IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERIC HOLMES,
on behalf of himself and all others
similarly situated,

Plaintiff,

v.

SID'S SEALANT, LLC,
NORTH SHORE RESOTRATION, LLC,
and SID ARTHUR

Defendants.

OPINION AND ORDER

16-cv-821-wmc

On December 12, 2016, plaintiff Eric Holmes brought a putative collective action claiming that defendants violated the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), by denying their employees overtime compensation, as well as a claim under Wisconsin law for prevailing wage violations. (*See* Compl. (dkt. #1) ¶ 1; Amend. Compl. (dkt. #17) ¶ 1.) At plaintiff's request, the court conditionally granted certification of the collective action in November 2017. (Conditional Certification Order (dkt. #43) 13.) In December 2017, plaintiff Andrew G. Yauck consented to join Holmes as an individual plaintiff in the lawsuit. (Yauck Consent (dkt. #44) 1.) On April 13, 2018, the parties jointly sought approval of a proposed, final settlement. (*See generally,* Mot. Approval (dkt. #46).) For the reasons addressed below, the final settlement is approved.

OPINION

The parties' settlement agreement is before the court for approval because FLSA claims cannot be settled in the absence of court or Department of Labor approval. *See Walton v. United Consumers Club, Inc.*, 286 F.2d 303, 306 (7th Cir. 1986) ("[T]he Fair Labor Standards Act is

designed to prevent consenting adults from transacting about minimum wages and overtime pay. Once the Act makes it impossible to agree on the amount of pay, it is necessary to ban private settlements of disputes about pay. Otherwise the parties' ability to settle disputes would allow them to establish sub-minimum wages.").[1] Where approval is required, the court must ensure that the settlement's terms and conditions (1) represent "a fair and reasonable resolution of a bona fide dispute over FLSA provisions" and (2) reflect "a compromise of disputed issues [rather] than a mere waiver of statutory rights brought about by an employer's overreaching." *Lynn's Food Stores, Inc. v. U.S. Dept. of Labor*, 679 F.2d 1350, 1354-55 (11th Cir. 1982). The proposed settlement here meets these requirements.

First, plaintiffs' case involved "a bona fide dispute over FLSA provisions." Plaintiffs alleged that defendants were joint employers and had two policies that effectively violated the FLSA: the companies failed to pay an overtime rate for hours worked over 40 hours per week; and the companies required employees to punch out at the start of travel, meaning that employees did not get compensated for (a) return trips during normal working hours, (b) travel between worksites, and (c) travel from worksites to the shop to continue working. Holmes also claims entitlement to a higher journeyman rate for some of his hours under Wisconsin law.

[1] Other courts have concluded that approval of a private settlement is not necessary for some FLSA claims, even when the Department of Labor was not involved. *See e.g.*, *Martin v. Spring Break '83 Productions, L.L.C.*, 688 F.3d 247, 255 (5th Cir. 2012) (holding that a private settlement of FLSA claims "predicated on a bona fide dispute about time worked" was enforceable, but not "a compromise of guaranteed FLSA substantive rights themselves"); *Thomas v. Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976) (finding private FLSA claims binding because there was no "disproportionate bargaining power" where employees got "everything to which they [were] entitled under the FLSA at the time the agreement [was] reached"); *Wilson v. Maxim Healthcare Servs., Inc.*, No. C14-789RSL, 2017 WL 2988289, at *1 (W.D. Wash. June 20, 2017) (court declined to review individual settlement agreements after FLSA collective action decertified). Similarly, it is unclear whether the court needs to examine the settlement of Holmes's prevailing wage claim, but the court will consider it along with the settlement of plaintiffs' FLSA claims since the settlement arguably intertwines the two.

(*See* Mem. Law Supp. Approval (dkt. #47) 2.) In opposing Holmes's request for conditional certification of a collective action, defendants argued that they were separate entities and further denied the existence of these policies. (*See* Defs.' Conditional Certification Opp'n (dkt. #36) 1-2.) Defendants also argued that they had not violated Wisconsin law. (Amend. Answer (dkt. #42) ¶¶ 15-16, 63-64.) Despite defendants' denials and opposition, Holmes made a showing sufficient to warrant conditional certification of a collective action. Accordingly, there was a legitimate dispute over whether the FLSA had been violated.

