

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER MANTZ

v.

NO. 01-CV-6351

STEVEN SINGER JEWELERS and
STEVEN SINGER

MEMORANDUM AND ORDER

McLaughlin, J.

May 7, 2003

The plaintiff petitions the Court for attorney's fees and costs following the Court's entry of judgment in his favor under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., and the Commonwealth of Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 et seq., on March 24, 2003. In its decision, the Court awarded the plaintiff reasonable attorney's fees and costs. The defendants dispute that the plaintiff's claimed fees and costs are reasonable, and argue that all his fees and costs after September 4, 2002, are barred because his ultimate award was less than their offer of judgment on that date.

I. Procedural History

Peter Mantz brought an action for unpaid wages against his former employer, Steven Singer Jewelers, and his former boss, Steven Singer, under the Fair Labor Standards Act of 1938 ("FLSA"), and the Commonwealth of Pennsylvania Wage Payment and

Collection Law ("WPCL"). The case was arbitrated and an award entered for the plaintiff. The defendants requested a trial de novo by this Court on September 4, 2002. On the same day, they offered to settle the case for \$15,000 total, including the plaintiff's award, attorney's fees, and costs. Mr. Mantz rejected the offer.

At the bench trial on October 31, 2002, the plaintiff requested a total of **\$23,498.43** (twenty-three thousand four hundred ninety-eight dollars and forty-three cents) in overtime pay under FLSA, regular pay under WPCL, and liquidated damages under both statutes. Plaintiff's Trial Exhibit 4a; Trial Transcript at 227-28. In addition, he requested attorney's fees and costs. Plaintiff's Amended Complaint at 5-6.

The Court found that the defendants had violated the FLSA and WPCL, and awarded Mr. Mantz overtime and regular pay. It found that liquidated damages were appropriate only for the FLSA violation, however, and that the statute **of** limitations barred the overtime pay for five of the **14** months it was claimed. The Court then awarded Mr. Mantz \$5,374.26 (five thousand three hundred seventy-four dollars and twenty-six cents) in overtime pay, regular pay and liquidated damages. It also awarded him reasonable attorney's fees and costs under the WPCL and **FLSA**.

The plaintiff then filed the instant petition for **\$31,083.00** (thirty-one thousand eighty-three dollars) in

attorney's fees and **\$1,545.99** (fifteen hundred forty-five dollars and ninety-nine cents) in costs pursuant to **29 U.S.C. § 216(b)** of the FLSA.

11. Analysis

The defendants do not dispute that Section 216(b) grants the plaintiff reasonable attorney's fees and costs. They raise several issues, however. First, they argue that the plaintiff counsel's hourly rate, certain attorney's fees and the overall attorney's fees are not reasonable. Second, they argue that the plaintiff's alleged costs of litigation are not reasonable. Third, they argue that the defendants' final settlement offer on September 4, 2002, terminated the plaintiff's entitlement to attorney's fees and costs incurred after the offer was made, pursuant to Fed. R. Civ. P. 68.

A. Reasonableness of Counsel's Hourly Rate and Fees

Attorney's fees awarded under the FLSA are initially calculated using the "lodestar" formula: the number of hours reasonably expended are multiplied by a reasonable hourly rate. Loughner v. University of Pittsburgh, 260 F.3d 173, 177 (3d Cir. 2001) (citing Hensley et al. v. Eckerhart et al., 461 U.S. 424 (1983)).

1. Reasonableness of the Hours Expended

In calculating the number **of** hours used to determine the lodestar, this Court must exclude hours that were not "reasonably expended." Hours are unreasonably expended when they appear to be excessive or redundant, when a case is overstaffed, or when the plaintiff's attorney has otherwise not exercised billing judgment. Hensley, 461 U.S. at 434; Loughner, 260 F.3d at 178.

The Court can, however, exclude hours charged only if the defendants challenge hours with sufficient specificity to give the plaintiff notice, however. Rode v. Dellaciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). It cannot "decrease a fee award based on factors not raised at all by the adverse party." Id. If the Court does reduce hours, it should specify the number of hours that would be reasonable and why so the appellate court can review its decisions. Id. at 1187 (remanding an order for attorney's fees to the district court for such a specification and explanation).

After considering the defendants' objections to specific hours billed by the plaintiff's attorney and his assistant, Louis Agre and Randall Shupp, the Court concludes that the plaintiff seeks fees for time that was unreasonably expended.

