The Employee Advocate

An Online Publication of The National Employment Lawyers Association
2015 Spring/Summer Issue

Celebrating 30 Years Of Employee Rights Advocacy

Inside This Issue:

Honoring The Founding Leaders Of NELA

The Employee Rights Advocacy Institute For Law & Policy 2014 Annual Report

2015 Trial Boot Camp

Willie Smith: A Champion Of Workers' Rights

The Transformational Impact Of Receiving Feedback Well: Coaching Our Clients And Improving Our Relationships

Letting Go Of The Rope: Arbitration Agreements As A Plaintiff's Weapon In Wage & Hour Cases

Analysis Of Counsel Fee Awards In Two Cases With Same Attorney

Jeffrey Campolongo

Attorney fees. There are few things in the practice of law that are as sacrosanct as payment for the professional guidance we provide to our clients, whether the matter is a billion-dollar complex acquisition by a multinational conglomerate or drafting a simple will. As lawyers we tend to be very self-aware, perhaps even sensitive, when it comes to being paid what we deem a reasonable amount for our time and attention to our craft. For those of us who practice in the employment law world where there is a statutory fee-shifting provision, we tend to be even more in tune to legal issues affecting how we are paid. That is why two recent decisions from the Eastern District of Pennsylvania issued merely a day apart have prompted some curious head-scratching by practitioners.

Both decisions involve fee-shifting statutes, both decisions relate to settlement of employment law disputes, both decisions required the court to assess the reasonableness of requested fees, both decisions cited the range of hourly rates used by Community Legal Services (the CLS fee schedule), and in fact, both decisions involve the same plaintiffs attorney. The results, therefore, could be expected to be the same or similar. But nothing is ever quite as it seems.

Here is the background. In *Pawlak v. CompuSolvePA.com* (E.D. Pa., July 14, 2015, No. 15-438), Jason Pawlak sued his employer alleging overtime violations under federal and state law. According to court documents, the parties reached an agreement at a settlement conference for the plaintiff to accept a new job with the employer. The agreement did not result in the payment of any damages, however, Pawlak was able to secure a coveted employment contract with a salary increase as a result of the litigation. The parties then agreed that the court would determine reasonable attorney fees and costs to be awarded to the plaintiff.

Counsel for plaintiff submitted a fee petition wherein he requested an hourly rate of $450 commensurate with his 20-plus years of experience as a pioneer in employment law. In support, counsel provided declarations from two other attorneys who practice employment law in the Philadelphia market, who stated that $450 is a reasonable rate for attorneys of plaintiffs counsel's caliber with his experience, qualifications and reputation. In fact, the court noted, the requested hourly rate of $450 was at the "low end of the billing range" given counsel's work in the field. The rate of $450, albeit low, was deemed appropriate.

The court further noted that the defendants did not take issue with "the reputation or skill of opposing counsel," but instead challenged the fee request as excessive in light of the amount in controversy and the stage at which the case settled. Although the defendants did not challenge individual line billings as unreasonable, the court nevertheless trimmed the fee petition by as much as one-third of the requested fees, including a 5 percent reduction due to the "degree of success" achieved.

In slashing the fees, the court declined to award counsel's

full rate for things such as communications with the client and the court and review of court orders, saying that these were administrative tasks ordinarily performed by a junior associate or paralegal.

The court also took issue with the hours counsel spent researching, drafting and revising the complaint; hours spent preparing for and participating in the Rule 16 conference; time spent preparing a settlement memorandum; and time spent reviewing and revising the employment agreement and settlement agreement. The court also slashed counsel's time spent researching, drafting and revising the fee petition and refused to award any fees for submitting a reply brief.

In analyzing the hair-splitting with which the court engaged in *Pawlak,* there appeared to be a reticence on the part of the court to recognize the economic realities of a solo or small firm practice. For example, it is quite common for the responsible attorney to wear many hats, including that of paralegal, secretary, office manager, accountant, file clerk, IT guru and many more. Less-demanding administrative tasks are a function of a small practice, however, the whole point of a "market rate" is to account for this economic reality. In this case, plaintiffs counsel had 20-plus years and was billing far below his market rate. This blended rate presupposes that counsel, as a solo practitioner, is engaging in tasks that are at the high end of his talents, as well as those that are far less demanding.

