In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2952

DANIEL KOCH, *et al.*,

Plaintiffs-Appellants,

v.

JERRY W. BAILEY TRUCKING, INC., and
ESTATE OF JERRY W. BAILEY,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Fort Wayne Division.
No. 1:14-CV-72-HAB — **Holly A. Brady**, *Judge*.

ARGUED MAY 17, 2022 — DECIDED OCTOBER 18, 2022

Before SYKES, *Chief Judge*, and KIRSCH and JACKSON-AKIWUMI, *Circuit Judges*.

JACKSON-AKIWUMI, *Circuit Judge*. The appellants in this case are truck drivers who obtained settlements from their former employer for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), and Indiana wage laws, IND. CODE § 22-2-5, -9. This appeal, however, is about the district court's award of attorney's fees to the truck drivers' lawyer,

Ronald Weldy. The truck drivers contend that the award of attorney's fees should have been higher. The defendants insist that the district court's award was reasonable and, even if it was not, the employees waived any challenge to the fee award when they stipulated to the filing of a satisfaction of judgment.

We affirm. The district court did not abuse its discretion when it lowered the fee award after it concluded that Weldy overbilled his hours and the employees obtained only partial success on the merits.

I

Jerry W. Bailey Trucking, Inc., provides services for hauling debris, rocks, and other materials. During the time relevant to this case, the company owned about 40 dump trucks, all of them in use during peak seasons. Two drivers sued the company and its owners, claiming that defendants violated the FLSA and Indiana wage laws by failing to pay drivers for time spent working before and after hauling jobs.

A. Certification, decertification, and settlements

The employees who launched this litigation proposed to represent a collective action under 29 U.S.C. § 216(b) for the federal wage claims, and a class action under Rule 23 of the Federal Rules of Civil Procedure for the state-law claims.[1]

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[1] A "collective action" under § 216(b) and a "class action" under Rule 23 are similar in that both allow one or more lead plaintiffs to sue on behalf of a group of similarly aggrieved individuals. But whereas a class action automatically includes all members of a class who do not affirmatively opt out, a collective action under the FLSA includes only employees who affirmatively opt in to the collective. *Smith v. Pro. Transp., Inc.*, 5 F.4th 700, 702 (7th Cir. 2021). To accommodate § 216(b)'s opt-in requirement, the

Even though defendants stipulated to both class certification under Rule 23 and conditional certification of the FLSA collective (while reserving their right to later move for decertification), the employees' first attempt at certification was still unsuccessful. Unsatisfied with the parties' stipulation, the district court ordered the parties to provide supplemental filings on two issues. First, the court required the parties to explicitly define the claims, issues, and defenses to be certified for class-wide resolution, as required by Rule 23(c)(1)(B). Second, the court required additional information about whether Weldy could adequately perform as class counsel, as required by Rule 23(g). Regarding the latter concern, the court noted that the Indiana Supreme Court had only recently reinstated Weldy's license to practice law following a disciplinary suspension. After receiving the parties' supplements, the court concluded that Weldy's disciplinary record precluded him from representing the class and denied certification.

The court eventually granted Weldy's motion for reconsideration, after Weldy provided more detail about his litigation experience and cited examples of cases in which he acted as class counsel after his suspension and reinstatement. Now convinced that Weldy could provide adequate representation, the court conditionally certified an FLSA collective and certified a Rule 23 class. The class was defined to include truck

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district court applied a two-step process in which plaintiffs sought "conditional certification" and sent notice to the putative collective members, after which defendants had an opportunity to seek decertification if too few employees opted in. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018) (collecting cases applying this process); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7B FEDERAL PRACTICE & PROCEDURE § 1807 (3d ed. 2005). The intricacies of this process, and how it differs from class certification under Rule 23, are not important to this appeal.

drivers who worked for defendants during a period between 2012 and 2013, while the collective reached back to 2011. Among other things, the court found that the proposed class was sufficiently numerous under Rule 23(a) because the named plaintiffs testified that Bailey Trucking generally employed about 60 truckers at any given time.

But almost four years later, and after the parties had already briefed cross-motions for summary judgment, the court granted defendants' motion to decertify the class and collective. Contrary to the employees' initial representation of a class size of more than 60 truckers, the employees were ultimately able to identify only 16 individuals who met the class definition. The collective action, which included only 14 truckers who had opted-in, was likewise too small for collective resolution to provide any efficiency above simple joinder.

