

A Case Study: Mandated Court Approval of Settlement and Related Attorney Fees

by Thomas E.L. Dewey

There are circumstances in which the parties must obtain court approval to dismiss an action, and by extension, the parties' settlement agreement. Courts consider a variety of factors when the parties request approval of a settlement agreement, attorney fees provided in a settlement agreement, and whether a court will even allow the parties to settle their dispute at the current stage of litigation. A case decided in the Eastern District of New York last month provides an excellent demonstration on how these factors may play out before a court, both for the circumstances explicitly relied on by the court, and as speculated in this article's practice tips, the optics not explicitly referenced by the court. Although the court ultimately approved the parties' settlement agreement, it reapportioned the amounts due under the agreement between the plaintiff and his attorneys.

Wage and Hour Action

In January 2017, plaintiff commenced an action against his employer, a meat distribution business, for claims pursuant to the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). *Abreu v. Congregation Yetev Lev D'Satmar Meats & Poultry*, No. 17-cv-272, 2019 WL 2526087, at *1 (E.D.N.Y. June 19, 2019). Plaintiff was employed as a meat packer and delivery worker for defendant for over three years and alleged that he was typically required to work approximately 60 hours per week with no overtime pay in excess of the standard 40-hour week, in violation of applicable law. (During the course of litigation, the parties entered into various stipulations that added and dismissed certain defendants. *Id.* at *1-2.) After approximately a year and a half of litigation, the parties agreed to resolve their dispute and submitted a motion for the court's approval of the parties' settlement agreement in August 2018, attaching the settlement agreement as an exhibit. *Id.* at *2.

The parties agreed to settle the action for a total sum of \$25,000, of which \$13,000 would be paid to plaintiff's counsel. The amount payable to plaintiff's counsel included attorney fees and expenses consisting of the filing and service fees. In support of the approval motion, plaintiff's counsel also attached an invoice setting forth the law firm's time and billing records and an estimate of plaintiff's maximum recovery allowable given plaintiff's claims. Plaintiff's counsel estimated a maximum possible recover of \$25,362.50 for alleged overtime and notice violations of the NYLL. Plaintiff agreed to release claims brought under the FLSA and NYLL. *Id.* at *2.

Factors Considered for Court Approval

The court (Matsumoto, J.) observed that stipulated dismissals under Federal Rule of Civil Procedure 41

that settle FLSA claims require approval by the district court or Department of Labor (*Cheeks v. Freeport Pancake House*, 796 F.3d 199, 206 (2d Cir. 2015)), and the parties must demonstrate their agreement is “fair and reasonable” to satisfy the court. *Id.* at *2. The court also considers the reasonableness of the attorney fees portion of a proposed settlement. *Id.* at *2. The court provided both the factors in determining the reasonableness of a FLSA settlement and factors that militate against court approval. *Id.* at *3 (citing *Wolinsky* at 900 F. Supp. 2d at 336. The Eastern District of New York has recently emphasized the importance of public access to FLSA settlements due to the public policies served by the FLSA, and has even denied a joint motion for settlement approval if the settlement agreement is not publicly filed with the court. See *Jones v. Smith*, 319 F. Supp.3d 619, 624-26 (E.D.N.Y. 2018)).

As referenced above, Judge Matsumoto ultimately approved the settlement amount offered; however, she modified the amounts apportioned between plaintiff and his attorneys. While the bulk of her opinion was devoted to the reasonableness of the attorney fees in the proposed settlement agreement, the court’s consideration of the settlement amount due to the plaintiff was also illuminating. The court held plaintiff’s 47% recovery of his attorney’s maximum allowable recovery was “unreasonable” due to the lack of difficult legal issues, despite the ordinary risks associated with litigation. *Id.* at *6. (The court ultimately decided a 54% recovery of the maximum estimated recovery is reasonable.) The court held that this percentage reflected plaintiff’s counsel’s unsuccessful attempt to obtain collective action certification, amend the complaint and seek a certificate of default. Nevertheless, the court held the settlement was achieved at arms-length, the releases were reasonably tailored and there were no onerous confidentiality or non-disparagement provisions. *Id.* at *6.

Lodestar Method and Reasonable Attorney Billing

The court reapportioned the additional amounts attributed to plaintiff from the settlement by cutting his attorney fees. The court applied the “lodestar” method to calculate plaintiff’s attorney fees, which is the number of attorney hours reasonably expended multiplied by a reasonable hourly rate. *Id.* at *3. The 12 factors considered for a reasonable hourly rate are:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the attorney’s customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at *3 (citations omitted).

