

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN JOHNSON and ROBERT	*	CIVIL ACTION NO. 04-3201
CHARLES BURDEN	*	c/w 05-6627
	*	
	*	SECTION "4"
VERSUS	*	
	*	MAGISTRATE: 1
	*	
BIG LOTS STORES, INC.	*	JUDGE: VANCE

MEMORANDUM OF AUTHORITIES

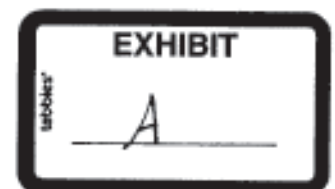
MAY IT PLEASE THE COURT:

On April 6, 2009, this Honorable Court entered Judgment against defendant and in favor of John Johnson and Robert Burden on their claims under the Fair Labor Standards Act (FLSA) following a bench trial. (Record, Document No. 501) Under the FLSA, plaintiffs are entitled to payment by the defendant of their reasonable attorney fees and costs as provided by 29 U.S.C. §216(b).¹

The language of the statute mandates that the court award attorney's fees to the prevailing party, but gives the court discretion in deciding what is reasonable. Lewis v. Hurst Orthodontics, 292 F.Supp.2d 908 (W.D. TX 2003).

The Fifth Circuit has used the "lodestar" method to calculate attorney's fees in FLSA

¹ 29 U.S.C. §216(b) provides, in pertinent part: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action."



cases. Fender v. Zapata Partnership, Ltd., 12 F.3d 480, 487 (5th Cir. 1994); Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999); Forbush v. J.C. Penney Co., 98 F.3d 817,821 (5th Cir. 1996); Camp v. The Progressive Corporation, Civil Action No. 01-2680 (E.D. La. 9/23/04), 2004 U.S. Dist. LEXIS 19172; Collins v. Sanderson Farms, Inc., Civil Action No. 06-2946 (E.D. La. 7/29/08), 568 F.Supp.2d 714.

The computation of reasonable attorneys' fees involves a three step process: (1) determine the nature and extent of the services provided by plaintiff's counsel; (2) set a value on those services according to the customary fee and quality of the legal work; and (3) adjust the compensation on the basis of other factors that may be of significance in the particular case. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974); Copper Liquor, Inc. v. Adolph Coors Company, 684 F.2d 1087, 1092 (5th Cir. 1982); Collins, supra; Camp, supra.

In calculating the number of hours reasonably expended on the litigation, whether the total number of hours claimed were reasonable and whether specific hours claimed were reasonably expended, the court must first ascertain the nature and extent of the services supplied by plaintiff's counsel. Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983). However, "the district court [retains] broad discretion in setting the appropriate award of attorney fees." Hensley, 104 S.Ct. at 1939-40.

The district court must eliminate excessive or duplicative time. Hensley, supra; Watkins v. Four Dice, 7 F.3d 453, 457 (5th Cir. 1993). Next, the court must value the service

according to the customary fee and quality of the legal work. The relevant market for purposes of determining the prevailing hourly billing rate to be paid in the fee award is the community in which the district court sits. Scham v. District Courts Trying Criminal Cases, 148 F.3d 554, 558 (5th Cir. 1998). The district court may then adjust the lodestar upward or downward depending on the respective weights of the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., *supra*. In calculating a lodestar, the hours worked and the rates claimed should be supported by the billing records of the attorney making the claim for fees. Watkins, 7 F.3d at 457. The court then determines the number of hours that were reasonably expended in litigation of the claim. The Fifth Circuit instructs that compensable hours are determined from the attorney's time records and includes all hours reasonably spent. Ships v. Trinity Industries, 987 F.2d 311, 319 (5th Cir. 1993). Counsel is also required to exercise billing judgment to exclude from the fee request any "hours that are excessive, redundant or otherwise unnecessary." Hensley, 103 S.Ct. at 1939-1940.

The lodestar is presumptively reasonable and should be modified only in exceptional circumstances. Watkins, *supra* at 457. Although the party seeking attorney's fees bears the initial burden of submitting adequate documentation of the hours reasonably expended and of the attorney's qualifications and skill, the party seeking reduction of the lodestar bears the burden of showing that a reduction is warranted. Hensley, *supra*; Wegner v. Standard Insurance Company, 129 F.3d 814, 822 (5th Cir. 1997); Louisiana Power and Light Company v. Kellstrom, 50 F.3d 319, 329 (5th Cir. 1995); Camp v. Progressive, *supra*.

