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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Joanne Zuniga, et al.,
Plaintiffs,
v.
Fiesta Pediatric Therapy Incorporated,
et al.,
Defendants.

No. CV-15-1978-PHX-DKD

ORDER

Plaintiff Joanne Zuniga, the prevailing party at a bench trial, has applied for attorneys fees. (Doc. 193) This matter is now fully briefed. For the reasons explained below, the Court will award the requested fees.

Standard of Review

The Fair Labor and Standards Act (“FLSA”) requires an award of attorneys’ fees to a prevailing plaintiff. 29 U.S.C. § 216(b); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 n.5 (1978). To determine an appropriate award, the Court starts with the lodestar calculation—the reasonable number of hours spent times a reasonable hourly rate—and adjusts using any of the following factors that have not already been included in the calculation:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform the legal services properly;
4. The preclusion of other employment due to acceptance of the case;

- 1 5. The customary fee;
- 2 6. The contingent or fixed nature of the fee;¹
- 3 7. The limitations imposed by the client or the case;
- 4 8. The amount involved and the results obtained;
- 5 9. The experience, reputation, and ability of the attorneys;
- 6 10. The undesirability of the case;
- 7 11. The nature of the professional relationship with the client; and
- 8 12. Awards in similar cases.

9 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975). The fee application
10 was revised to include time incurred after the application was filed and in response to an
11 error noted by Defendants. (Doc. 198)

12 **Untimely Motion**

13 Defendants argue that Plaintiff is not entitled to any fees because the fee
14 application was untimely. (Doc. 195) Plaintiff filed a Notice of Late filing stating that
15 the motion was untimely because of technological problems and that it had been timely
16 conveyed to Defendants. (Doc. 194) Because it was timely provided to Defendants, the
17 Court cannot perceive any prejudice to Defendants in preparing a response and
18 Defendants have not argued that they were in any way prejudiced by Plaintiff's procedure
19 to work around their technological problems. As a result, the Court will accept the
20 untimely filing.

21 However, the Court will not require Defendants to pay fees related to the untimely
22 filing since that was entirely caused by Plaintiff's counsels' technological problems.
23 Accordingly, the Court will reduce Plaintiff's fee request by \$110.00, the amount billed
24 to "Draft Notice of Late Filing of Motion for Fees and Costs." (Doc. 198 at 310)

25 **Analysis of *Kerr* Factors**

26 The time and labor required. Plaintiff's claim was a straightforward one but this
27 matter was anything but straightforward.

28 ¹ Plaintiffs do not use this factor in their fee application and so the Court will not
consider it.

1 The novelty and difficulty of the questions. FLSA claims are not novel or
2 difficult. However, the Court acknowledges that Defendants veered this matter into other
3 terrain including bankruptcy, community property, HIPPA, and the fluctuating work
4 week. Moreover, this matter was further complicated by the fact that Defendant paid
5 Plaintiff twice a month, not every two weeks.

6 The skill requisite to perform the legal services properly. Again, this matter was
7 more complicated than other FLSA cases.

8 The preclusion of other employment due to acceptance of the case. The Court
9 understands that Plaintiff's counsel could not accept other work because of the time
10 required to work on this matter.

11 The customary fee. Counsel for Defendants wrote to counsel for Plaintiff and
12 stated that they did not object to hourly rates, between \$195 and \$275 for Jeff Silence and
13 between \$400 and 450 for Kraig Marton. (Doc. 193 at ¶ 21) Because the Court agrees
14 that these rates are within the customary range for attorneys of their experience in this
15 market, this agreement will stand.

16 The limitations imposed by the client or the case. Counsel for Plaintiff stated that
17 this case was similar to all cases in that there were time limitations. The Court concludes
18 that this factor is not applicable here.

19 The amount involved and the results obtained. Plaintiff prevailed on her claim and
20 testified that the amount at issue was significant for her.

21 The experience, reputation, and ability of the attorneys. Plaintiff's counsel have
22 submitted un rebutted declarations about their experience in employment law matters.²
23 (Doc. 193 at 17-49) The Court will accept these in support of this factor.

24 The undesirability of the case. FLSA fees are mandatory because individual cases
25 have, by their nature, a small recovery. Accordingly, this factor is included in the
26 mandatory nature of the fee award.

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²² Wisely, Plaintiffs have not sought fees for detours in this case which, with their
experience, they should have known to avoid.

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IT IS THEREFORE ORDERED that Plaintiff is awarded \$322,914.36 in fees and non-taxable costs.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated this 22nd day of June, 2018.



David K. Duncan
United States Magistrate Judge