A Reasonable Attorney Fee Award "May Be No Fee at All"; Eleventh Circuit Confirms No Abuse of Discretion in Denying Attorney's Fees to Prevailing FLSA Plaintiff

By Peter J. Moser

In a recent unpublished decision, *Batista v. S. Fla. Womans Health Assocs.*,[1] the Eleventh Circuit Court of Appeals confirmed the reasoning and outcome of several prior district court decisions, that in some wage and hour cases under the federal Fair Labor Standards Act ("FLSA"), a prevailing plaintiff may be denied an award of attorney fees altogether. This may be the result when the conduct of plaintiff's counsel, particularly in a so-called nuisance case where there is the appearance of fee-churning, needlessly results in the initiation or prolonging of litigation.

The *Batista* decision will no doubt draw cheers from defense attorneys frustrated by the current state of affairs in wage and hour litigation. Still, the Eleventh Circuit decision was highly fact-dependent. Recent decisions from other circuits illustrate that mere disproportionality – i.e., where the apportionment of settlement money going to a plaintiff is small, and the apportionment going to their attorney is many multiples higher – will not alone establish the fee award as unreasonable.

This article examines the *Baptista* decision and contrasts it with several recent decisions in other circuits involving FLSA attorney's fee determinations.

The *Batista* Decision

Background[2]

The plaintiff, Mitzy Batista ("Batista"), worked for the defendant South Florida Womans Health Associates, Inc. ("SFWHA"), for a little over two weeks before she was discharged for missing a day of work. SFWHA claimed that it sent Batista's final paycheck to her last known address; however, Batista never received the check. Her lone previous paycheck had been issued via direct deposit.

Batista contacted an attorney within a few weeks of her discharge. Three months later, Batista filed suit against SFWHA and its owner alleging a violation of FLSA's minimum wage provisions, based on unpaid wages. Neither Batista nor her attorney had contacted SFWHA during the three-month period prior to filing suit. In her complaint, Batista sought damages of $551.00, consisting of $275.00 in back wages plus an equal amount as liquidated damages. She also requested an award of attorney's fees and costs.

Upon receiving notice of the claim, SFWHA promptly offered to send Batista a check for $551.00, characterizing the dispute as a "misunderstanding."[3] However, settlement was "stymied", according to the Court, by the insistence of Batista's attorney upon "receiving attorney's fees in an amount greater than [the Defendants] thought was reasonable."[4] It would later be revealed through time records that Batista's attorney had, at the time of initial settlement discussions, logged only 4.3 hours of work whereas his demand for fees at the time was $3,200.00, an amount which the defendants deemed "ridiculous."[5]

Eventually the parties did settle. Key settlement terms included mutual releases and a payment by the Defendants of $551.00 in damages plus $523.00 in court costs. As for attorney's fees, the agreement left it up to the district court to determine what was reasonable.

The path to final resolution grew extended, as the Defendants attempted to renegotiate the attorney's fee portion of the settlement. This effort was rejected by Batista's attorney, who instead sought judicial enforcement of the original deal. Eventually the district court confirmed and approved the parties' original settlement, retaining jurisdiction to enforce its terms and to determine a reasonable attorney's fee. The court referred the issue of attorney fees to a magistrate judge.

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[1] 2021 U.S. App. LEXIS 2623 (11th Cir. Feb. 1, 2021).

[2] Recitation of background facts drawn from 2021 U.S. App. LEXIS 2623, *2-16.

[3] 2021 U.S. App. LEXIS 2623, *5.

[4] 2021 U.S. App. LEXIS 2623, *2.

[5] 2021 U.S. App. LEXIS 2623, *7.

Batista requested fees of $10,675, but the magistrate judge ultimately recommended an award of no fees at all. The magistrate found that (i) the Defendants had timely issued and mailed Batista her final paycheck to the address she provided, (ii) that Batista's attorney had made no effort to contact Defendants to inform them that Batista had not received her check before suing, and (iii) had he done so, he would have discovered that Defendants had sent Batista's paycheck to her address and were willing to immediately issue another check. Accordingly, the magistrate judge concluded that the case was a "prototypical 'nuisance suit'" involving nothing more than a lost paycheck which Batista's attorney "could have resolved by placing a brief phone call to Defendants."[6] The fee demand was "excessive relative to the minimal work [i.e., a brief phone call] necessary to resolve the matter and make his client whole."[7]

The magistrate's recommendation was adopted by the district court, and Batista appealed. The issue on appeal was whether the district court had abused its discretion in determining "reasonableness."