**CLASSIFICATION OF ATTORNEYS AND PARALEGALS
SUBMITTING HOURS FOR COMPENSATION**

There are three firms who have submitted fee and cost requests for work performed in this case. The firms and attorneys are Philip Bohrer of Bohrer Law Firm, L.L.C., Michael T. Tusa, Jr. and James Rather of McCranie, Sistrunk, Anzelmo, Hardy, Maxwell & McDaniel, PC, and Hartley Hampton and Michael Josephson of Fibich, Hampton and Leebron, LLP.² The bills include both attorney and paralegal time. The attorneys' years of experience and requested rates are as follows:

ATTORNEY	YEARS OF EXPERIENCE	REQUESTED BILLING RATE
Philip Bohrer	24	\$300.00
Hartley Hampton	31	\$300.00
Michael Josephson	10	\$300.00
Jim Rather	11	\$225.00
Michael T. Tusa, Jr.	25	\$300.00

It is well established that fees for paralegal time are recoverable. Missouri v. Jenkins, 491 U.S. 274, 288, 105 L.Ed.2d 229, 109 S.Ct. 2463 (1989); Volk v. Gonzales, 262 F.3d 258, 535 (5th Cir. 2001); Camp v. Progressive, *supra*. Total paralegal time per firm and requested paralegal rates is as follows:

² Michael T. Tusa, Jr. left McCranie, Sistrunk, Anzelmo, Hardy, Maxwell & McDaniel in January, 2009.

BASIS OF THE REQUESTED HOURLY RATES

An attorney's requested hourly rate is *prima facie* reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates and the rate is not contested. Louisiana Power and Light Company v. Kellstrom, *supra*; Camp v. The Progressive Corp., *supra*. In Camp, Magistrate Judge Joseph C. Wilkinson, Jr. determined, in 2004, that:

Based on my knowledge of the prevailing market rates in this legal community, my familiarity with the qualifications and expertise of plaintiff's counsel and recent awards of reasonable attorney fees in this district, I find that the requested rates of \$225.00 for partners and \$140.00 for associates are reasonable.

...

Again, based on my experience in this legal community, I find that \$60.00 per hour for paralegal time is reasonable. *Id.* at 16.

In Judith L. DeCorte, et al v. Eddie Jordan, et al, Civil Action No. 03-1239-SRD-SS, Magistrate Judge Sally Shushan issued a report and recommendation regarding attorney fees in 2006 (Record, Document 407). The recommended rates that were approved by the district court were as follows:

The rate for the trial attorney with 25 years of experience in employment discrimination cases was \$235.00 per hour. The award for the attorney that assisted the trial attorney was \$165.00 per hour. The rates sought by Downey for Hogan (\$225.00 per hour) and McKnight (\$175.00 per hour) are reasonable.

In Collins v. Sanderson Farms, Inc., *supra*, Judge Berrigan approved and found

reasonable \$350.00 per hour for partners and \$95.00 per hour for paralegals in 2008.

Thus, prevailing market rates in this legal community range from \$225.00 for partners and \$140.00 for associates in 2004, to \$350.00 for partners in 2008, and \$175.00 for associates in 2006. The requested hourly rates of \$300.00 for partners, \$225.00 for associates, and \$75.00 for paralegals is reasonable and represents "... prevailing market rates within the New Orleans legal community for similar services by lawyers of reasonably comparable skills, experience and reputation." Camp v. The Progressive Corp., *supra*.

All of the billed activities are related to the exempt status of John Johnson and/or Robert Burden, liquidated damages, and bad faith. For example, the depositions taken in Columbus, Ohio of Schlonsky, Waite, Coney and Schnorff, as well as the corporate deposition of Big Lots, were relevant to the issues presented at the trial of Burden and Johnson, as was the written discovery on the exempt/non-exempt and liquidated and willful issues.

Counsel successfully challenged the admissibility of defendant's expert, Dan Bremer, whose testimony was directed at the exempt status of Johnson, Burden and others. Had plaintiffs not succeeded in this challenge, Big Lots would have undoubtedly offered him at trial.

Counsel also participated in numerous discovery disputes, discovery conferences and motions to compel for issues relating to the exemption, bad faith, liquidated damages, job duties of ASMs and company policy and procedures showing lack of managerial discretion

exercised by Johnson and Burden. Although much of this work was done during the collective action phase of the case, all of these efforts were relevant to the Johnson/Burden trial. Nearly all of the trial exhibits were obtained through these efforts.

Plaintiffs' counsel respectfully submit that all of the billed activities are compensable.

