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United States District Court, E.D. Virginia,
Alexandria Division.

Jose ZAMORA, Plaintiff,
v.
ENTERPRISE RAC OF
MARYLAND, LLC, Defendant.

1:20-cv-00478 (LMB/MSN)
|
Signed 12/07/2020

Attorneys and Law Firms

Thomas Francis Hennessy, Fairfax, VA, for Plaintiff.

Steven W. Ray, Vienna, VA, Amy Elizabeth Smith, Richmond, VA, Edward Lee Isler, Isler Dare PC, Vienna, VA, for Defendant.

ORDER

Leonie M. Brinkema, United States District Judge

***1** Before the Court is Defendant's Petition for Attorney's Fees and Costs ("Petition"), in which defendant Enterprise RAC of Maryland, LLC ("defendant") argues that plaintiff's counsel Thomas F. Hennessy ("plaintiff's counsel" or "Hennessey") should be required to pay $26,355.28 in attorneys' fees and costs pursuant to 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 54(d). [Dkt. No. 44]. Hennessy has opposed the Petition. [Dkt. No. 46]. For the reasons below, the Petition will be granted.

I.

On April 24, 2020, plaintiff Jose Zamora ("plaintiff"), through counsel, filed a complaint alleging that the defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 200 et seq., by miscalculating the amount of overtime that was due on plaintiff's bonus compensation. Five days after defendant was served, on May 12, 2020, defendant's counsel sent a letter to Hennessy, asserting that plaintiff had been paid for all overtime related to his incentive bonuses, bonus gift cards, and shift differential income. [Dkt. No. 12-1]. The letter provided Hennessy with plaintiff's recent pay stubs which showed the Premium Overtime that had been paid, and urged Hennessy to voluntarily dismiss the claims based on this information. Id. In response, Hennessy filed the Amended Complaint on June 12, 2020, alleging the same violations of the FLSA but this time styling the action as a potential class action. [Dkt. No. 12]. Defendant moved to dismiss the Amended Complaint for failure to state a claim, or, in the alternative, for summary judgment. [Dkt. Nos. 13, 14].

During oral argument on defendant's dispositive motions, held on August 11, 2020, the Court cautioned Hennessy that the parties' memoranda indicated that "the way [he was] trying to calculate the overtime due [to his] client is definitely wrong." [Dkt. No. 42] at 4:1-3. In response, Hennessy conceded that he did not "have any basis with respect" to some of his claims,[1] but maintained that his method of overtime calculation was correct. Id. at 5:3-12. In addition, he raised an entirely new argument that not only had the overtime on plaintiff's bonuses been miscalculated, but that the bonuses themselves had been systematically underpaid—an issue that the Court admonished had not been "articulated in [the] complaint." Id. at 30:7-10.

1 Specifically, in opposing the dispositive motions, Hennessy had provided a sample calculation which he claimed demonstrated why "Enterprise owes Mr. Zamora unpaid overtime compensation under the FLSA." [Dkt. No. 20] at 10-11. His calculation included as "Bonus" pay (upon which overtime should have been paid) employer contributions that were clearly labeled on his paystub as long-term disability insurance and group term life insurance, which are not forms of employee compensation that are subject to overtime pay. Id. at 10. When it was pointed out to Hennessy that his calculation was wrong, he conceded that the calculations in his brief were incorrect, stating, "At this point in time, Judge, I don't have any basis with respect to that particular item to dispute the representation that that's what that item was attributable for or that's what that item was paid for. I don't have any basis to do that at this stage." [Dkt. No. 45] at 5:3-7.

***2** After oral argument, the Court entered an Order directing the parties to file "a clear description of exactly how each side believes the overtime pay for plaintiff should be calculated," using the same paystub to facilitate comparison. [Dkt. No. 24]. Both plaintiff and defendant responded to that order by

filing supplemental briefs on August 19, 2020. [Dkt. Nos. 25, 26]. Defendant's supplemental brief requested leave to petition the Court for attorney's fees under 28 U.S.C. § 1927, based on Hennessy's pattern of ignoring evidence contrary to his theory of the case and his "persist[ence] in presenting meritless arguments and in protracting this litigation." [Dkt. No. 25] at 8-9. On August 20, 2020, Hennessy submitted two additional filings, neither of which addressed defendant's request for leave to petition for fees. One was a reply to defendant's supplemental brief, in which Hennessy proposed yet another method for calculation that differed from the one he had submitted only one day before, [Dkt. No. 29]; the other was a motion for continuance to allow him to take discovery to determine whether plaintiff was "paid the non-overtime bonus amount he earned through a bonus scheme based on number and type of cars washed as well as various other duties"—an issue not raised in the Amended Complaint. [2] [Dkt. No. 28] at 1-2. Both motions attached new declarations from the plaintiff that raised facts or arguments not previously advanced. Defendant opposed the motion to continue, [Dkt. No. 34], and plaintiff filed a reply. [Dkt. No. 38].