The U.S. Court of Appeals for the Third Circuit has recognized this economic reality by allowing the attorney to bill for clerical or paralegal work where it is more productive for the attorney to perform the task than to delegate it. (See *Elizabeth S. v. School District of Philadelphia (E.D. Pa.*, June 28, 2012), citing In *re Busy Beaver Building Centers*, 19 F.3d 833 (3d Cir. 1994).) Moreover, even if the administrative tasks for which counsel was reduced were performed by a paralegal, the paralegal would have incurred other hours in the case, plus there would be additional hours by the responsible attorney for supervising the paralegal's work. This calls to mind a quote from the Ninth Circuit in a fee decision, *Moreno v. City of Sacramento,* 534 F.3d 1106, 1112 (9th Cir. 2008): "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker."

In somewhat stark contrast to the *Pawlak* case is the fee decision in *Lyons v. Gerhard's* (E.D Pa. July 15, 2015, No. 14-6693). Like Pawlak, Jeffrey Lyons sued his employer alleging violations of state and federal overtime laws, including a claim that he was misclassified as an independent contractor under the Fair Labor Standards Act (FLSA). Unlike the other case, however, Lyons settled with Gerhard's for an amount of damages of $153,000. Because the agreement involved the settlement of a wage-payment claim under the FLSA, the court was required to examine the agreement to ensure that it represented "a fair and reasonable resolution of a bona fide dispute."

After conducting an analysis of whether the settlement was reasonable, and determining that it was, the court next considered the reasonableness of counsel fees. Under the proposed settlement, $67,387.50 was attributable to attorney fees and costs, representing a 44 percent contingency of the total settlement. According to the opinion, nearly $6,000 of that was litigation costs, leaving almost $60,000 for fees, or about 39 percent of the total award. At the fairness hearing, counsel for the plaintiff (who was the same attorney in the *Pawlak* case) attested that he had devoted 92 hours to the case, an amount the court deemed reasonable "given the complexity of the case, the number of documents produced, and the number of depositions taken."

The court did not require any itemized time or billing records, and relied exclusively on the affirmations by counsel on the record at the fairness hearing. When said and done, the fee

worked out to a rate just over $650 per hour. Lyons' counsel, who the court noted has been a practicing attorney for over 25 years and devotes approximately 95 percent of his practice to employment law cases, was within the CLS fee schedule range of $600-$650 for an attorney with this amount of experience. There was no discussion at the hearing or in the briefs of a lower hourly rate for certain less-demanding, administrative tasks in considering the lodestar. The court did not find any problems with the fee charged or the hours expended and approved the settlement.

Interestingly, what we have are two factually similar cases handled by the same attorney resulting in vastly different counsel fee awards. What could possibly cause such a difference in the fee analysis? Was the level of representation that much different from case to case?

In the first case, the fee was being paid directly from the employer on a non-contingent basis, after a settlement on the merits of the case, whereas in the second case the fee was being taken as a percentage of the proposed award to the plaintiff. On the one hand, the substantially "adjusted" fee was assessed against the alleged wrongdoer (alone); while on the other hand the "unquestioned" higher fee was deducted from the victim's share. The court in the second case analyzed the reasonableness of the settlement using factors applicable to a class action lawsuit, even though it was an individual claim. This seems to suggest a hesitance to disgorge money from the "bad guy," unless, of course, it is coming out of the "good guy's" portion.

We are left to question how seriously our courts are taking the "private attorney's general" mission under the civil rights statutes. In cases like those of Pawlak and Lyons where the damages may be relatively low, but the results were quite substantial (i.e., an employment contract and a raise), counsel deserves to be paid a fee that reflects factors like access to justice, as well as risks such as contingency-based representation. Whether the approved rate is $450 or $650 per hour, the result can be life-changing to an employee of modest means. Rather than meet the fee petitions with a dubious eye for overreaching, the hope is that courts will more fairly assess fee petitions in the context of the harm done to the plaintiff.

Jeffrey Campolongo
Attorney at Law
Law Office of Jeffrey Campolongo
50 Monument Road
Suite 101
Bala Cynwyd, PA 19004
phone - (215) 592-9293
fax - (215) 592-9296
jcamp@jcamplaw.com
www.jcamplaw.com