Specifically, the Court finds that the following hours were unreasonably spent:

a. 0.6 hour (six-tenths of an hour) billed by Mr. Agre for serving the complaint and preparing a return of service. An attorney should not charge for serving the complaint and the Clerk's Office prepares the return of service.

b. 6.1 hours billed by Mr. Agre for preparing a request for the production of documents and interrogatories. These hours are excessive for two reasons. First, the request and interrogatories are simplistic in nature, and the plaintiff's counsel claims familiarity with FLSA prior to this case. Second, there are duplicate entries for this task on May 14, 2002, for 3.0 and 3.1 hours each; the plaintiff conceded in his reply brief that one of these entries may have been a duplicate or an entry from another date. The preparation of this discovery should not have taken any longer than one hour.

c. 3.4 hours total billed by Mr. Agre for reviewing deposition transcripts, 1.9 hours on July 26 and 1.5 hours on July 31, 2002. The Court finds that 1.5 hours is more than enough time to review the transcripts. It should not take 3.4 hours to review two transcripts of depositions counsel attended in an FLSA case.

d. 8.0 hours billed by Mr. Agre for preparing a motion to amend and amended complaint from January 18 through 25, 2002. The motion was straightforward and unopposed. The amended complaint was virtually identical to the original complaint

except it provided for an "opt-in" class action under the FLSA. Only one other plaintiff, Stephanie Harris, opted in; her claim was settled before arbitration or trial. This makes any time spent creating the opt-in unproductive. The Court deducts all eight hours from its calculations.

e. 6.4 hours billed by Mr. Agre and 23.35 hours by Mr. Shupp for preparing a spreadsheet.

In recent correspondence to the Court, the plaintiff's attorney indicated that all the damages calculations were calculated using a spreadsheet that he had developed for other litigation. This spreadsheet allows him to plug in numbers and obtain a damages calculation.

Despite the simplicity with which this spreadsheet must allow him to calculate damages, the plaintiff's attorney billed 6.4 hours for preparing the spreadsheet - 3.9 hours on June 26, 2002, 1.1 hours on July 29, 2002, and another 1.4 hours on August 6 and 7, 2002. His assistant, Mr. Shupp, billed another 23.35 hours for preparing and revising the spreadsheet. All this time cannot have been reasonably expended to plug numbers into an existing spreadsheet and review them.

The Court allows **Mr.** Agre to bill one hour for reviewing the spreadsheet, and allows Mr. Shupp to bill 10 hours for entering and correcting the data on the spreadsheet. The Court found the plaintiff's spreadsheets unhelpful; it drew data

only from the defendants' spreadsheets to create its own spreadsheet for its decision.

f. 9.7 hours by Mr. Shupp for tasks relating to the spreadsheet's presentation during the arbitration and for trial. In addition to the 23.35 hours on spreadsheet preparation, Mr. Shupp also billed 1 hour for "document preparation for deposition," 3.2 hours for "preparation for arbitration testimony, document preparation for arbitration," and 5.5 hours for participating in the arbitration. This time is either (1) clerical in nature or (2) related to the spreadsheet's presentation at the arbitration. The time spent on clerical tasks should not reasonably be billed as an attorney's fee.

g. 6.4 hours billed by Mr. Agre for preparing an arbitration brief. Given that counsel claimed familiarity with FLSA, this is an exorbitant amount of time. The Court allows only two hours for this task.

h. 8.9 hours by Mr. Agre for preparing his first fee petition from August 15 to August 28, 2002. This petition was filed immediately after the arbitrators handed down an award for the plaintiff, before the defendants' request for a trial de novo. The petition was premature.

h. 16.6 hours by Mr. Agre for preparing his second fee petition from March 22 to 28, 2003. This petition is essentially duplicative of the material which counsel prepared

for the first petition. The Court allows a total of six hours of time for preparation of the fee petition.

2. Reasonableness of the Hourly Rate

The plaintiff must establish that his attorney's requested hourly rate has been calculated according to the prevailing market rates in the relevant community. Loughner, 260 F.3d at 180. He must establish this with satisfactory evidence in addition to his attorney's own affidavit. The starting point for this analysis is the attorney's usual billing rate, but this is not dispositive. Id. A district court "should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Id. (citing Rode, 892 F.2d at 1183).

In 2001, the Loughner Court affirmed a district court's holding that \$250 an hour was excessive for all the tasks performed by the attorney based on the type of claims asserted in the action, which were FLSA and Pennsylvania WPCL claims. Id.