Second, the proposed settlement is "a compromise of disputed issues." In support of the settlement agreement, the parties explain that from the beginning of their negotiations, defendants threatened to seek bankruptcy protection unless a global settlement for these claims *and* claims brought by fringe benefit funds for benefit contributions (and other monies owed) could be reached. (Mem. Law Supp. Approval (dkt. #47) 2.) Through negotiation, the parties were able to reach a global settlement, which among other things, will compensate the plaintiffs and their attorney in this case as follows:

Date	Holmes Wages	Holmes non-Wages	Yauck wages	Yauck non-wages	Attorneys' Fees
March 13, 2018	10,000	10,000	1500	1500	8000
April 1, 2018	2000	2000	400	400	1700
May 1, 2018	2000	2000	400	400	1700
June1, 2018	2000	2000	400	400	1700
July 1, 2018	1000	1000	300	300	1900

(Settlement Agreement (dkt. #46-1) 1.)[2] The parties also clarify that defendant Sid's will "make a total down payment of $32,000, and monthly payments of $8,000," with plaintiffs' compensation drawn out of these payments. (Mem. Law Supp. Approval (dkt. #47) 2.) The parties explain that most -- but not all -- of the early settlement payments go to plaintiffs' claims in order to receive the agreement of the benefit funds. (*Id.* at 4.)

While plaintiffs calculated that the maximum possible recovery would be $91,000 for Holmes (including $80,000 for prevailing wage damages) and $17,628 for Yauck, they acknowledge that if litigation continued they likely would not recover these amounts because: (1) there was no documentation supporting Yauck's claim that Sid's employed him during the first six months of 2015; (2) certified payroll reports show Sid's employees generally worked less frequently on prevailing wage projects than alleged by Holmes; and (3) if defendants filed for bankruptcy, plaintiffs would receive far less than what is provided in the settlement. (*Id.* at 2-3.) The parties also credibly contend that the proposed settlement is the product of arms' length negotiation, as demonstrated by defendants agreeing to provide a larger down payment than initially offered and plaintiffs' satisfaction that defendants cannot afford a larger lump sum payment. (*Id.* at 1, 3-4.)

The final consideration for the court is whether the requested attorney's fee is

[2] The parties agreed that half of each payment to each plaintiff would "be characterized as liquidated damages rather than wages," with the defendants responsible for "the employer share of social security and medicare taxes on the portion of the payments characterized as wages." (Settlement Agreement (dkt. #46-1) 1.) While the parties characterize this as a "common fund" case, that is at best misleading, since there is no common pool of money, rather the settlement provides specific compensation to each plaintiff and their attorney. *See Common Fund*, Black's Law Dictionary (10th ed. 2014) ("A monetary amount recovered by a litigant or lawyer for the benefit of a group that includes others, the litigant or lawyer then being entitled to reasonable attorney's fees from the entire amount."). In fairness, perhaps they are referring to a larger pool of money set aside for other aggrieved parties to the global settlement.

appropriate. *See* 29 U.S.C. § 216(b) ("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."); *see also De La Riva v. Houlihan Smith & Co., Inc.*, No. 10 C 8206, 2013 WL 5348323 (N.D. Ill. Sept. 24, 2013) ("A district court must award reasonable attorney fees and costs to the prevailing plaintiff in a FLSA case, including a plaintiff who favorably settles his claims." (citing 29 U.S.C. § 216(b); *Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 707 (7th Cir. 2001))). The Previant Law Firm seeks $15,000 in attorney's fees, explaining that the retainer agreement provided that the firm would receive the larger of either one-third of the amount recovered or actual attorney's fees. (Mem. Law Supp. Approval (dkt. #47) 6-7.)[3] Here, counsel represents that one-third of recovery would total $18,334, but that he is only seeking $15,000 or about 27.3% of the recovery.[4] (*Id.* at 7.)

[3] The retainer agreement provides that:

> In consideration of services rendered and to be rendered, the Client agrees to pay said Attorneys the sum of 33 1/3 percent of whatever is awarded as a result of said claims, less Attorney fees awarded on an hourly basis by the Court or settlement. If attorneys fees awarded by the Court or settlement exceed 33 1/3 percent of the recovery, then Attorneys shall retain all attorneys fees awarded by the Court or settlement, rather than 33 1/3 percent of the recovery. The 33 1/3 percent of the recovery shall be computed on the net sum recovered, after all costs incurred in prosecuting this action . . . have been deducted from the recovery.

(Retainer Agreement (dkt. #50-1) ¶ 4.) There is also a provision providing that if the client settles or decides to stop pursuing his claims without counsel's consent, the client will pay counsel "either, the sum of 33 1/3 percent of the settlement amount, or Attorney fees at Three Hundred Dollars ($300.00) per hour for all hours of legal services the Client received, whichever is larger." (*Id.* ¶ 6.)