The Decision

Section 216(b) of the FLSA provides a mandatory award of reasonable attorney's fees to a prevailing plaintiff:[8]

> The 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.[9]

As for the standard of review regarding reasonableness, the Court explained:

> We will not set aside the district court's determination of what fee is reasonable pursuant to § 216(b) of the FLSA absent a "clear abuse of discretion." *Kreager v. Solomon & Flanagan*, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985). An abuse of discretion occurs if the judge fails to apply the proper legal standard, follows improper procedures, or bases an award of attorney's fees upon findings of fact that are clearly erroneous. *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883, 890 (11th Cir. 1990).[10]

The Court began its analysis by reciting in detail the facts and reasoning of several prior district court[11] decisions in which zero fees had been awarded to a prevailing FLSA plaintiff. Notably, several of those cases involved the same attorney representing Batista, Elliot Kozolchyk. The Court quoted extensively from these prior district court decisions, in particular highlighting the conduct of attorney Kozolchyk in those matters. For example:

> "[Kozolchyk's] conduct was part of a strategy to churn the file and create unnecessary attorney's fees". Further, "the requested amount of fees is grossly lopsided when compared to both the amount in controversy and the final settlement. (citations omitted)[12]
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> [Kozolchyk's] "sole intent [in rejecting a settlement offer] was to run up his bill."[13]

In the present matter, the Court recited the "specific faults the magistrate judge laid at the feet of Kozolchyk", which once again would constitute the "special circumstances" needed to overcome the FLSA requirement that fees are to be awarded to a prevailing plaintiff.[14] In sum, the magistrate's view in *Batista,* adopted by the district court, was that:

> At all times this case has involved a lost paycheck—nothing more . . . . Plaintiff and/or her counsel could have resolved this matter simply by placing a brief telephone call to Defendants and without the need to file suit. The fact that the FLSA does not impose a

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[6] 2021 U.S. App. LEXIS 2623, *12.

[7] 2021 U.S. App. LEXIS 2623, *12.

[8] The Court noted that "No one disagrees that [Batista] is the prevailing party" or that the FLSA provides an entitlement to reasonable attorney's fees. 2021 U.S. App. LEXIS 2623, *16.

[9] 29 U.S.C. § 216(b).

[10] 2021 U.S. App. LEXIS 2623, *16.

[11] A lone 2009 11th Circuit decision was also discussed, *Sahyers v. Prugh Holliday & Karatinos, P.L.*, 560 F.3d 1241 (11th Cir. 2009); however, the facts and reasoning of *Sahyers* were unique. In *Sahyers*, similar to *Batista*, the district court rejected an award of attorney's fees to a prevailing plaintiff in an FLSA case, and on appeal there was similarly no abuse of discretion found, but rejection was based in large measure on the status of the parties. Defendants were a law firm and its lawyers, and plaintiff's counsel had made no attempt to initiate contact or tender a demand to these lawyers before filing suit. Such "disregard for lawyer-to-lawyer collegiality and civility" resulted in a needless waste of judicial resources, and so rejection of an attorney's fees award was deemed within the district court's inherent powers to supervise the conduct of the lawyers who come before it and to "keep in proper condition the legal community of which the courts are a leading part". See discussion of *Sahyers* at 2021 U.S. App. LEXIS 2623, *26, 32.

[12] 2021 U.S. App. LEXIS 2623, *25.

[13] 2021 U.S. App. LEXIS 2623, *23.

[14] 2021 U.S. App. LEXIS 2623, *29-31.