After decertification, the court struck as moot the existing motions for summary judgment. The two employees who initiated the suit then amended their complaint to add nine plaintiffs who had been members of the class, collective, or both, after which the parties engaged in a second round of summary judgment briefing.

The court granted partial summary judgment for the employees, concluding that the company had violated federal and state wage laws. But it concluded that a genuine dispute existed about two issues that would affect the size of damages: (1) whether defendants' violation was willful, which would extend the FLSA's statute of limitations from two years to three, 29 U.S.C. § 255(a); and (2) whether defendants acted in bad faith, which would unlock additional liquidated damages under Indiana law, IND. CODE § 22-2-5-2.

Following the court's ruling on summary judgment, the parties negotiated settlements for each of the remaining plaintiffs and submitted them to the court for approval. This step was necessary because a settlement is a contract, and the FLSA restricts one's ability to contract for wages below the minimum wage, so any settlement of an FLSA claim requires a judicial imprimatur. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986). Here is a chart showing the damages each plaintiff claimed at summary judgment, as compared against how much each obtained in the negotiated settlements:

	Claimed Damages	**Settlement**
	$ 9,380.46	$ 6,500.00
	$ 8,702.64	$ 6,172.00
	$ 11,581.82	$ 4,400.00
	$ 11,581.42	$ 6,700.00
	$ 6,776.65	$ 3,100.00
	$ 6,805.50	$ 4,955.00
	$ 4,039.88	$ 673.31
	$ 22,383.80	$ 15,000.00
	$ 4,113.57	$ 2,742.38
	$ 9,483.67	$ 5,200.00
	$ 8,683.73	$ 5,200.00
Total	**$ 103,533.14**	**$ 60,642.69**

For the most part, the employees' settlements reflected a full recovery of claimed damages for the two-year period preceding suit, along with a partial recovery for the third year of damages that would have been available if the employees proved a willful violation of the FLSA. The court approved the settlements, concluding that an immediate partial recovery outweighed the time and risk of trial.

B. Attorney's fees litigation and notice of satisfaction of judgment

The employees petitioned for an award of more than $200,000 in attorney's fees pursuant to the FLSA's fee-shifting provision. *See* 29 U.S.C. § 216(b). Their request reflected a billing rate of $450 per hour for about 416 hours of work performed by Weldy, plus additional hours billed by Weldy's associate at $200 per hour and paralegal at $150 per hour.

The district court granted in part the fee petition. As the employees requested, the court applied the "lodestar" method to calculate attorney's fees by determining Weldy's reasonable hourly rate and multiplying it by the hours he reasonably expended on the litigation. *See, e.g., Nichols v. Illinois Dep't of Transportation*, 4 F.4th 437, 441 (7th Cir. 2021). But the court disagreed with the employees' calculations and made three modifications.

First, the court concluded that Weldy failed to support his requested billing rate of $450 per hour, and that a $350 rate was more reasonable. Weldy does not challenge this part of the ruling on appeal.

Second, the court struck some of Weldy's billed hours. The court reasoned that Weldy should not recover fees for time he spent litigating his own adequacy to represent the class,

because that was time spent furthering his own interests rather than that of his clients. It then found that Weldy had billed an excessive number of hours for time he and his paralegal spent calculating and double-checking each employee's damages, including several truckers who did not ultimately join the suit. The court also found that Weldy billed an unreasonable number of hours for time spent litigating two rounds of summary judgment, particularly since the second round of briefing "was largely a cut-and-paste version of the first." After trimming these hours, the court calculated a lodestar figure of $134,940.

Third, the court reduced the lodestar figure to account for Weldy's only partial success in litigating the case. It explained that Weldy failed in the suit's primary goal of obtaining a judgment on behalf of a class and collective. Moreover, the court continued, the final settlements were only a fraction of the damages that the employees had claimed at summary judgment. It thus cut the lodestar figure of $134,940 by about half, awarding only $70,000.

