

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Orozco,

Plaintiff,

vs.

Mark S. Borenstein, et al.,

Defendants.

No. CV 11-02305-PHX-FJM

ORDER

We granted the parties’ joint request that we decide issues of liability for attorney’s fees before requiring the parties to submit argument and evidence on the value of services (doc. 74). We now have before us plaintiff’s motion for attorney’s fees (doc. 69) and memorandum in support (doc. 75), plaintiff’s supplemental brief and motion for summary denial of defendant’s motion for attorney’s fees (doc. 76), and defendants’ opposition to plaintiff’s motion for attorney’s fees (doc. 79).

I

Plaintiff filed this action contending that defendants violated the Fair Labor Standards Act (“FLSA”) and Arizona’s wage statutes, by deducting certain work-related expenses from hourly employees’ paychecks, leaving their net pay below minimum wage. Shortly after the lawsuit was filed, defendants stopped making the challenged deductions and reimbursed plaintiff and 51 other current and former minimum wage employees the uniform laundering

1 charges that had been deducted, plus an additional equal amount as liquidated damages as
2 prescribed by 29 U.S.C. § 216(b).

3 On August 29, 2012, we granted defendants' motion to dismiss, concluding that
4 defendants' tender of full payment for all wage deductions plus statutory damages rendered
5 this case moot (doc. 65). We are now presented with a dispute as to whether plaintiff is also
6 entitled to attorney's fees under the FLSA.¹

7 II

8 An employer who violates the FLSA is liable to the affected employee for unpaid
9 wages, an additional equal amount as liquidated damages, as well as attorney's fees and
10 costs. 29 U.S.C. § 216(b). Here, defendants tendered the full amount of unpaid wages, plus
11 liquidated damages. Plaintiff now contends that he is also entitled to reasonable attorney's
12 fees and costs.

13 A

14 Defendants first contend that because we dismissed this action on grounds of
15 mootness, we no longer have subject matter jurisdiction to decide the issue of attorney's fees.
16 We disagree. "Attorney fees issues are ancillary to the underlying action and survive
17 independently under the court's equitable jurisdiction." Carter v. Veterans Admin., 780 F.2d
18 1479, 1481 (9th Cir. 1986); see also Budinich v. Becton Dickinson & Co., 486 U.S. 196,
19 199-200, 108 S. Ct. 1717, 1720-21 (1988). We had jurisdiction at the inception of this case.
20 The case was mooted only after defendant tendered payment. Therefore, because the issue
21 of attorney's fees is a collateral matter that does not involve the merits of the case, we
22 continue to have jurisdiction to decide the issue.

23 B

24 The FLSA provides that "[t]he court in such action shall, in addition to any judgment
25 awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the
26

27 ¹Both parties originally filed motions for attorney's fees. Defendants have now
28 withdrawn their motion (doc. 78).

1 defendant, and costs of the action.” 29 U.S.C. § 216(b). Defendant contends that a
2 “judgment” is a necessary predicate to an award of attorney’s fees under the FLSA, and
3 because we dismissed the action on grounds of mootness, there was no “judgment” in favor
4 of plaintiff. We think this narrow interpretation of the statute is contrary to the broad
5 remedial purpose of the FLSA to allow plaintiffs to enforce their rights without incurring
6 prohibitive expenses. The Supreme Court has “consistently construed the [FLSA] ‘liberally
7 to apply to the furthest reaches consistent with congressional direction.’” Tony & Susan
8 Alama Found. v. Sec. of Labor, 471 U.S. 290, 296, 105 S. Ct. 1953, 1959 (1985) (quoting
9 Mitchell v. Lubin, McGaughey & Assocs., 358 U.S. 207, 211, 79 S. Ct. 260, 264 (1959)).