> pre-filing notice requirement does not absolve counsel of his obligation as an officer of the court to avoid unnecessary litigation.[15]

The Court was careful to clarify that the lower court's decision was not based on a lack of pre-filing notice from Batista to the Defendants. There is no pre-filing notice requirement under the FLSA; however, this does not excuse an attorney from exercising "some diligence before filing a legal action, with counsel's legal fees in peril if it turns out that the employer was faultless and that a simple inquiry would have so indicated."[16] Moreover:

> The absence of any pre-filing inquiry by counsel . . . was ancillary to the factor that most strongly motivated the district court's decision: "At all times this case has involved a lost paycheck—nothing more . . . ."[17]

In the end, the Court reversed and remanded the lower court's ruling, but only to address a factual dispute raised by the Plaintiff in objection to the magistrate's report; specifically, the magistrate had relied in large measure on the assumption that defendants mailed a check to Batista at the time of her separation, yet Batista now challenged this assertion, and because no affidavit had yet been submitted by Defendants on the matter there was a lack of evidence to support the magistrate's assumption which needed to be addressed.[18]

Other Recent Circuit Court Decisions Regarding FLSA Attorney's Fees

Perhaps illustrating that the decision in *Batista* was primarily a function of egregious conduct, recent decisions from the Second Circuit and Sixth Circuit confirm that mere disproportionality in a settlement allocation between a plaintiff and their attorney, even in a case with very low recovery for the plaintiff, need not result in a finding of "unreasonableness."[19]

In *Fisher v. SD Prot. Inc.,*[20] the parties to an FLSA action sought court approval of a $25,000 settlement agreement, whereby plaintiff's counsel would receive $23,000 of the total settlement amount in fees and costs. The trial court approved the settlement but reapportioned the amounts so that the attorney would only receive $8,250 in fees, approximately one-third of the total figure. On appeal – uncontested by defendants -- the Second Circuit held that the district court had abused its discretion in rewriting the settlement agreement to modify the allotment of settlement funds.

The Court reasoned that "[n]othing in [the FLSA clause addressing attorneys fees] or the surrounding text supports the conclusion that a 'reasonable attorney′s fee' must be a 'proportional' fee."[21] Further a "proportionality rule" would be "inconsistent with the remedial goals of the FLSA, which we have deemed a 'uniquely protective statute.'"[22]

The matter was remanded back to the lower court for a determination of the reasonableness of attorney's fees "without using proportionality as an outcome determinative factor."[23]

In *Rembert v. A Plus Home Health Care Agency LLC*,[24] settlement was reached in an FLSA claim whereby judgment would enter in favor of the plaintiffs in the amount of $18,961, plus "reasonable fees and costs." A fee application was then made in the amount of $38,190; however, the district court ultimately reduced the fee award to $13,790, in part by reducing the number of compensable hours, and in part to bring the figure in line with the 35% fee percentage that the court said was "typically approved."[25] On appeal, the Sixth Circuit ruled that the district court had abused its discretion.

The Court explained that a reasonable fee is one that is "adequately compensatory to attract competent counsel" but "avoids producing a windfall for lawyers."[26] The Court further explained that the well-known lodestar method which was ostensibly applied in this case "yields a fee that is presumptively sufficient to achieve this objective."[27] While the district court had "some discretion regarding the rates and hours which comprise the lodestar analysis,"[28] the court was obligated to provide "a clear and concise explanation of its reasons for the fee award."[29] Here, the

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[15] 2021 U.S. App. LEXIS 2623, *30.

[16] 2021 U.S. App. LEXIS 2623, *34-35.

[17] 2021 U.S. App. LEXIS 2623, *32.

[18] 2021 U.S. App. LEXIS 2623, *35-37.

[19] In addition to considering the reasonableness of attorney's fees under 29 U.S.C. 216(b), where judicial approval is required for an FLSA settlement the court will also generally consider the overall fairness of the settlement.

[20] 948 F.3d 593 (2d Cir. 2020).

[21] 948 F.3d at 603.

[22] 948 F.3d at 603, quoting *Cheeks v. Freeport Pancake House, Inc.*, 796. F.3d 199, 207 (2d Cir. 2015).

[23] 948 F.3d at 606.

[24] 986 F.3d 613 (6th Cir. 2021).

[25] 986 F.3d at 616.

[26] 986 F.3d at 616, quoting *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004).

[27] 986 F.3d at 616, quoting *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010).

[28] 986 F.3d at 616.

[29] 986 F.3d at 616, quoting *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 818 (6th Cir. 2007).

lower court did not do so and consequently, the award was reversed and the case remanded with instructions to grant the original petition for fees and costs.

