. Pa. Sept. 9, 2011)(33 1/3%, stating that percentage of recovery is favored method in “common fund” cases.”)⁴; *Heath v. Hard Rock Cafe Intern. (STP), Inc.*, 2011 WL 5877506 (M.D. Fla. Oct. 28, 2011)(33 1/3 % of recovery); *Jack v. Hartford Fire Ins. Co.*, 2011 WL 4899942 (S.D. Cal. Oct. 13, 2011)(Reduced fee from 30% of fund to 25% of fund, stating that in the 9th Circuit, “25% is presumptively a reasonable fee in a class action.”); *In re Wells Fargo Loan Processor Overtime Pay*, 2011 WL 3352460 N.D. Cal. 2011)(25% of recovery); *Sanderson v. Unilever Supply Chain, Inc.*, 2011 WL 6369395 (W.D. Mo. 2011)(33 7/8% of recovery – cross-checked using lode star, which was higher)

C. *Is this standard faithful to the statute?* Many of the courts in the cases just cited have required evidence to be submitted showing what the result would have been under a lodestar method, and often that method would have yielded a higher amount. However, the courts have not generally in these cases been careful to assure that the plaintiffs who are recovering only a fraction of their claims are not having their recovery reduced to pay their attorneys' fees. Often, the primary compromise is in the back pay or liquidated damages, not on the attorneys' fees. This runs counter to the explicit command of Section 216(b) that the fees be “paid by the defendant.”

D. *Are the Courts following the law?*

- **Case Study 1 - *Wolfson v. CareGroup, Inc.***, CA 1:09-cv-1164 (D. Mass. Sept. 13, 2010) Over 10,000 members in the class. Settlement amount was \$8.5 million, inclusive of fees and expenses. Fee requested was 33 1/3% of the total fund, or \$2.83 million.⁵ Defendant agreed not to oppose the fee. If the fee was reduced, the reduction would go to the defendant. No evidence was filed as to the hours expended or rates of counsel; as to the amount of any plaintiff's claim. Neither was mentioned in the Court's Order finally approving the settlement.

Consider: No answer was filed and no discovery had been conducted before the settlement. The only filings made by plaintiffs after the complaint and before the

⁴ The Court also noted that in *Boone v. City of Philadelphia*, 668 F. Supp. 693, 714 (E.D. Pa. 2009), a study was cited of 289 class action settlements in the 3d circuit and that the average (mean) percentage awarded was 31.7% and the median was 33 1/3.

⁵ Counsel had obtained contingent fee agreements from the named plaintiffs for 50% of the recovery, and filed an Affidavit attesting that the “national market rate” for FLSA cases is a 50% contingent fee. Compare 29 U.S.C. §216(b)(fees shall be “paid by the defendant”). See *Skidmore v. John J. Casale, Inc.*, 160 F.2d 527, 531 (2d Cir. 1947) (“We have considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that an employee's recovery should be net...”);

Motion to Approve Settlement were motions for *pro hac vice* admission. The mediation lasted two days and the case settled nine months after the Complaint was filed. There was no conditional or final certification before the settlement was reached. Is this a reasonable fee?

Consider: The opt in plaintiffs were to receive \$212 each, plus their share of the settlement proceeds, which would be determined by multiplying the remainder of the settlement fund (about \$5.3 million) by a fraction, the denominator of which was the total earnings of all members of the class, and the numerator of which was the earnings of the individual. What does this formula have to do with the amount of overtime that these employees lost? Did the plaintiffs pay the attorneys?

- **Case Study 2** - *Gregg v. The Trustees of the University of Pennsylvania*, 2:09-cv-05547 (E.D. Pa. 6/10/11) Settlement amount was \$7.75 million. Attorneys' fees requested and approved by the Court were \$2.6 million -33 1/3% of the fund. Class members recovery? \$100 each. In the Agreement, defendant agreed not to contest attorneys' fees. There was minimal discovery.
- **Case Study 3** - *Barrus v. Dicks Sporting Goods, Inc.*, CA No. 05-cv-06253 (W.D.N.Y. 7/29/11): Settlement amount was \$15 million, inclusive of fees and expenses. Attorneys' fees requested and approved by the Court were \$5 million. Class members' recovery? \$100 each. In the Agreement, defendant agreed not to contest attorneys' fees.

IV. EXPERT WITNESS FEES IN FLSA CASES

A. Plaintiffs often request payment for expert witness fees incurred in petitioning for fees and costs under 29 U.S.C. §216(b). However, in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987), the Supreme Court held that 28 U.S.C. §1821(b) limits the expert witness fees awardable under 28 U.S.C. § 1920(3) to \$40 a day, unless otherwise provided by statute or agreement.

B. In *West Virginia University Hospitals, Inc. v. Robert Casey*, 499 U.S. 83, 101 (1991) the Supreme Court held that 42 U.S.C. §1988 does not provide statutory authorization for greater expert fee recovery. (“[W]e conclude that §1988 conveys no authority to shift expert fees. When experts appear at trial, they are of course eligible for the fee provided by § 1920 or § 1821 ...”)

C. The Civil Rights Act of 1991 overruled the Supreme Court cases, but did so only for cases filed under Title VII, the Americans with Disabilities Act and 42 U.S.C. §1981. The amendment does not apply to 29 U.S.C. §216(b). Therefore, in cases under the FLSA, the ADEA and the FMLA, recoverable expert witness fees remain capped at \$40 per day. *James v. Sears, Roebuck & Co.*, 21 F. 3d 989, 996-96 (10th Cir. 1984)(“As a matter of law, expert witness fees are not available as part of attorney’s fees and costs recoverable under the ADEA.”); *Tyler v. Union Oil Co. of California*, 304 F. 3d 379, 405 (5th Cir. 2002)(“there is no express statutory

authority in the ADEA or the FLSA to award expert witness fees for other than court-appointed expert witnesses.”)

John J. Myers
Eckert Seamans Cherin & Mellott, LLC
Pittsburgh, PA
jjm@eckertseamans.com