CALCULATION OF THE LODESTAR AMOUNT

A. Exercise of Billing Judgment

Each attorney who has submitted hours for consideration has attached an Affidavit setting forth their exercise of billing discretion and judgment.³ As this Court is well aware, this litigation is now almost five years old. There were many issues, such as certification as a collective action, the collective action trial, depositions used in the collective action phase, and much exchange of written discovery that was not related to the exempt status of John Johnson or Robert Burden, liquidated damages or bad faith. Hours for these activities were not included. In fact, hundreds of hours spent by counsel in this litigation were excluded. Further, hours expended on unsuccessful endeavors, such as plaintiff's motion for partial summary judgment, were likewise excluded. Finally, hours associated with certain experts, such as Jonathan Walker and Gordon C. Rausser, were likewise entirely excluded.⁴

³ Affidavit of Bohrer attached as Exhibit "1", Affidavit of Tusa attached as Exhibit "2", Affidavit of Rather attached as Exhibit "3", Affidavit of Hampton attached as Exhibit "4" and Affidavit of Josephson attached as Exhibit "5".

⁴ Arguably, billing for these activities is compensable. See Dowdell v. City of Apopka Florida, 698 F.2d 1181, 1187 (11th Cir. 1983), citing Fifth Circuit authority and stating that "[t]he theory that fee applications should be dissected into 'winning' and 'losing' hours with the latter be non-reimbursable contradicts

Counsel's hourly submissions were billed at .10 per hour increments. Block billing or rounding up to .25 hour increments was not utilized. Repetitive and/or duplicative efforts were stricken. However, to the extent multiple attorneys billed for working on the same item, such as joint participation in depositions or revising or drafting pleadings, counsel submits that each attorney's bill reflects the distinct contribution of each lawyer to the case and represents the customary practice of multiple lawyer litigation. Simply stated, these billing entries reflect actual contribution and not merely passive receiving and reviewing of other people's work. Thus, plaintiffs respectfully submit that they have exercised appropriate billing discretion such that there should be no reduction of the hours submitted.

B. The Hours Submitted By Counsel

ATTORNEY	HOURS SUBMITTED	HOURLY RATE	TOTAL
Philip Bohrer	377.40	\$300.00	\$ 113,220.00
Hartley Hampton	90.7	\$300.00	\$ 27,210.00
Michael Josephson	335.7	\$300.00	\$ 100,710.00
Jim Rather	70.50	\$225.00	\$ 15,862.50
Michael T. Tusa, Jr.	285.10	\$300.00	\$ 85,530.00
TOTALS:	1,159.40		\$ 342,532.50

the law of this circuit." Nonetheless, plaintiffs' counsel have chosen not to submit hours for these activities in the exercise of billing discretion.

PARALEGAL TIME BY FIRM	REQUESTED BILLING RATE	HOURS SUBMITTED	TOTAL
Fibich, Hampton & Leebron	\$75.00	481.67	\$36,125.25
Bohrer Law Firm, LLC	\$75.00	43.25	\$ 3,243.75
McCranie, Sistrunk, et al	\$75.00	9.10	\$ 682.50
TOTALS		534.02	\$40,051.50

Plaintiffs respectfully submit that the above charts, which total \$382,584.00 and are comprised of both paralegal and attorney time, reflect the appropriate lodestar fee that should be awarded.

APPLICATION OF THE JOHNSON FACTORS

After determining the lodestar, the court should turn to a consideration of whether adjustment upward or downward of the lodestar is appropriate. Wegner v. Standard Insurance Company, 129 F.3d 814, 822 (5th Cir. 1977); DeCorte v. Jordan, *supra*; Forbush, *supra* at 821.

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) set forth 12 factors for the court to consider:

1. The Time and Labor Required

Plaintiffs' submissions, contained in Exhibits "1" through "5", set forth the amount

of time expended.

2. The Novelty and Difficulty of the Question

Unlike “off-the-clock” cases, misclassification cases are quite difficult. Application of the executive exemption was unique, given the factual situation presented. The court and the parties were faced with analyzing this case under both pre and post 2004 versions of the exemption. Determining actual job duties was complicated. The issue of manager on duty and its legal ramifications was complex. Moreover, this case was rife with mixed questions of fact and law. The court and the parties were forced to conduct extensive discovery regarding Big Lots’ policies, procedures and their implementation in the field.

3. The Skill Required to Perform the Legal Service Properly

Attached to Exhibits “1”, “2”, “3”, “4” and “5” are the curriculum vitae of Bohrer, Tusa, Rather, Josephson, and Hampton. Tusa, Bohrer and Josephson have extensive experience in Fair Labor Standards Act litigation. All counsel have experience in complex cases. These lawyers, collectively, have numerous published opinions dealing with wage and hour issues. Given the complexity of the law and the unique issues presented, plaintiffs submit that this case required greater skill to litigate than would be expected of a typical overtime case.