On the issue of proportionality, the Court cited the Second Circuit's decision in *Fisher*, rejecting the notion that there is any proportionality limit applicable to the assessment of FLSA attorney fee reasonableness.

Conclusion

The Eleventh Circuit's recent *Batista* decision is a welcome read for weary defense counsel, and may hold persuasive value across jurisdictions for the drastic discounting of attorney's fee awards where the conduct of plaintiffs' counsel is egregious and needlessly causes or prolongs litigation. However, in the majority of wage and hour matters, even where backpay liability is very small and the attorney fee expectations far larger, decisions like those in *Fisher* and *Rembert* are far more illustrative.

Peter J. Moser is an attorney at Hirsch Roberts Weinstein LLP in Boston, MA. Pete has represented employers for more than 20 years in the areas of traditional labor law, employment law, and related litigation. He is an adjunct-professor at Boston University School of Law and previously served as an adjunct professor at Boston College.

Supreme Court Review

MINIMUM WAGE

The U.S. Railroad Retirement Board's Refusal To Reopen A Prior Benefits Determination Was Subject To Judicial Review As A "Final Decision Of The Board"

Salinas v. United States RRB, 141 S. Ct. 691 (2021)

In 1992, Manfredo M. Salinas began seeking disability benefits under the Railroad Retirement Act of 1974 ("RRA") based on serious injuries he suffered during his 15-year career with the Union Pacific Railroad. Salinas' first three applications were denied, but he was granted benefits after he filed his fourth application in 2013. He timely sought reconsideration of the amount and start date of his benefits. After reconsideration was denied, he filed an administrative appeal, arguing that his third application, filed in 2006, should be reopened because the U.S. Railroad Retirement Board had not considered certain medical records. An intermediary of the Board denied the request to reopen, because it was not made "within four years" of the 2006 decision, and the Board affirmed [20 CFR § 261.2(b)]. Salinas sought review with the Fifth Circuit, but the court dismissed the petition for lack of jurisdiction, holding that federal courts cannot review the Board's refusal to reopen a prior benefits determination. The U.S. Supreme Court held that the Board's refusal to reopen a prior benefits determination is a "final decision" within the meaning of § 355(f), and therefore, subject to judicial review. The Court reversed the judgment of the court of appeals and remanded the cases for further proceedings consistent with its opinion.

The Court stated that the RRA makes judicial review available to the same extent that review is available under the Railroad Unemployment Insurance Act ("RUIA") [*see* 45 U.S.C. § 231g]. Thus, to qualify for judicial review, the Board's refusal to reopen Salinas' 2006 application must constitute "any final decision of the Board" [§ 355(f)]. The Court stated that it did.

The Court stated that the phrase "any final decision" "denotes some kind of terminal event," and similar language in the Administrative Procedure Act has been interpreted to refer to an agency action that "both (1) mark[s] the consummation of the agency's decisionmaking process and (2) is one by which rights or obligations have been determined, or from which legal consequences will flow." *Smith v. Berryhill*, 139 S. Ct. 1765, 204 L. Ed. 2d 62. The Court stated that the Board's refusal to reopen Salinas' 2006 denial of benefits satisfied these criteria. First, the decision was the "terminal event" in the Board's administrative review process. After appealing the intermediary's denial of reopening to the Board, Salinas' only recourse was to seek judicial review. Second, the features of a reopening decision make it one "by which rights or obligations have been determined, or from which legal consequences will flow." For example, a reopening is defined as "a conscious determination ... to reconsider an otherwise final decision for purposes of revising that decision" [20 CFR § 261.1(c)]. It, therefore, entails substantive changes that affect benefits and obligations under the RRA. The Board reads § 355(f)'s earlier reference to "any other party aggrieved by a final decision under subsection (c)" to mean that each authorized party may seek review of only "a final decision under" § 355(c). However, the Court stated that § 355(f) uses the broad phrase "any final decision" without tying it to the earlier reference to § 355(c)—a notable omission, since Congress used such limiting language elsewhere in § 355. *See* § 355(c)(5).

The Court further stated that any ambiguity in the meaning of "any final decision" must be resolved in Salinas' favor

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