In support of his claim that he should receive \$250 per hour, the plaintiff's attorney attached the Community Legal Services' Fees Schedule for Philadelphia, Pennsylvania. It states that attorneys with 16-20 years' experience receive \$250-\$270 per hour; Mr. Agre has 16 years' experience. He also

attached affidavits by attorneys Robert P. Curley and Angus Love. Mr. Curley stated that the reasonable hourly fee for an attorney with ten years' experience was \$225 to \$275 per hour; Mr. Love stated that the reasonable hourly fee for an attorney with fifteen years' experience was \$225 to \$275 per hour. Neither attorney made observations specific to Mr. Agre's work in this case. He also attached an October 2000 decision by the Honorable Stanley S. Brotman of the District of New Jersey awarding him \$225 per hour in a **FLSA** cases when the defendants were actively litigating the action and \$150 per hour when the defendants had discontinued actively litigating the action. Judge Brotman also found that \$40 per hour was a reasonable rate for the paralegals' time and \$60 per hour was a reasonable rate for another attorney's time.

Given the relative simplicity of this case, its barely successful outcome when one considers the amount of money sought by the plaintiff, and Mr. Agre's skill as observed by this Court at trial and in the pleadings he has submitted, the Court exercises its discretion to apply an hourly rate of \$200 for Mr. Agre's work. This was a straightforward case that should have been litigated singly and efficiently. It was not.

The Court also exercises its discretion to apply an hourly rate of \$40 for Mr. Shupp's work. His work was more that of a paralegal than another attorney; most of his work was

plugging numbers into a spreadsheet. And those spreadsheets were not helpful to the Court, as noted earlier.

3. Calculating the Lodestar

Multiplying the hours it finds reasonably expended by the hourly rate it has determined is reasonable, the Court calculates the lodestar for the attorney's fees it awards the plaintiff. Loughner, 260 F.3d at 177.

The Court multiplies the hours of Mr. Agre and Mr. Shupp's time that was reasonably spent by their respective reasonable hourly rates.' The lodestar is then **\$14,360.00** (fourteen thousand three hundred sixty dollars).

B. Reasonableness of Litigation Costs

Costs are awarded if the party requesting them provides a reasonable basis for the expenditures being reimbursed. Otherwise, an award of costs by the court cannot be supported. Id. at 181.

The defendants object to the costs of the copies because there is insufficient information to show the purpose or nature of the copies, or a rate per copy. They also object to the "unspecified" telephone call. The Court finds these objections unpersuasive because they appear to require the plaintiff to make a very detailed description of his costs. It

¹ See Appendix A for all the calculations.

finds all the costs, a total of \$1,545.99 (fifteen hundred forty-five dollars and ninety-nine cents), asserted by the plaintiff are reasonable.²

C. Effect of the Defendants' Offer Under Rule 68

Ordinarily, under the Court's decision pursuant to Section 216(b), the plaintiff would be entitled to all reasonable attorney's fees and costs. The defendants argue that their September 4, 2002, offer acted as an offer of judgment under Rule 68, which would cut off the plaintiff's entitlement to any fees and costs accrued thereafter.

When a party defending against a claim makes an offer to settle the claim more than ten days before trial, Rule 68³ dictates that the offering party is not liable for costs accruing after the date of the offer if the offer is not accepted and the ultimate judgment is not more favorable than what was offered.

² These costs are calculated on a spreadsheet in Appendix A. The court simply adds together all the costs asserted by the plaintiff to find the total costs it should award.

³ Rule 68 states in relevant part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon an adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. ... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Wright, Miller & Marcus: Federal Practice and Procedure Civil 2d § 3001.

The defendants' argument raises the question whether Rule 68 acts to cut off attorney's fees in a FLSA case. See, e.g., Dayton Haworth et al. v. State of Nevada et al., 56 F.3d 1048, 1051 (9th Cir. 1995) (citing Fegley); Fegley v. Higgins, 19 F.3d 1126, 1135 (6th Cir. 1994), cert. denied 513 U.S. 817 (1994); see also Moore's Federal Practice, Civil § 54.102 n. 36. The Court need not decide that issue if the ultimate judgment, reasonable fees and costs were more favorable than the defendants' offer.

To determine if the judgment actually awarded the plaintiff is more favorable than the defendants' lump-sum offer of judgment, the Court must compare the lump-sum offer with the award of judgment plus the reasonable costs and fees the plaintiff incurred as of the date of the offer. The method ensures that an offer meant to include an award, costs and fees is compared to a judgment that includes the actual award, costs and fees.

This method is the one proposed by the defendants in their opposition. See Dalal v. Alliant Techsystems, Inc. et al., 182 F.3d 757, 761-62 (10th Cir. 1999) (affirming the district court's calculation when the court first calculated the costs it would award the plaintiff, then determined if an offer functioned

under Rule 68 to cut off reimbursement of future costs); ~~see also~~ Scheeler v. Crane Co., 21 F.3d 791, 793 (8th Cir. 1994); Marryshow v. Flynn, 986 F.2d 689, 692 (4th Cir. 1993); Alfonso v. Aufiero, 66 F. Supp. 2d 183, 202-03 (D. Mass. 1999); Wright, Miller & Marcus, Federal Practice and Procedure, Civil 2d § 3006.1.