In response to the fees order, defendants mailed a check to Weldy. Defense counsel also asked Weldy whether Weldy would oppose defendants' filing of a satisfaction of judgment. Weldy said he had no objection, and defendants filed a "notice of satisfaction of judgment and order" containing language agreed to by the parties:

> Come now the remaining Defendants, Jerry W. Bailey Trucking, Inc. and the Estate of Jerry W. Bailey (deceased), both by counsel, Beers Mallers Backs & Salin, LLP, and notify the Court and the clerk that the Defendants have paid in full all sums due under the Judgment entered

> (March 12, 2021) [Doc 260] and the Order and Opinion on attorney fees (July 16, 2021)[Doc 278], and have therefore satisfied their obligations under the same.

Shortly after defendants filed this notice, the employees moved for reconsideration under Rules 52(b) and 59(e). But the district court concluded that the employees had waived any objection to the size of the fee award when they stipulated to defendants' notice of satisfaction. Relying on *U.S. for Use & Benefit of H & S Indus., Inc. v. F.D. Rich Co.*, 525 F.2d 760, 765 (7th Cir. 1975), the court reasoned that the employees had demonstrated their intention to bring the litigation to a definite conclusion. In the alternative, the court explained that the employees had not pointed to any newly discovered evidence, nor shown any manifest error of law or fact, as would be necessary to reopen the judgment. *See Robinson v. Waterman*, 1 F.4th 480, 483 (7th Cir. 2021).

The employees appeal the district court's award of attorney's fees, as well as its order denying reconsideration.

II

We review *de novo* any questions about the proper legal framework when awarding or calculating an award. *Nichols*, 4 F.4th at 441. But so long as a district court applies the correct legal standards, we "give the district court the benefit of the doubt" in exercising its discretion to award fees and determine the size of any award. *Id.* at 442 (quotation omitted). We

conclude that the district court's ruling fell well within its discretion to fashion an appropriate award.[2]

A. The district court reasonably cut counsel's billable hours

The employees first contend that the district court erred by limiting the time that Weldy could reasonably bill for various litigation tasks. The disputed billable hours fall into three categories. We address each in turn.

Time spent drafting briefs on the adequacy of class counsel: The employees first challenge the district court's decision to strike hours Weldy spent briefing his own adequacy as class counsel. The court decided that an award of fees for time spent litigating this issue was inappropriate because (1) Weldy's briefing on his adequacy as class counsel did not further the interests of the litigants, it merely furthered his own interest to serve as counsel; and (2) Weldy's disciplinary history triggered the need for extra briefing.

The employees' sole argument on appeal is that Weldy *was* fighting for the interests of his clients because the employees would not have had an opportunity to opt in to the collective if he had not obtained certification. But as the district court pointed out, different counsel could have represented the employees equally well. And in any case, the court decertified the class and collective—the employees who joined the suit ultimately did so as individual plaintiffs, a procedure for

[2] Defendants alternatively argue that the employees waived any argument regarding the size of the fee award when they stipulated to the notice of satisfaction of judgment. We need not decide any issue of wavier, however, because we conclude that the district court did not abuse its discretion when calculating the fee award and affirm the award on that basis.

which Weldy's adequacy to handle a class action was irrelevant. So overall, the time Weldy spent defending his adequacy as class counsel had little effect on the final judgment.

We do not mean to imply that class counsel should never be reimbursed for time spent litigating their own adequacy under Rule 23(g). A showing of counsel's adequacy to represent a class is a crucial step in this type of litigation; a court cannot certify a class without it. *See Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011). And by enacting the FLSA's fee-shifting provision, Congress intended to encourage lawyers to take these cases. *See* 29 U.S.C. § 216(b); *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366 (7th Cir. 2000). We see no reason why lawyers should not be encouraged to litigate the requirements for certification with the same zealousness that the legal profession expects them to litigate the substantive merits.

But here, the extra briefing on Weldy's competency as class counsel was necessary only because Weldy failed to adequately address the issue in his original motion for class certification. And Weldy should have been on notice that his adequacy might be questioned—he knew about his prior discipline, and he knew that our court had previously affirmed the denial of class certification in another case based on his inadequacy to represent a class. *See Gomez*, 649 F.3d at 592. As the district court explained, "Weldy did not come into this case with a clean slate." The court reasonably concluded that defendants should not foot the bill for Weldy's time spent defending his disciplinary history, particularly when he was ultimately unsuccessful in maintaining certification.