4. The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case.

The case has been litigated for nearly five years. The exemption, liquidated and willfulness component of the case was a significant undertaking. The case itself required

significant devotion of time, to the exclusion of work on other matters. Further, plaintiffs' counsel will have been required to wait over five years for payment for their work on this case. Big Lots has now appealed, thus requiring further work.

5. The Customary Fee

The customary fee in FLSA litigation where there is no class wide common fund settlement is the hourly rate fee recognized by this court in this legal community. Counsel's submission is reasonable in light of the customary fee, calculated at an hourly rate. Further, the FLSA itself provides for a specific fee award, based on a lodestar calculation.

6. Whether the Fee is Fixed or Contingent

Johnson and Burden retained the services of plaintiffs' counsel on a contingent basis.

7. Time Limitations Imposed by the Client or the Circumstances

Plaintiffs Johnson and Burden did not impose time constraints on plaintiffs' counsel. However, the case itself required significant devotion of time, to the exclusion of work on other matters.

8. The Amount Involved and the Results Obtained

Burden was awarded \$63,847.40 and Johnson was awarded \$63,587.60. Except for the court's determination that Big Lots did not commit a willful violation, plaintiffs received an excellent result, prevailing on the exemption and liquidated damage claims. Big Lots has never offered any settlement and has vigorously defended all aspects of this case, including now appealing to the U.S. Fifth Circuit Court of Appeals. The amount involved is not

inconsequential and represents a significant overtime award.

9. The Experience, Reputation and Ability of the Attorneys

This was addressed in Section 3, *supra*. All counsel are experienced and have superior ability. The court, through its interactions with counsel and review of their work over the last five years, can readily satisfy itself that plaintiffs' counsel possess the requisite knowledge and skill in this area.

10. The Undesirability of the Case

Despite thousands of ASMs employed by Big Lots throughout the country, there are few, if any, other cases brought outside of this litigation. Burden and Johnson was the only case to be tried on the merits. Many of the ASM plaintiffs have decided to dismiss their cases. As demonstrated by Big Lots' absolute refusal to engage in settlement discussions, these are not desirable cases.

11. The Nature and Length of the Professional Relationship With the Client

Both Burden and Johnson have been represented by plaintiffs' counsel for almost five years.

12. Awards in Similar Cases

Plaintiffs have cited, *supra*, several Eastern District of Louisiana and Fifth Circuit FLSA cases awarding hourly rates. The lodestar calculation is dependent upon the work performed in the individual case. Thus, awards in other cases are similar to the anticipated award in this case: a lodestar award calculated at a reasonable rate.

**THE JOHNSON FACTORS DO NOT JUSTIFY A
UPWARD OR DOWNWARD DEVIATION OF THE LODESTAR**

Plaintiffs' counsel respectfully submit that the Johnson factors do not justify any adjustment to the lodestar. DeCorte, supra. Plaintiffs respectfully submit that attorney fees should be based solely on a straight lodestar calculation.

**RELATIONSHIP BETWEEN THE FEE REQUESTED BY
PLAINTIFFS' COUNSEL AND JUDGMENT RENDERED FOR PLAINTIFFS**

The Judgment rendered herein totals \$127,435.00. The fee request exceeds this amount. However, attorney fee awards should not be tied to the amount of damages a plaintiff recovers. In Cowan v. Prudential Insurance Company, 935 F.2d 522, 526 (2nd Cir. 1991) the court held:

Nothing in the statute or its legislative history requires, or even suggests, that attorney's fees should be proportional to damage awards. 935 F.2d 522, 526 (2nd Cir. 1991)

Further, DiFilippo v. Morizo, 759 F.2d 231 (2nd Cir. 1985), citing the congressional purposes of insuring effective access to the judicial process in allowing prevailing parties to recover fees, held that "[a] presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award." "Given the nature of claims under the FLSA, it is not uncommon that attorney fee requests can exceed the amount of judgment in the case by many multiples." Fegley v. Higgins, 19 F.3d 1126, 1134-35 (6th Cir. 1994).⁵

⁵ Fegley affirmed an award of \$7,680.00 in overtime compensation and \$40,000 in attorney fees. See also Cox v. Brookshire Grocery Company, 919 F.2d 354, 358 (5th Cir. 1990) affirming an award of \$1,181.00 in overtime compensation and \$9,250.00 in attorney fees; Bonnett v. Cal Health & Welfare, 704 F.2d 1465, 1473

Thus, attorney fees in FLSA cases should not be tethered to the amount of the award.