2 In its opposition to Hennessy's motion to continue, defendant submitted a September 9, 2020 letter to Hennessy in which defense counsel had explained that plaintiff was actually over-compensated according to Enterprise's incentive bonus scheme. The incentive bonuses were paid based on the number of cars washed during certain time periods; plaintiff was terminated from Enterprise because he allegedly over-reported the total number of cars he washed, sometimes even claiming to have washed the same car hundreds of times after the car had been removed from Enterprise's rental fleet. [Dkt. No. 34-1].

At an October 26, 2020 hearing, which addressed all three pending motions, the Court granted defendant's motion to dismiss and found that "sanctions ... are appropriate," and that Hennessy would "be required to reimburse the reasonable attorney[s'] fees and expenses that the defendant incurred starting after the August 11 hearing." [Dkt. No 42] at 12:17-21.

II.

Defendant's Petition seeks attorneys' fees and costs totaling $26,355.28, [3] pursuant to 28 U.S.C. § 1927. Hennessy has opposed the Petition. Section § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Section 1927 is "aim[ed] ... at attorneys who multiply proceedings," without regard to the ultimate merits of the underlying claims. DeBauche v. Trani, 191 F.3d 499, 511 (4th Cir. 1999) (emphasis in original); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980) ("§ 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes.").

3 This total consists of $21,250.00 for attorneys' fees incurred after the August 11 hearing, $5,000.00 for attorneys' fees incurred preparing the Petition, and $105.28 for costs incurred by defendant following the August 11 hearing.

Instances of Hennessy multiplying the proceedings in this matter abound. Defendant first advised Hennessy that the claim was without merit in a May 26, 2020 letter, which was sent about three weeks after the original complaint was filed and which plaintiff actually attached as an exhibit to the Amended Complaint. [Dkt. No. 12-1]. The letter explained that overtime had already been paid on all of plaintiff's bonuses, provided the method of calculation, and attached all of plaintiff's relevant paystubs which, according to defendant's counsel, "unmistakably establish that there is no basis for the legal action." Id. at 3. In that letter, defense counsel also put Hennessy on clear notice that if he disregarded the evidence they had presented, and "Enterprise [was] compelled to spend further legal fees responding to the Complaint, [they would] not hesitate to pursue all legal

remedies available, including a motion for sanctions under Rule 11." Id. at 3-4. Rather than heeding defense counsel's warning, Hennessy filed the Amended Complaint that did not respond to the evidence provided by defendant and instead attempted to expand the litigation into a class action. Defendant's counsel again emailed Hennessy to request that he voluntarily dismiss the claims, stressing that the Court had rejected his argument that the amounts reflected on the paystubs at "OT Prem. Pay" were anything other than overtime paid on bonuses. [Dkt. No. 25] at 8.

***3** Instead of recognizing that the overtime claims were unsupported, Hennessy continued to manufacture controversy by raising new ways of calculating overtime and even new claims in each successive briefing, requiring defendant to expend considerable effort and expense to respond. This pattern is something of a modus operandi for Hennessy, who has previously been assessed fees pursuant to § 1927 for an identical course of conduct. See Salvin v. Am. Nat'l Ins. Co., 281 F. App'x 222 (4th Cir. 2008). In Salvin, the plaintiff brought breach of contract claims against her former employer, arguing that she had been under-compensated pursuant to the agreement. Id. at 224. During the plaintiff's deposition, it became clear that her claim was meritless, and that she had received the amount of compensation to which she was entitled under the agreement. Id. At that point, defense counsel asked Hennessy to voluntarily dismiss the claim. Hennessy declined, forcing defendants to continue with discovery and ultimately to seek summary judgment. Id. Hennessy filed an opposition to the motion for summary judgment in which he side-stepped defendant's arguments based on the plaintiff's deposition and instead "relied on an alternative theory, which was based on factual allegations not included in the complaint." Id. He also "included a new affidavit from [the plaintiff] that contained statements contradicted by the testimony she gave in her deposition." Id.

The Fourth Circuit found that Hennessy's refusal to dismiss the action and his persistence in advancing a new theory "not pled in the complaint ... [was] sufficient to support a determination that Hennessy acted in bad faith under either an objective or a subjective standard," and affirmed the district court's § 1927 fee award. Id. at 225. The same conclusion is warranted by the conduct in this civil action: Hennessy has continued to pursue the overtime claims after they have been shown to be meritless, spinning out new theories of liability untethered to the claims actually advanced in the Amended Complaint and producing a new declaration from the plaintiff raising unpled factual allegations, just as he did in the Salvin litigation. "[L]itigants and their counsel are not free, simply because they can meet the requirements of a prima facie case, to disregard evidence that comes to light ... and to continue to press their case without any reasonable belief" that defendant is liable. Blue v. U.S. Dep't of Army, 914 F.2d 525, 537 (4th Cir. 1990).