The Court calculates the plaintiff's attorney's fees before September 4, 2002, to be \$9,894.00 (nine thousand eight hundred and ninety-four dollars); and its costs before September 4, 2002 to be \$1,306.54 (one thousand three hundred six dollars and fifty-four cents).⁴ Adding \$5,374.26 (five thousand three hundred seventy-four dollars and twenty-six cents) awarded in damages to these fees and costs, the total is \$16,574.80 (sixteen thousand five hundred seventy-four dollars and eighty cents). This is more than the \$15,000 offered by the defendants on September 4, 2002. Therefore, even if Rule 68 were applicable, it does not bar recovery of costs after that date.

D. Reasonableness of the Attorney's Fees Given the Offer

Although Rule 68 would not bar the recovery of attorney's fees after the defendants' offer in this case, the Court can consider whether the attorney fees that the plaintiff

⁴ These figures were calculated using the reasonable costs and fees asserted by the plaintiff until September 4, 2002, when the offer of judgment was made. See Appendix A.

requests are reasonable after he receives such an offer. See, e.g., Dalal v. Alliant Techsystems, Inc., et al., 182 F.3d 757, 761 (10th Cir. 1999). In determining what fee is reasonable in this circumstance, this Court can take into consideration the amount of the Rule 68 offer, the stage of the litigation at which the offer was made, what services were rendered thereafter, the amount obtained by judgment, and whether it was reasonable to continue litigating the case after the Rule 68 settlement offer was made. See id. (citing Dayton Haworth et al. v. Nevada et al., 56 F.3d 1048, 1052-53 (9th Cir. 1995)).

This is an independent basis on which to reject the amount of the attorney's fees sought by the plaintiff. **If** the Court had not already decreased the amount **of** the requested fees under the general reasonableness analysis, it would do so under this approach.

An appropriate order follows.

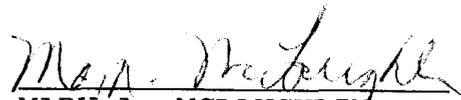
IN THE UNITED STATES DISTRICT COURT
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PETER MAISTZ :
 :
 v. : NO. 01-CV-6351
 :
 STEVEN SINGER JEWELERS and
 STEVEN SINGER

ORDER

AND NOW, this 7th day of May, 2003, upon consideration of the Plaintiff's Application for Attorney's Fees Pursuant to 28 U.S.C. § 216(b) (Docket No. 30), the Defendants' opposition thereto, and the Plaintiff's reply to the opposition, as well as this Court's decision dated March 24, 2003, it is hereby Ordered that the Plaintiff is awarded \$14,360.00 (fourteen thousand three hundred sixty dollars) in attorney's fees and \$1,545.99 (one thousand five hundred forty-five dollars and ninety-nine cents) for costs of the action, a total of \$15,905.99 (fifteen thousand nine hundred and five dollars and ninety-nine cents), for the reasons given in a memorandum of today's date. This case is closed.

BY THE COURT:


MARY A. MCLAUGHLIN, J.

ATTORNEY FEES COSTS
Mantz v. Steven Singer Jewelers and Steven Singer
(01-CV-6351)