COSTS

Attached as part of Exhibits "1", "2", and "5" are the costs incurred by plaintiffs' counsel in the activities itemized and described in the bills.⁶ The requested costs are summarized as follows:

FIRM NAME	TOTAL COSTS
Bohrer Law Firm, LLC	\$ 22,515.97
McCranie, Sistrunk, et al	\$ 19,545.08
Fibich, Hampton & Leebron	\$100,375.32
TOTAL:	\$142,436.37

Counsel exercised discretion and only submitted costs related to Johnson and Burden's individual claim and the willfulness and liquidated damage component of the case. The requested costs are substantially less than the total costs incurred in this litigation. As is evident, no costs associated with the conditional certification, decertification, the collective action trial, Jonathan Walker, or Gordon Rausser are claimed. Likewise, costs associated

(9th Cir. 1983), affirming an award of \$18,455.00 in damages and \$100,000.00 in attorney fees; and Lucio-Cantu v. Vella, No. 06-20787, 2007 Westlaw 1342513 (5th Cir. May 8, 2007) affirming an award of \$51,750.00 in attorney fees and total damages of \$9,393.58.

⁶ McCranie, Sistrunk's costs are listed at the end of their billing submission, attached as Exhibit "B" to the Affidavit of Tusa which is attached hereto as Exhibit "2".

with notice in the collective action and depositions of witnesses in the collective action were excluded.

An item is recoverable as a cost under FRCP 54(d) if it is enumerated in 28 U.S.C. §1920. Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The statute provides that a judge or clerk of any court of the United States may tax as costs the following:

- 1) Fees of the Clerk and Marshall;
- 2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for the use in the case;
- 3) Fees and disbursements for printing and witnesses;
- 4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- 5) Docket fees under Section 1923 of this Title;
- 6) Compensation for court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under 1828 of this Title.

The district court enjoys wide discretion in determining and awarding reasonable costs. Chapman v. AI Transport, 229 F.3d 1012 (11th Cir. 2000).

In addition, non-taxable costs also are shifted to the losing party in an FLSA case since the statute provides for the shifting of attorney fees, as long as these costs are

“[i]dentifiable, out-of-pocket expenses” as opposed to “non-recoverable routine office overhead, which must normally be absorbed within the attorney’s hourly rate.” Kuzma v. IRS, 821 F.2d 930, 933-34 (2nd Cir. 1987); Cho v. Koam Medical Services, PC, 524 F.Supp.2d 202, 207 (Court) (11/30/07); Yang v. ACBL Corp., 04-Civ. 8987, (S.D. N.Y.), 2006 U.S. Dist. LEXIS 6919 (2/22/06); Alvarez v. IBP, Inc., CT-98-5005, (E.D. Wa.), 2001 U.S. Dist. LEXIS 25341 (allowing travel, hotel, meals, photocopies, postage and long distance charges) (12/14/01); Bowers v. Foto-Ware, Inc., 3:cv-03-1137, (M.D. Pa.), 2007 U.S. Dist. LEXIS 84626 (11/15/07); Moon v. Joon Gab Kwon, 99 Civ. 11810, (S.D. N.Y.), 2002 U.S. Dist. LEXIS 21775; 8 Wage and Hour Cases 2nd (BNA) 461 (11/6/02).

Plaintiffs respectfully submit that the costs are reasonable, related to the issues presented at the trial of Burden and Johnson and are recoverable.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully move this Honorable Court to award fees and costs as set forth herein.

Respectfully submitted:

FIBICH, HAMPTON & LEEBRON, LLP
Michael Josephson
Texas State Bar 24014780
1401 McKinney, Suite 1800
Houston, TX 77010
Telephone: 713-751-0025
Facsimile: &14-751-0030
Admitted PHV

-and-

BOHRER LAW FIRM, L.L.C.
8712 Jefferson Highway, Suite B
Baton Rouge, Louisiana 70809
Telephone: 225/925-5297
Facsimile: 225/231-7000

By: s/Philip Bohrer
Philip Bohrer (#14089)
COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to all counsel registered in this case. Any counsel not registered for electronic notice of filing with the Clerk of Court will be mailed a copy of the above and foregoing, First Class U.S. Mail, postage prepaid and properly addressed.

Baton Rouge, Louisiana this 14th day of May, 2009.

s/Philip Bohrer
Philip Bohrer