Time spent creating damages spreadsheets: The employees next argue that the court abused its discretion by cutting

hours that Weldy's firm spent preparing spreadsheets of each employee's lost wages. Although Weldy and his paralegal logged dozens of hours related to these spreadsheets, the court cut that time to only five hours for Weldy and five for his paralegal. The employees argue that the court should have accepted the hours, which were reasonable given the large number of paystubs and the complicated formula used to calculate overtime pay.

The employees do not address, however, the district court's main reasons for cutting these hours. Central to the court's analysis was the vague nature of Weldy's billing records. Weldy and his paralegal billed for tasks such as "entering information into excel" and time spent to "[r]eview documents produced; finalize damage spreadsheets; calculate damages for class members." The court explained that Weldy's vague billing statements made it impossible for it to determine how much time Weldy's office had spent calculating damages for nonplaintiffs. Further, the employees conceded that Weldy and his paralegal had to redo the damages calculations "on multiple occasions" because of their mistakes. Yet Weldy's vague records made it impossible to determine how much of his billed time was duplicative. District courts have discretion to strike vague billing entries that do not adequately describe the work performed. *See Montanez v. Simon*, 755 F.3d 547, 555 (7th Cir. 2014). It appears, if anything, the court gave Weldy the benefit of the doubt when it did not strike these hours entirely.

The district court also took issue with Weldy's billing of nearly 20 hours for "finalizing" spreadsheets that his paralegal had already spent 26 hours to prepare. In general, an attorney's billing rate is not appropriate for paralegal tasks.

Nichols, 4 F.4th at 444. Yet the employees did not explain to the district court why Weldy seemingly duplicated his paralegal's work, and even on appeal, their only explanation is that Weldy needed to redo calculations "because of a flaw with an equation" and because he learned new facts at deposition. The district court reasonably found this explanation lacking and concluded that defendants should not have to pay extra for time Weldy's office spent remedying its own mistakes. We see no abuse of discretion in that decision.

Time spent briefing summary judgment motions: Third, and finally, the employees challenge the district court's decision to trim the hours Weldy spent drafting two rounds of summary judgment briefs. By the district court's calculations, Weldy billed about 61 hours for the first round of briefing, which was ultimately rendered moot, and another 31 for the second round after the court decertified the class and collective. The court cut this time down to 60 hours total, explaining that the second round of briefs was mostly a copy-and-paste of the first round, and that the litigated issues were relatively straightforward and did not justify 90-plus hours of work.

The employees concede that the two sets of briefs are similar, but they argue that Weldy's billed hours were reasonably necessary to brief the issues and update the latter briefing to cite new record evidence. These arguments, however, boil down to a mere disagreement with the district court's assessment regarding the complexity of the briefing. This type of broad disagreement, without more, does not warrant reversal because district courts have broad discretion to assess the reasonableness of an attorney's fees and cut hours that they find to be unjustified. *Montanez*, 755 F.3d at 556. And having reviewed the two sets of summary judgment briefs ourselves,

we agree with the district court that the second motion for summary judgment was mostly a copy of the original. The district court reasonably concluded that the briefing was not complex enough as to justify the billed hours.

B. The district court reasonably concluded that employees obtained only a partial victory

The employees next contend that the district court erred when it concluded that their lawsuit was only partially successful. They argue that Weldy obtained excellent settlements for each of the plaintiffs who joined the suit after decertification.

But the district court properly exercised its discretion when decreasing the fee award to account for the employees' relative lack of success. A prevailing plaintiff is entitled to only "*reasonable* attorney's fees" under the FLSA. 29 U.S.C. § 216(b) (emphasis added), and a plaintiff's degree of success on the merits is the "most critical factor" in a district court's determination of what constitutes "reasonable" fees. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). A plaintiff who achieves "excellent results" should receive the entire lodestar, but when "a plaintiff has achieved only partial or limited success," the lodestar "may be an excessive amount." *Hensley v. Eckerhart*, 461 U.S. 424, 435–36 (1983).

