

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>STEVEN ROMAN,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Docket No. 96-256-P-DMC</b>
	)	
<b>MAIETTA CONSTRUCTION, INC.,</b>	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION FOR AWARD  
OF ATTORNEY FEES AND COSTS<sup>1</sup>**

Following an unsuccessful appeal, the plaintiff, having prevailed at trial on one of his claims under the Fair Labor Standards Act, 29 U.S.C. § 207 *et seq.*, seeks an award of attorney fees in the amount of \$37,240 and costs in the amount of \$2,172.26 pursuant to 29 U.S.C. § 216(b). I awarded the plaintiff damages in the amount of \$2,436. Findings of Fact and Conclusions of Law (Docket No. 34) at 8. By contrast, the plaintiff represented in his proposed findings of fact and conclusions of law that he was entitled to more than \$50,000. Plaintiff’s Proposed Findings of Fact and Conclusions of Law (Docket No. 33) at 16-17, 26-27.<sup>2</sup> The defendant objects to any award of more

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

<sup>2</sup> The plaintiff did not present a total amount of damages to which he contended he was entitled, but included claims for \$12,714 for overtime at the race tracks, \$2,898 for overtime at the shop, \$1,476 for regular time at the racetracks, unspecified liquidated damages in the federal (continued...)

than a nominal amount of attorney fees.

### I. Attorney Fees

Section 216(b) provides in relevant part that “[t]he court . . . 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.” The Supreme Court, in a case decided under 42 U.S.C. § 1988 that has established the standards for all federal statutory attorney fee awards, stated:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court also should exclude from this initial fee calculation hours that were not reasonably expended. Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from the fee submission.

*Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983) (internal quotation marks and citation omitted).

The court continued:

There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the “results obtained.” This factor is particularly crucial where a plaintiff is deemed “prevailing” even though he succeeded on only some of his claims for

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<sup>2</sup>(...continued)

statutory amount of twice the wages due, double damages under state law on the overtime wages due, and treble damages and attorney fees under state law on the \$1,476 amount.

relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

*Id.* at 434. If the claims upon which the plaintiff does not succeed are based on different facts and legal theories from the claims upon which he succeeded, no fee may be awarded for services on the unsuccessful claims. *Id.* at 435. If the claims involve a common core of facts or are based on related legal theories, it will be difficult to divide the hours expended on a claim-by-claim basis, and the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Id.* If a plaintiff has achieved only partial success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. *Id.* at 436. In that case, the court may reduce the award to account for the limited success. *Id.* at 437.

This court's approach to attorney fee awards is informed by *Weinberger v. Great N. Nekoosa Corp.*, 801 F. Supp. 804 ("*Weinberger II*") (D. Me. 1992). The fee petitioner bears the burden of proving entitlement to an attorney fee. *Id.* at 807. The First Circuit directs district courts to "calculate fees by means of the time-and-rate method known as the lodestar." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). Here, the defendant does not contest the reasonableness of the hourly rate chosen by the plaintiff's counsel. I therefore need to direct careful scrutiny only to the reasonableness of the hours expended for which recovery is sought, bearing in mind that lawyers who are partners should not seek compensation at their usual billing rates for associate-level tasks. *Weinberger II*, 801 F. Supp. at 814.

When considering the number of hours expended by counsel, the court must determine

whether he or she “exercised billing judgment” in submitting the fee application, deducting any time that is excessive, redundant or unnecessary. *Id.* at 815. The court may also reduce an award where the documentation provided by the party seeking an award of attorney fees is inadequate. *Id.* at 816.

Here, counsel for the plaintiff contends that he has met the requirement to exercise billing judgment by deducting \$3,323 from his initial attorney-fee bill in the amount of \$65,390 for unnecessary time. He has also reduced his bill by 40%, an amount which he contends is sufficient to account for his limited success.

It is not necessary that the court set forth an hour-by-hour analysis of its fee determination. *Nelson v. University of Maine Sys.*, 944 F. Supp. 44, 48 (D. Me. 1996). I intend to give a clear explanation of the fee award that I find sufficient in this case without such an analysis. I begin with the fact that the plaintiff seeks to recover, before his deductions for billing judgment and his limited success, for 424 hours of attorney time, 154.5 hours of paralegal time and 11.3 hours of “law clerk” time, at varying hourly rates. The “law clerk” is not described or identified in the materials submitted in support of the request, nor are any of the itemized hourly entries identified as having been recorded by this person. The documentation provided is insufficient to allow recovery of any portion of the \$565 sought for this person’s time.