10 It is not only appropriate to award fees to a successful plaintiff, it is mandatory. 29
11 U.S.C. § 216(b) (the court “shall . . . allow a reasonable attorney’s fee”); Christiansburg
12 Garment Co. v. EEOC, 434 U.S. 412, 415 n.5, 98 S. Ct. 694, 697 n.5 (1978) (referring to §
13 216(b) of the FLSA as one of the “statutes [that] make[s] fee awards mandatory for
14 prevailing plaintiffs”). This is true even when the action is rendered moot by defendant’s
15 tender of full payment. To hold otherwise would allow defendants to avoid paying plaintiff’s
16 fees and costs by simply tendering payment at any point before a final judgment is entered.

17 The statute provides that the court shall award a reasonable attorney’s fee “in addition
18 to any judgment awarded to the plaintiff.” This does not make a “judgment” a necessary
19 precondition to an award of fees, but rather allows a plaintiff to receive not only a judgment
20 for unpaid wages, but also fees and costs incurred in obtaining that recovery.

21 Here, plaintiff filed an action in order to enforce his FLSA rights. Shortly thereafter
22 defendant tendered the unpaid wages plus liquidated damages. We evaluated the sufficiency
23 of that tender by way of defendant’s motion to dismiss, see Order at 4-6 (doc. 65), and in
24 doing so attached our judicial imprimatur to the tender. Therefore, we conclude that plaintiff
25 is entitled to reimbursement of reasonable fees associated with the successful tender.²

26
27 ²We note that the United Food and Commercial Worker’s Union (“UFCW”) has
28 spearheaded this action, allegedly as part of its latest efforts to organize defendants’

1 III

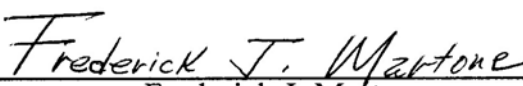
2 Plaintiff filed this action on November 22, 2011. On February 1, 2012, defendants
3 issued checks reimbursing plaintiff and 51 other employees for unpaid wages plus liquidated
4 damages. Borenstein Decl. ¶ 21 & ex. B (doc. 23). On March 30, 2012, defendants
5 produced to plaintiff evidence that all hourly employees had been reimbursed for deductions
6 for uniform laundering expenses. Shaw Decl. ¶¶ 6-7 (doc. 41). On April 25, 2012, defendant
7 produced to plaintiff evidence that no expenses other than uniform laundering had ever been
8 deducted from plaintiff's pay. Id. ¶ 10. Nevertheless, plaintiff's lawyers continued to press
9 plaintiff's claims despite clear evidence that plaintiff and the putative class had been fully
10 compensated. Therefore, we conclude that plaintiff is eligible for an award of fees from the
11 filing of the complaint through April 25, 2012 only, plus reasonable fees associated with
12 filing this motion for attorney's fees.

13 **IT IS ORDERED GRANTING** plaintiff's motion for attorney's fees (doc. 69), the
14 amount of which will be determined after compliance with the briefing schedule below.

15 **IT IS ORDERED DENYING** plaintiff's motion for summary denial of plaintiff's
16 motion for attorney's fees as moot (doc. 76).

17 **IT IS FURTHER ORDERED** that plaintiff shall file his supporting memorandum
18 on or before February 28, 2013. Defendant's response shall be due on March 14, 2013, and
19 plaintiff's reply on March 21, 2013.

20 DATED this 20th day of February, 2013.

21
22 
23 Frederick J. Martone
United States District Judge

24 _____
25 employees. It hired the law firm of Lubin & Enoch, P.C. and agreed to pay all of plaintiff's
26 legal fees. See Defendants' Response, ex B (engagement agreement between Lubin & Enoch
27 and UFCW; and ex. C (letter from Lubin & Enoch to plaintiff ("You [plaintiff Orozco] are
28 not responsible for my legal fees or any costs as those are being paid by UFCW.")). While
a lack of any obligation to pay fees might itself be a reason to deny fees, the defendants have
not raised this as a defense to plaintiff's motion for attorney's fees.