The “range of reasonableness” for attorney fees in an individual FLSA action is greater than a collective

or class action. Id. at *4. Plaintiff's counsel submitted hourly rates of \$350 for counsel, \$300 for a fourth-year associate, \$250 for a third-year second associate and \$125 each for two paralegals. Id. at *5. The court first determined that the reasonable hourly rates in this action should be "within, and not at the top end of" the range of fees in this district due to the lack of difficult legal issues, evidence plaintiff's counsel was precluded from taking other matters and the two-year client relationship only required "as needed communications," not ongoing legal advice. Id. at *4. The court also observed the magistrate judge's concerns over plaintiff's counsel's motivation after he requested collective action certification despite the lack of responses to his statutorily required notice.

Although the court noted plaintiff's counsel's 10 years of experience litigating before the Eastern District of New York, including wage and hour division actions, it nevertheless cut counsel's requested rate of \$350 to \$300, which is the "higher end of hourly rates awarded to partners in this district but is more clearly within the range typically awarded." Id. at *5. The court similarly cut the rates of plaintiff's two associate representatives, which the court found was excessive for a mid-level associate and junior associate, respectively. The court noted there was no information regarding the experience or qualification of the paralegals and cut the rate for the paralegals to \$85 per hour. Id. at *5.

The court then considered the reasonableness of the hours billed, stating that courts may review bills on an item-by-item basis and reduce attorney fees for duplicative, vague or excessive billing entries. Id. at *5. The court cut 2.8 hours billed for drafting a certificate of default which was rendered moot by plaintiff's counsel's decision to amend the complaint. Id. at *6. The court also found 20 hours billed for drafting and revising a 29 U.S.C. §216(b) motion and notice that led to no additional plaintiffs joining in a collective action and 4.3 hours billed for an amended complaint were excessive. The court came to the same conclusion for time spent on the amended complaint in light of the lack of novel or difficult legal questions. Thus, the court reduced the bills attributable to those tasks by 75%, or 6.1 hours billed by a junior associate and 1.9 hours billed by a paralegal. Id. at *6.

After calculating these changes in the lodestar method, the court concluded that plaintiff's counsel was entitled to \$10,570.00, and reduced plaintiff's request of \$12,504 in attorney fees to that sum. The court also allowed plaintiff's counsel to recover the \$496 in claimed expenses, finding that it was both sufficiently supported and typical of such an action. Id. at *6. Thus, the court approved the settlement, but modified the distribution of its described funds as \$13,934 to plaintiff and \$10,570 to his attorneys. Id. at *7.

Practice Tips

This EDNY decision offers crucial insight for a practitioner seeking approval of a settlement that includes attorney fees in the district. Judge Matsumoto summarized the factors courts consider for reasonableness of a settlement; barriers to approval of a FLSA settlement; reasonable rates for different levels of

legal representation; and factors considered for the reasonableness of time billed. When seeking attorney fees, a practitioner should demonstrate the maximum allowable recovery; the complexity of legal and factual issues involved; the skill required to grapple with those issues; the experience and relevant knowledge of the attorneys and support staff involved; the nature and length of the relationship with the client; and the effect of the representation in the matter on the firm's business and time (i.e., turning down work or reallocating resources from other matters to litigate the matter the practitioner now seeks to settle). A practitioner should also be aware of additional factors that are likely beyond her control, such as the likelihood of recurrence of the circumstances that precipitated the litigation, other potential plaintiffs, the prevailing billing rates and hours for the subject matter at issue in the relevant jurisdiction, and circumstances regarding the opposing party that may hinder settlement (i.e., repeat offender of the FLSA or NYLL). Moreover, although not an issue in this case, courts consider unreasonable confidentiality or non-disparagement provisions as barriers to approval of a settlement.

However, beyond the court's explicit recitation and application of prevailing standards for approval of settlements and attorney fees, there are two additional lessons we can draw from this decision.

First, a practitioner should take care in seeking fees related to strategic decisions that were ultimately not implemented, notably due to counsel's own decision-making. Here, the court cut significant time from the attorney fees application related to a request for a collective action that received no response from additional potential plaintiffs and that plaintiff's counsel mooted himself by filing an amended complaint. The court noted that this time was excessive largely due to plaintiff's counsel's own decision-making, as well as the lack of complexity of legal issues.

Second, although not explicitly noted by the court, a practitioner should be mindful of the optics of a proposed settlement that apportions a larger percentage of the settlement proceeds to a plaintiff's counsel than the actual client. This concern is amplified where the attorney seeking fees represents a single client and the legal and factual issues in the litigation are not especially complex. The court seemed to allude to this concern, finding that a plaintiff receiving 47% of the maximum allowable recovery was unreasonable but raising that apportionment to 54% makes it a reasonable settlement. Perhaps the reasonableness of this recovery was also connected to the client receiving 56% of the settlement proceeds rather than the 48% requested in the parties' offered settlement agreement.

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