The itemized records often include many different activities in a single entry, so that it is impossible to assign a time for each. It is also largely impossible to assign any particular entry to the plaintiff’s claim for unpaid overtime at his workplace, upon which he recovered, as opposed to his claim for payment for time spent at the racetrack, for which he did not recover. In general, I can approximate the following number of hours billed by one or more of three attorneys for each of the following tasks: telephone calls, 3.1 hours; drafting the complaint, 12.6 hours; all work on the

motion for partial summary judgment (5 pages, with a supporting statement of material facts), 43.3 hours; conferences of counsel, 4.0 hours; document review, 13 hours; preparation of the pretrial memorandum (4 pages) and trial brief (13 pages), 48.4 hours; and preparation of the proposed findings of fact and conclusions of law (31 pages, approximately half of which were devoted to claims upon which the plaintiff did not recover), 45.8 hours, 4.3 of which the plaintiff's attorney has removed in the exercise of his billing judgment. *See Forrest v. Stinson Seafood Co.*, 990 F. Supp. 41, 45 n.4 (D. Me. 1998) (disallowing 5.0 of 12.8 hours charged for preparation of post-trial brief as reasonable estimate of time spent on unsuccessful portion of claim). Certain entries include travel time billed at the attorney's full hourly rate. *See Weinberger II*, 801 F. Supp. at 823 ("This Court does not permit travel time to be recovered at anything approaching a usual billing rate," *quoting Auburn Police Union v. Tierney*, 762 F. Supp. 3, 4 (D. Me. 1991)). Trial was conducted over three days. The trial day for the first two days of trial ran from 8:30 a.m. to 2:00 p.m. For the third day of trial, which ended at 9:30 a.m., the plaintiff's lawyer has billed 12.0 hours; this entry also includes "work on closing brief" and "thank you letters to witnesses."

The plaintiff's counsel has billed for an inordinate amount of time for many of these tasks, a fact that I must address before I consider the issue of the degree of the plaintiff's success and the interrelationship, or lack thereof, between the claim upon which he recovered and those upon which he did not. The listed tasks are not the only ones for which the time charged is excessive, but they are tasks which could not have been affected by the first of the two explanations given by the plaintiff's counsel for the overall size of his bill: the alleged recalcitrance of the defendant "about the most basic facts of the case," Affidavit of Donald F. Fontaine, Esq. Concerning Attorney's Fees ("Fontaine Aff.") (Docket No. 44) ¶ 3, an assertion strongly disputed by the defendant's counsel,

Affidavit of Graydon Stevens, Esq. In Support of Objection to Plaintiff's Application for Attorney's Fees ("Stevens Aff.") (Docket No. 47) ¶¶ 2-4 and referenced exhibits.<sup>3</sup> The plaintiff argues that his counsel was required as a result of this recalcitrance to spend a "substantial amount of time . . . locating witnesses, interviewing them, persuading them to testify, and preparing for the impeachment of defendant witnesses." Fontaine Aff. ¶ 4. The plaintiff also contends that the defendants were uncooperative in providing financial information, necessitating additional hours of work by his attorney and a paralegal, *id.*, a claim also denied by the defendant, but it is impossible to tell from most of the entries on the itemized bill cited by the plaintiff in support of this contention how much time actually was spent in this endeavor, as many unrelated tasks are usually included in each such entry. In any event, these factors are not alleged by the plaintiff to have increased the time necessary for drafting pleadings or reviewing documents as set forth above.

The plaintiff's second explanation for the size of his counsel's bill — that the case involved novel legal and factual issues, *id.* ¶ 3 — is insufficient to support the number of hours charged for research and drafting of pleadings. While the court, like the plaintiff, found no reported case law exactly on point with the factual situation presented by this case, that fact does not justify the devotion of dozens of hours of attorney time to legal research and drafting in a case in which the factual situation was not particularly complex and the legal situation merely required the application of existing principles, statute, and case law to a set of facts not directly presented before in any

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<sup>3</sup> From all that appears in the record, *see* Exhs. A & C to Stevens Aff., the defendant indicated its willingness from an early date to pay the plaintiff for the unpaid "comp" time which is the only aspect of his claim upon which the court entered judgment in his favor after trial. This action proceeded to trial due to the plaintiff's insistence upon receiving payment for his work at the racetracks. Exhs. 7 & 9 to Plaintiff's Reply Memorandum to Maietta Construction's Objection to Plaintiff's Application for Attorney's Fees (Docket No. 48).

reported decision, a not uncommon circumstance in the practice of litigation.