Most significantly, the court cited the decertification of the class and collective as a major loss for the employees in this case. When, as here, a plaintiff's primary goal is to certify a case for collective action under the FLSA, the plaintiff's ability to secure certification may be factored into the court's fees determination. *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008). Billable hours that would be

appropriate for a sprawling class action may no longer be reasonable if a class is decertified, after which counsel represents only a fraction of the class members. *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 753 (7th Cir. 2010), *overruled on other grounds by Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015). A court can reasonably conclude that defendants should not bear the entire cost if the attempt to bring a claim as a class action "was a flop." *Id.*

The employees argue that they were still successful despite decertification because the temporary certification helped galvanize additional employees to join the suit. But the employees' stated goal was to obtain judgments for more than 60 truckers, and they obtained settlements for only one-sixth of that number. The deterrent effect on the employer is thus lessened, as is size of the total judgment that can be attributed to Weldy's advocacy. Moreover, as the district court explained, Weldy did not clearly differentiate between the time he spent working on behalf of the settling plaintiffs and other class members. And when a court cannot easily separate the successful and unsuccessful work, it can impose an "across-the-board reduction that seems appropriate in light of the ratio between winning and losing claims." *Montanez*, 755 F.3d at 557 (quoting *Richardson v. City of Chicago*, 740 F.3d 1099, 1103 (7th Cir. 2014)).

Even if we ignore the putative class members who were booted from the suit, decertification also limited the potential recovery of the individual plaintiffs who remained and negotiated settlements. The settling employees lost out on the "*in terrorem* character of a class action," by which the threat of a class recovery can be used to obtain larger settlements for class members with relatively weaker claims. *Messner v.*

Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012). The named plaintiffs also lost out on incentive awards, in addition to their individual damages, that they might have received for representing the class and collective. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876–77 (7th Cir. 2012). In sum, certification potentially would have meant more money for everyone on the plaintiff's side of the "v." The district court reasonably concluded that decertification thus rendered the suit only partially successful.

Even more important to the district court's decision to reduce the lodestar, however, was that "[a]t base … Plaintiffs recovered only a fraction of the damages claimed in the summary judgment briefs." Altogether, the employees recovered about $60,600 of the $103,500 they claimed in damages, with each individual plaintiff receiving between 17% and 73% of that plaintiff's claim. This limited recovery was particularly striking when compared against Weldy's request for more than $200,000 in fees, about triple what his clients received. A district court assessing a plaintiff's degree of success may consider how the size of the final recovery stacks up against the amount plaintiff originally sought. *Spegon v. Cath. Bishop of Chi.*, 175 F.3d 544, 558 (7th Cir. 1999). And although a fee award does not need to be proportionate to the amount of damages recovered, a court may also consider the ratio of damages and fees as one factor when contemplating a reduction. *Id.* "[A] fee request that dwarfs the damages award might raise a red flag." *Montanez*, 755 F.3d at 557 (quoting *Anderson v. AB Painting & Sandblasting Inc.*, 578 F.3d 542, 546 (7th Cir. 2009)).

The employees defend each individual settlement, arguing that most employees received full recovery for two years'

worth of wage violations, plus partial recovery of the additional damages that would have been unlocked had plaintiffs proven defendants' willfulness or bad faith. They say that because willfulness and bad faith are "highly contested in these kinds of cases," *any* recovery under those categories is a great result. The employees thus appear to be arguing that they won on the easy claims while struggling with the hard ones. We do not see why taking a hit on only the hard claims means that the employees should be considered to have been fully successful on the merits—at the very least, the district court had discretion to characterize the settlements as only a partial victory.

Finally, we are not persuaded by the employees' argument that the district court's reduction of the lodestar represented a misunderstanding of the facts. The employees maintain that the court erroneously believed that the putative class was larger than it was, and therefore reduced the fee award only because it overestimated how much time Weldy spent working on the claims of non-settling class members. But the court decertified the class and collective *because* it understood that the class proved to be much smaller than the employees anticipated. The difference between reality and expectation is part of why the court found that the employees obtained only a limited degree of success.

Ultimately, the court awarded about 45 percent of the adjusted lodestar, which it deemed reasonable in light of decertification and a final judgment that was roughly 59 percent of the damages claimed by the settling plaintiffs. This award was still more in fees than the total amount recovered by the plaintiffs themselves. We see no abuse of discretion in the court's decision to not award more.

III

For the above reasons, we AFFIRM the district court's order granting in part the employees' request for attorney's fees.