[4] Counsel calculated this percentage by dividing the attorney's fee by the total recovery:

$$\frac{15{,}000}{55{,}000} = 27.23\%.$$

However, as the court previously noted, this is *not* a common fund case.[5] A $15,000 fee would translate to an hourly rate of $252.95, slightly higher than the $250/hour rate specified in the parties' joint submission.[6] (Mem. Law Supp. Approval (dkt. #47) 7.) In either case, the requested hourly rate is less than the $300 specified in the retainer agreement, which, if used, would result in a total attorney's fee of $17,790. (*See* Retainer Agreement (dkt. #50-1) ¶ 6.)

Determining an appropriate attorney's fee is within the discretion of the court. *Riddle v. National Sec. Agency, Inc.*, No. 05 C 5880, 2010 WL 1655443, at *2 (N.D. Ill. Apr. 23, 2010) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).[7] The proper starting point is the lodestar amount, calculated by multiplying the hours reasonably spent on the litigation by a reasonable hourly rate. *Id.* (citations omitted); *De La Riva*, 2013 WL 5348323, at *1. The district court is required to exclude hours either not reasonably expended or inadequately documented. *Riddle*, 2010 WL 1655443, at *2. "In determining an appropriate market rate, the court must rely not only on 'evidence of rates similarly experienced attorneys in the community charge paying clients for similar work,' but also on 'evidence of fee awards the

[5] In a common fund case, the appropriate comparison is the attorney's fee to the fee plus the class recovery. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014).

[6] The court calculated this amount based on counsel's 59.3 hours worked through April 26, 2018. (Statement of Atty's Fees (dkt. #40-1) 5.) The parties' settlement materials represented that counsel spent 60 hours on this matter. (*See* Mem. Law Supp. Approval (dkt. #47) 7.) Counsel explains that he rounded up to 60 hours because "[i]f the Court does approve the settlement, [he] will need to spend a small amount of time making sure that the monthly payments paid to Holmes and Yauck are in the correct amounts, and to oversee the mailing of th[os]e payments." (Letter (dkt. #50) 1.)

[7] Although *Riddle* solely concerns the appropriate calculation of attorneys' fees in an FLSA case where the plaintiffs (two named plaintiffs and seventeen opt-in plaintiffs) prevailed via stipulated judgment, the basic standard of review employed would seem equally applicable here.

attorney has received in similar cases.'" *De La Riva*, 2013 WL 5348323, at *4 (quoting *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir. 2011).

Counsel spent 59.3 hours developing, litigating, and ultimately settling this case. (*See* Statement of Atty's Fees (dkt. #40-1) 5.) Overall, counsel's time appears to have been reasonably spent. Counsel defended against a motion to dismiss for lack of jurisdiction and secured conditional certification of the FLSA collective action before sending out court-approved notice and engaging in settlement negotiations. Counsel's cumulative hours are facially reasonable.

While neither side has submitted affidavits of practitioners to establish the market rate, the parties point the court to a handful of cases where counsel was awarded attorney's fees in other FLSA cases. (*See* Mem. Law Supp. Approval (dkt. #47) 7.) While all of these cases involved a common settlement fund, the court finds them helpful in gauging an appropriate hourly fee. (*See e.g.*, *Dexter v. Ministry Health Care*, No. 14-cv-87-wmc, dkt. #72; *Smoot v. Wieser Brothers Gen. Contractors*, No. 15-cv-424-jdp, dkt. ##58, 64.) In *Dexter*, the court awarded counsel 30% of the class recovery, equating to an hourly rate of approximately $500. (*Dexter* Final Settlement Approval (No. 14-cv-87-wmc dkt. #72) 5.) In *Smoot*, the court awarded counsel $57,523.50 in attorneys fees, which, based on 110 hours worked, translated to an hourly rate of approximately $523. (*Smoot* Final Settlement Approval (No. 15-cv-424-jdp dkt. #64) 5; *Smoot* Mot. Attys. Fees (No. 15-cv-424-jdp dkt. #58) ¶ 2.) Here, where there were only two plaintiffs, counsel is seeking an hourly fee of approximately $250/hour, which appears reasonable both in comparison and based on the litigation posture and the serious risk of nonpayment, either because of the documentary challenges or the potential bankruptcy of defendants.

Accordingly, counsel's request for a fee of $15,000 is approved. *See De La Riva*, 2013 WL 5348323, at *6 ("An award of the originally calculated lodestar amount is presumptively reasonable, and it is the [opposing party's] burden to convince [the court] that a lower rate is required." (quoting *Robinson v. City of Harvey*, 489 F.3d 864, 872 (7th Cir. 2007))).

ORDER

IT IS ORDERED that

1) The joint motion for court approval of settlement (dkt. #46) is GRANTED.

2) The clerk of court is DIRECTED to close this case.

Entered this 18th day of May, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge