AMERICAN ARBITRATION ASSOCIATION

EMPLOYMENT ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between PAMELA HERRINGTON, individually and on behalf of all others similarly situated, CLAIMANT, and WATERSTONE MORTGAGE CORPORATION, RESPONDENT.	AAA No. 01 14 0000 4860

DECISION AND PARTIAL FINAL AWARD ON ATTORNEY' S FEES AND COSTS

(July 5, 2017)

I, George C. Pratt, the undersigned arbitrator, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having considered the parties' submissions, do hereby issue this Decision and Partial Final Award on Attorney's Fees and Costs pursuant to the Employment Rules of the American Arbitration Association.

In the Partial Final Award on Liability, dated April 13, 2017, it was determined that Waterstone is liable to Claimants under the FLSA for unpaid minimum wages, for unpaid overtime, and for unreimbursed expenses, as well as for attorney's fees and costs, to the extent described in the Partial Final Award on Liability.

The Partial Final Award on Damages, dated June 12, 2017, determined that Claimants were entitled to recover damages from Waterstone the sum of $7,267,919, and Claimants' counsel was directed to submit an application for attorney's fees and costs, as allowed by the FLSA.

Claimants' application for attorney's fees and costs was submitted on May 26, 2017. It consisted of a 30-page brief, an attorney's 37-page declaration with nine exhibits including detailed time sheets for eight attorneys plus support staff, covering the nearly six years that this matter has been in litigation. The application also included copies of expense receipts, biographical data for the attorneys involved, and copies of 84 cases cited in the brief.

Waterstone's 34-page response was submitted on June 9, 2017. It consisted of the responding brief, a series of objections to "evidence" contained in Claimants' submission, two attorney's declarations, and 15 exhibits.

Claimants submitted a 30-page reply brief on June 16, 2017. Attached were two additional exhibits and copies of 37 cases cited in the brief.

I have considered all of the materials submitted and now make this determination of the reasonable attorney's fee and costs to be awarded to Claimants in this protracted proceeding.

Claimants' Application.

Claimants have requested a total of $3,352,317 in attorney's fees, $97,729 in costs, and an incentive payment of $30,000 for the named claimant, Pamela Herrington. The incentive payment is sought as compensation for "the outstanding service she provided to the class in this arbitration" and for the risks she bore in undertaking the leading role. Claimants presented detailed support for a lodestar figure of $2,600,790.90 based on over 7400 hours of work over the nearly six-year period by eight attorneys, two data analysts, paralegals, and clerical staff. The hourly rates, which were based on the firm's charges to clients in 2016, range from $245 to $700.

Counsel, who undertook this litigation on a contingent basis, also seek an enhancement to the lodestar by a multiplier of 1.29 to compensate them for the risk, time, and effort associated with pursuing the claims of the class in this arbitration. If applied, Claimants contend that their claim for attorney's fees would be $3,352,317.

As prevailing parties, claimants are also entitled to recover the "costs of the action" (29 USC §216(b)). They claim to have incurred a total of $97,729 in costs, which they have documented in detail.

Counsel point out that under their retainer agreements with the 220 opt-in class members they are entitled to be paid the greater sum of either the amount awarded by me on this application, or one-third of the total of the damages awarded plus the amount of attorney's fees awarded.

Finally, Claimants request an enhancement award of $30,000 to Claimant Herrington as an incentive payment for her services and compensation for the burdens and risks she bore as the named claimant in this opt-in, collective arbitration.

Waterstone's Response.

Waterstone does not contest Claimants' entitlement to recover a reasonable attorney's fee and costs, but it does argue that their requests should be substantially reduced.

It contends, first, that the fees should be reduced by two-thirds because Claimants originally advanced three claims for relief – FLSA, breach of contract, and

Wisconsin law – but succeeded only on the FLSA claim. Waterstone argues that Claimants' attorneys should not be compensated for work on the failed legal theories.

Next, it argues that the attorney's hourly rates are excessive for two reasons: (1) they are based on a claimed "national" rate, rather than a Wisconsin rate; and (2) they represent 2016 rates rather than the rates applied over the six-year term of this litigation.

Waterstone also claims that the other part of the lodestar calculation – hours spent – is "grossly exaggerated"; that a lodestar multiplier is not called for in this case; that the claim for travel time should be cut in half; and that the amount of costs should also be reduced.

Although it does not challenge the appropriateness of an incentive payment to Claimant Herrington, Waterstone argues that the payment should be one-half of the requested $30,000, or $15,000.

In summary, Waterstone believes that Claimants' application should be reduced as follows:

- Attorney's fees should be reduced from $3,352,317 to$1,885,419.88;
- Costs should be reduced from $97,729.00 to $60,623.26; and
- The incentive award should be reduced from $30,000 to $15,000.

Claimants' Reply Brief.

In reply, Claimants essentially repeat the arguments made in their initial application:

- There should be no reduction for non-FLSA claims;
- The attorney's rates are reasonable;
- The hours worked by counsel and staff are reasonable;
- A multiplier is appropriate in the circumstances of this case;
- The costs incurred were both reasonable and necessary; and
- The requested incentive payment to Ms. Herrington should be allowed.

DISCUSSION

The final step in this six-year-old arbitration calls for an award of reasonable attorney's fees and costs to Claimants as prevailing parties on their FLSA claim. The

ultimate question to be answered is "What are reasonable amounts to be awarded to Claimants for their attorney's fees, reimbursement of costs, and an incentive payment, given the particular circumstances of this arbitration?" As the Supreme Court noted in *Hensley v. Eckerhart* 461 US 424, 437 (1983), "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." However, because settlement does not always occur, the Court provided important guidance for considering disputed applications for counsel fees that, as with the FLSA here, are authorized by statute for prevailing plaintiffs. Justice Brennan in his partial dissent noted that litigating over attorney's fees "after the merits of a case have been concluded" "must be one of the least productive types of litigation imaginable". (*Id.* at 442).

According to Justice Powell, writing for the majority, "the most critical factor is the degree of success obtained." (*Id. at 436).* "Litigants in good faith may raise alternative legal grounds for a desired outcome" but where the claims for relief involve a common core of facts or are based on related legal theories "rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." (*Id.* at 435). Further,

> 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. [But that] does not end the inquiry. 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 relief. . . [T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours

> reasonably expended on the litigation. . . . Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. (*Id.*)

This case has presented an atypical number of difficulties. Herrington initially sued in the United States District Court for the Western District of Wisconsin with a complaint seeking to pursue an opt-out class action under the FLSA. Waterstone began its strenuous resistance with a motion to dismiss the complaint and to compel Herrington to arbitrate her claims. After Waterstone's motion was granted, Herrington turned to this arbitration under the auspices of the American Arbitration Association.

Waterstone has defended this arbitration vigorously at every turn, including four unsuccessful attempts to have the Wisconsin District Court overturn interim orders in the arbitration. Herrington's work was made more difficult by the facts that the putative class included LOs from multiple branch offices that were spread over 22 states, and that the treatment of the arbitration as an opt-in collective action ultimately required record gathering, communications with, and damage calculations for each of 225 claimants, five of whose claims have been dismissed by previous orders in this arbitration.

Working through all of those difficulties and others, Claimants' attorneys have finally achieved a substantial award for their clients. The total damages established ($7,267,919) works out to an average recovery of $41,530 for 175 claimants.

Through the entire litigation period, the only compensation received by Claimants' attorneys has been $83,130 from two sanctions imposed on Waterstone for two incidents of misconduct with respect to this arbitration. In addition to undertaking and prosecuting this case on a contingent basis, Claimants' counsel have advanced nearly $100,000 in expenses in order to bring this matter to a successful conclusion.

Throughout, Claimants' attorneys have performed ably, efficiently, and ethically, displaying admirable expertise, professionalism, and diligence in representing their many clients. Having achieved an award that is substantially greater than most other FLSA recoveries, Claimants' counsel now seek to recover what they assert to be the reasonable attorney's fees and costs that Claimants are entitled to recover under the FLSA.

Their detailed application is *prima facie* sufficient, and Waterstone's objections to "evidence" submitted with the application are all overruled. Nevertheless, Waterstone's specific arguments for adjustments to Claimants' lodestar claim in the form of reductions in the claimed fees and expenses must be addressed.

Success on Only One of Three Claims.

Herrington originally sought recovery on three different legal theories – FLSA, breach of contract, and Wisconsin law – and recovered only on the FLSA claim. Since the general rule is that a claimant should not be rewarded for pursuing unsuccessful

claims, Waterstone argues that the claimed fees should be reduced by two-thirds so as to provide coverage for only the one successful claim out of three asserted.

The proper approach is not just a simple claim-by-claim allocation. As Justice Powell noted in *Hensley:*

> [T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. . . . Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. (*Hensley,* 461 US at 435).

Here, the great bulk of the evidence was focused on the FLSA claim. Very little related to the other two claims. Indeed, Waterstone even protested against the Wisconsin-law claim that it was seriously addressed by Herrington only at the last minute and had not been given much attention during the years of pre-trial activities.

The breach of contract claim rested on a claimed provision in the underlying agreements that Waterstone had agreed to pay the minimum wage and overtime required by the FLSA. Addressing it merely required applying a contractual analysis to the same facts – ours worked and expenses incurred – needed to support the statutory FLSA claim.

In the circumstances of this case, no reduction in attorney's fees should be imposed on the basis that two of the claims initially asserted were unsuccessful. "The result is what matters." (*Hensley,* 461 US at 435). Claimants' success here fully justifies an unreduced award of attorney's fees for the time reasonably devoted to achieving that result.

Excessive Hourly Rates.

Waterstone contends that the hourly rates Claimants apply to reach the lodestar figure are excessive for two reasons. First, they argue that because the action was originally brought in Wisconsin and because the employment agreements had to be interpreted under Wisconsin law, the hourly rates should be based on the local Wisconsin market for legal services in FLSA cases. Presumably, legal fees in Wisconsin tend to be somewhat lower than the "national" rates Claimants seek to apply.

True, Waterstone's home base is in Wisconsin, but its operations and relations with its LOs affect property and people in many different states. Attorneys such as Claimants' counsel who do extensive FLSA work do not tend to confine their activities to a single jurisdiction. They take on cases that arise in many different areas. The law firms of Waterstone's two sets of attorneys are not located in Wisconsin, but instead in Philadelphia and San Diego. Moreover, Waterstone chose not to reveal the rates paid to its counsel to defend this case.

Accordingly, I find and conclude that the "national" rates applied by Claimants for the legal work done on this case are reasonable.

Waterstone's second complaint against the rates applied by Claimants to the work done over the six years of this litigation are that the rates are those charged by counsel in 2016. Instead, according to Waterstone, they should have applied counsel's presumably lower rates for the earlier years during which much of the work was performed. However, it is common practice to invoke current rather than historical rates on an application such as this in order to account for the delay in payment. This is particularly appropriate when, as here, no pre-award interest is allowed.

I find and conclude that using 2016 rates rather than historical rates in this case is reasonable and proper.

Excessive Hours.

Waterstone argues that the number of hours claimed by Claimants is "grossly excessive" because of overstaffing and duplication of work. Getman, Sweeney & Dunn, PLLC, the firm that represents Claimants, seems to have reasonably allocated the various tasks to appropriate levels of personnel in order to keep the legal costs at a reasonable level. Since the case was being processed on a contingent basis, the firm had no motive to "pad" the account, and certainly was under pressure to keep the amount of work being done as low as was consistent with proper representation of their many clients.

Of the hours claimed, 44% were done by paralegals, 33% by associates, and only 22% by partners. Furthermore, Waterstone's scorched-earth defense tactics were responsible for much of the extensive work that Claimants' counsel were required to do in this case.

Waterstone's complaint about having more than two attorneys present at conferences and at trial is groundless. The advantages of having multiple heads addressing a problem are well known. Counsel's use of several attorneys and paralegals at conferences and trials was consistent with modern law-firm practice throughout the country.

Waterstone's argument that the hours devoted to this case by Claimants' attorneys are excessive is rejected. I find and conclude that the number of hours is reasonable when considered in light of all the circumstances of this case.

Data Analysis.

Claimants' damages were prepared by Mike Russo and Jason Kandel, employees of the Getman firm, and were presented at the hearings by Mr. Kandel. Waterstone argues that the 1200 hours spent by them in preparing and presenting Claimants' damage information "shocks the conscience". I disagree. Far from shocking the conscience, the damage analysts were required to gather information about 13 forms of employment agreements, hours worked by the 220 Claimants during the multi-year claim period, and the amounts paid to them both as salaries and commissions. They then had to allocate the payments into two-week pay periods, convert the

information into compatible formats, and develop an interactive spreadsheet that was capable of adjusting each claimant's damages depending on Claimants' success or failure on each of the many disputed issues.

The firm's use of in-house technicians, rather than an outside expert, for presenting Claimants' damages was consistent with its overall practice of keeping expenses of the case within reason.

I find and conclude that the hours spent for data analysis were reasonable.

Clerical Work.

Waterstone contends that the $16,321 sought by Claimants for clerical work should be disallowed because work done by clerks should be regarded as part of overhead and should not be separately compensated. Herrington responds that many cases have allowed for recovery for the costs of clerical work when applied at reduced rates. Here, the average rate for the claimed clerical help is $95.00.

I find and conclude that the claim for clerical work is allowable and reasonable.

Travel Time.

Considerable time was spent by Claimants' attorneys in traveling. They have billed for that time and have done so at their respective full rates. Waterstone contends that travel time should be billed at only one-half of working-time rates. Claimants respond that many cases allow recovery of travel time and that the matter lies in the discretion of the arbitrator. There is no question but that considerable time was spent in traveling (here about 3% of the total time) because of the need to attend two mediations, in-person depositions, hearings on arguments, and the evidentiary hearing.

I find and conclude that the amounts claimed at full rates for travel time were both proper and reasonable.

Lodestar Multiplier.

Claimants have requested a fee enhancement in the form of a lodestar multiplier of 1.29 because of the extraordinary time and labor required, the difficult legal questions involved, the contingent nature of the attorney's compensation, and the exceptional result obtained. A multiplier is a discretionary feature of awards in this type of litigation. Claimants cite cases of multipliers being allowed at rates of 1.75 and 1.6.

Waterstone opposes a multiplier because many of the arguments advanced by Claimants are based on factors that are already subsumed in their claim for attorney's fees, and because Claimants advanced claims that with one exception were unsuccessful. According to Waterstone a multiplier should be allowed only in "very exceptional" cases.

I find and conclude that this is a very exceptional FLSA case and that a multiplier is appropriate. The multiplier rate, however should be at 1.20, rather than 1.29.

Costs.

Waterstone contends that the claimed costs should be reduced by about one third. It focuses on copying costs; attorney meals, travel, and lodging; and allegedly vague entries with respect to postage and office supplies. The arguments have no merit.

Incentive payment.

Waterstone does not contend that Herrington should be refused an incentive payment. Instead it argues that the amount should be $15,000 rather than the $30,000 she has requested. I find and conclude that in the circumstances of this case an incentive payment of $20,000 is reasonable.

SUMMARY

Claimants are entitled to recover from Waterstone reasonable attorney's fees and costs as follows:

Lodestar	$2,667,602
Multiplier enhancement (20%)	$ 533,520
Costs	$ 97,729
Total	$3,298,851

Claimant Herrington is entitled to an incentive fee of $20,000.

PARTIAL FINAL AWARD ON

ATTORNEY' S FEES AND COSTS

On their application for attorney's fees and costs, Claimants are entitled to recover from Waterstone:

Lodestar		$2,667,602
Multiplier enhancement (20%)		$ 533,520
Costs		$ 97,729
Incentive fee		$ 20,000.
	Total	$3,318,851

Dated: July 5, 2017

George C. Pratt
Arbitrator

State of New York }
County of Nassau }

MARCIA P. BURKE Notary Public of the State of N.Y. County of Nassau 01BU4991715 My commission expires 4/8/18

On this 5th day of July, 2017, the above arbitrator came and appeared before me and confirmed to me that he is the individual described herein, and acknowledged to me that he is the individual who executed the foregoing instrument.

Marcia P Burke
Notary Public
State of New York