I conclude that a reasonable number of hours to have been spent on this litigation by the plaintiff's counsel would be 180 hours. I would also find 100 hours of paralegal time to be a reasonable amount. *But see Weinberger*, 801 F. Supp. at 823 (disallowance of all amounts charged for work by paralegals); *cf. Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 847-48 (D. Me. 1996) (reducing but not entirely disallowing paralegal charges). These conclusions generate a "lodestar" amount, at the rates charged by the plaintiff's counsel, of \$30,200. This amount must then be reduced to account for the plaintiff's ultimate success at trial, for time spent on claims that did not prevail, or both. *Wilcox*, 921 F. Supp. at 849. The plaintiff's counsel contends that less than 5% of the total time included in his bill was devoted to his claim for payment for time worked at the racetrack, that a "negligible part of the case" involved work on the state-law claims, Memorandum of Law in Support of Application for Attorney's Fees (Docket No. 45) at 4, and that the state-law claims and the claim for work done at the racetrack were so closely related to the claim upon which the plaintiff prevailed that he should recover fees for all of the attorneys' work.

There is some merit to the plaintiff's contention that the claims upon which he did not prevail were closely related to the claim upon which he did prevail. However, that does not mean that he should recover for all of the time reasonably spent by his counsel in pursuing those unsuccessful claims. Where, as here, the documentation provided for the attorney fee claim would not permit the court to determine what time was spent on which claim even if the claims were wholly distinct as a matter of fact or law, it is appropriate for the court to make a general adjustment for the lack of success at trial. I conclude that a reduction of 70% is appropriate, resulting in an award of attorney fees in the amount of \$9,560.

## II. Expenses

The plaintiff seeks out-of-pocket costs in the amount of \$2,172.26. The burden of persuasion as to the reasonableness of expenses claimed rests with the plaintiff. *Weinberger II*, 801 F. Supp. at 827. This court has customarily disallowed or reduced expenses claimed for copying, telephone calls, facsimile transmissions, postage and travel. *Id.* The two-page statement submitted in support of the plaintiff's claim for expenses includes \$234.56 for copies, \$46.40 for telephone calls and facsimile transmissions, \$80 to the Secretary of State for "information," \$75.94 to an associate attorney for "miscellaneous expenses — travel/copying/postage," and \$221.82 in payments to witnesses who were not called to testify at trial.

The claim for photocopies does not indicate what was copied, how many pages were copied, or what the charge per page was for the copies. "As a result, the Court cannot determine whether either the rate or the number of pages is reasonable." *Fleet Bank of Maine v. Steeves*, 793 F. Supp. 18, 24 (D. Me. 1992). I will allow \$100 for copying costs, a reasonable amount in view of the number of documentary exhibits presented at trial. I will not allow the amounts for telephone calls and fax transmissions, which should be included in a law firm's overhead costs, nor will I allow the \$80 payment to the Secretary of State for which there is no supporting documentation. The \$75.94 payment to the associate attorney suffers from the same deficiency.

In addition, not only will I not allow recovery of payments made to witnesses who were not called to testify at trial, but I will also exclude from the plaintiff's recovery my best estimate of the costs of service upon those witnesses. The payments to the witnesses who were not called represent 47.2% of the total payments to witnesses listed by the plaintiff. Applying that percentage to the total amount for service listed by the plaintiff generates an additional deduction of \$85.29. The total

amount to be deducted from the plaintiff's requested amount is \$644.01, leaving a recoverable total of costs in the amount of \$1,528.25.

### **III. Conclusion**

For the foregoing reasons, the defendant is hereby **ORDERED** to pay the plaintiff as the prevailing party \$9,560 in attorney fees and \$1,528.25 in costs, for a total of \$11,088.25.

Dated this 27th day of October 1998.

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David M. Cohen  
United States Magistrate Judge