APPENDIX A

Date	Service Rendered	Hours	Attorney	Rate per Hour	Amount Claimed (Hours x Rate)
12/11/2001	Phone call with client, legal research re: salary exemption	1.7	Agre	\$200.00	\$340.00
12/12/2001	Phone call with client, legal research re: salary exemption, preparation of complaint and civil cover sheets	3.2	Agre	\$200.00	\$640.00
12/13/2001	Revision to complaint, meeting with client	1.4	Agre	\$200.00	\$280.00
5/14/2002	Preparation of request for production of documents, interrogatories, review of file	1.0	Agre	\$200.00	\$200.00
	Preparation of initial disclosures	0.7	Agre	\$200.00	\$140.00
5/29/2002	Finalization and filing of interrogatories and request for documents, corresponded with defense counsel, receipt/review of offer of judgment	1.5	Agre	\$200.00	\$300.00
6/14/2002	Receipt and review of defendants' initial disclosure	0.6	Agre	\$200.00	\$120.00
6/26/2002	Meeting with client	1.7	Agre	\$200.00	\$340.00
	Review of calendars and paychecks, preparation of spreadsheet, enter amounts on spreadsheet	1.0	Agre	\$200.00	\$200.00
7/2/2002	Meeting with Randall Shupp re: damages	0.4	Agre	\$200.00	\$80.00
	Preparation of spreadsheets	1.1	Shupp	\$40.00	\$44.00
7/8/2002	Revision to spreadsheet, receipt/review of interrogatory answers and request for production of documents, preparation for deposition, meeting with client	7.5	Agre	\$200.00	\$1,500.00
	Revision to spreadsheet. interview client	1.75	Shupp	\$40.00	\$70.00
	Document preparation for deposition	1.0	Shupp	\$40.00	\$40.00
7/9/2002	Preparation for and attendance at deposition, legal research re: speculative damages	8.0	Agre	\$200.00	\$1,600.00
7/10/2002	Legal research re: fluctuating versus set hours salaried workweek	1.9	Agre	\$200.00	\$380.00
7/11/2002	Legal research re: breach of contract and speculative damages	2.2	Agre	\$200.00	\$440.00
7/26/2002	Phone call with opposing counsel, review of interrogatory answers	0.5	Agre	\$200.00	\$100.00
7/29/2002	Phone call/correspondence with opposing counsel re: damages and offer of judgment	0.3	Agre	\$200.00	\$60.00
7/31/2002	Review of Singer's deposition transcript	1.5	Agre	\$200.00	\$300.00
8/1/2002	Legal research re: motion for summary judgment	1.1	Agre	\$200.00	\$220.00
8/7/2002	Preparation of arbitration brief	2.0	Agre	\$200.00	\$400.00
	Revision to spreadsheets, interview client	0.5	Shupp	\$40.00	\$20.00
8/13/2002	Preparation for arbitration, meeting with client	4.9	Agre	\$200.00	\$980.00
8/14/2002	Preparation for, travel to and from, and attendance at arbitration	5.5	Agre	\$200.00	\$1,100.00
10/8/2002	Preparation of, revision to plaintiff's damages calculations spreadsheet	2.75	Shupp	\$40.00	\$110.00

ATTORNEY FEES COSTS
Mantz v. Steven Singer Jewelers and Steven Singer
(01-CV-6351)

APPENDIX A

10/9/2002	Preparation of. revision to plaintiff's damages calculations spreadsheet: phone call with client	2.9	Shupp	\$40.00	\$1 16.00
10/25/2002	Preparation for trial, legal research for and preparation of pre-trial memo, preparation of trial exhibits, meeting with copy company	1.9	Agre	\$200.00	\$380.00
10/28/2002	Phone call with client	0.3	Agre	\$200.00	\$60.00
10/29/2002	Trial preparation, phone calls with opposing counsel, client, witness	6.9	Agre	\$200.00	\$1,380.00
12/2/2002	Telephone call with Dep't of Labor/Industry, receipt/review of Accu-Weather case	0.6	Agre	\$200.00	\$120.00
12/3/2003	Correspondence with the Court	0.3	Agre	\$200.00	\$60.00
3/14/2003	Correspondence with the Court	0.4	Agre	\$200.00	\$80.00
3/18/2003	Receipt/review of hours breakdown, set-up and prep. of spreadsheet	1.9	Agre	\$200.00	\$380.00
3/19/2003	Receipt/review of correspondence from opposing counsel	0.2	Agre	\$200.00	\$40.00
3/21/2003	Receipt/review of Judge's decision, telephone call with client	0.6	Agre	\$200.00	\$120.00
3/22/2003	Preparation of second fee petition	6.0	Agre	\$200.00	\$1,200.00
Total hours:		79.80		Total fees:	\$14,360.00
Total hours to September 4, 2002:		52.95		Fees to Sept. 4, 2002:	\$9,894.00

LITIGATION COSTS		
Date	Description	cost
12/13/2001	Filing fee	\$150.00
1/25/2002	Copies	\$8.50
1/28/2002	Copies	\$16.75
3/7/2002	Copies	\$6.00
5/29/2002	Copies	\$13.50
7/30/2002	Singer Transcript	\$718.20
	Mantz Transcript	\$238.50
8/13/2002	Copies for arbitration	\$105.25
8/28/2002	Copies of fee petition and attachments	\$48.75
	Long distance	\$1.09
10/1/2002	Copies	\$25.50
10/28/2002	Copies of Singer Jewelers calendars	\$120.90
	Copies of trial exhibits	\$36.50
10/30/2002	Mantz trial --taxi to and from: lunch for Peter and Randy	\$25.80
3/28/2003	Copies	\$30.75
		\$1,545.99
		\$1,306.54

TOTAL FEES and COSTS: \$15,905.99