In opposing the Petition, Hennessy disregards the record and argues that any award of attorneys' fees would violate Due Process, because he "had no notice that this Court was considering sanctions against him and no opportunity to present the district court with his argument against the sanctions." [Dkt. No. 46] at 7. That argument is clearly meritless, given the multiple times both defense counsel and the Court warned Hennessy that his claims were groundless and sanctions could be imposed if he continued to pursue them. His first warning came on May 12, 2020, when he received a letter from defense counsel explaining that the assertions in the Complaint lacked merit and informing him that defendant might seek sanctions if he continued to pursue them in spite of the evidence. [Dkt. No. 12-1]. At the August 11 hearing, the Court warned Hennessy that the letter from defendant's counsel "basically served you a Rule 11 notice ... and that if ... you pursue the case and it comes out that, you know, you were clearly wrong, then they're going to be coming after you-all for sanctions." [Dkt. No. 45] at 31:11-18. Later in that same hearing, after Hennessy began raising factual claims not alleged in the Amended Complaint, the Court put him on even more explicit notice:

> I will advise you now, Mr. Hennessy, that you'll proceed at your own risk going forward, because again, I can see how this could get very expensive if you're starting to dig into ... how, in fact, the bonuses are calculated and how many cars are involved, etc., etc., and if, in fact, you're unsuccessful, that will give the defense a basis to seek compensation for the attorneys' fees expended.

Id. at 31:25-32:1-7. After that hearing, defense counsel contacted Hennessy, asking him to voluntarily dismiss the Complaint in light of the Court's findings. [Dkt. No. 25] at 8.

***4** Defendant's counsel again put its intention to seek fees from Hennessey on the record in their first supplemental brief, which was filed on August 19, 2020. [Dkt. No. 25] at 7-9. Defendant explained:

> Since receiving Plaintiff's initial Complaint in this matter, Enterprise has readily and repeatedly provided Plaintiff's counsel with information explaining how overtime was calculated on the incentive compensation payments and demonstrating clearly that Plaintiff was properly paid his catch-up overtime on such payments. Instead of carefully reviewing this information and the law at issue, and conceding the accuracy of Enterprise's calculations, Plaintiff's counsel has instead grasped at various theories of recovery, going so far as to ignore explicit statutory language (and even attempting to change the very nature of Plaintiff's claims at the Hearing on this matter).

Id. at 7-8. Based on this course of conduct, defendant asked that it be permitted "to petition for the fees it incurred in preparing this Supplemental Brief pursuant to 28 U.S.C. § 1927." Id. at 8 (citing Salvin, 281 F. App'x at 227). Hennessy filed a reply to defendant's supplemental brief, which did not oppose or even address defendant's request for § 1927 fees. It was only after defendant had cited the changing nature of Hennessy's claims as a basis for a fee award in their supplemental brief, [Dkt. No. 25] at 8, that Hennessy filed his motion to continue to seek discovery to support allegations that had not been included in the Amended Complaint. Given this record, Hennessy's Due Process argument that he did not have notice that he faced sanctions is just another example of meritless pleading.

As for Hennessy's argument that he has not had the opportunity to present his argument against sanctions, he has in fact done so, in his Opposition Brief. Although the Court had already announced at the October 26 hearing that it considered sanctions appropriate, it also made clear that Hennessy would have an opportunity to respond to any fee petition that defendant filed. [Dkt. No. 42] at 13:3-7 ("And so, I'm going to direct you, Mr. Isler, to file within 14 days a petition for attorney's fees and expenses. And Mr. Hennessy, you will have 14 days to respond or reply to the fees only. I don't want you rearguing the merits of the case."); id. at 19:18-20 ("So within 14 days, Mr. Isler, just provide us with a fee petition, attorney fees, and expenses. And you'll have a time to respond to that, Mr. Hennessy.").

Altogether, the record reveals at least a half dozen instances in which Hennessy was put on notice that his conduct might subject him to sanctions, and he had multiple opportunities to respond to those notices. Instead, he protracted the litigation by changing his claims to meet the moment rather than the evidence, requiring defendant to spend time and money responding to his kaleidoscope of claims. That is precisely the conduct that § 1927 is designed to prevent; accordingly, an award of fees and costs to defendant is appropriate.

With respect to the amount requested in the Petition, Hennessy has not contested either the hourly rates cited by defense counsel or the time expended; however, the Court has independently assessed the reasonableness of the $26,250.00 requested for attorneys' fees.[4] To calculate an award of attorneys' fees, "a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009). In the Fourth Circuit, reasonableness is determined by reference to the twelve factors adopted in Barber v. Kimbrell's, Inc.:

> ***5** (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in

> controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

577 F.2d 216, 226 n.28 (4th Cir. 1978). "Although each factor is persuasive, the court need not consider each of them individually because they all are 'subsumed' into an analysis of what constitutes a reasonable rate and number of hours expended." Mulugeta v. Ademachew, No. 1:17-cv-649, 2019 WL 7945712, at *5 (E.D. Va. Nov. 6, 2019) (quoting Smith v. Loudoun Cty. Pub. Schs., No. 1:15-cv-956, 2017 WL 176510, at *2 (E.D. Va. Jan. 17, 2017)).

4 The $105.28 for costs—including $13.13 for the cost of shipping a courtesy copy of defendant's opposition to plaintiff's motion for continuance, and $92.15 for the cost of the transcript of the October 26 hearing—is also reasonable.

Considering defendant's calculations, time logs, and declarations, see [Dkt. No. 44] at 12-13; [Dkt. No. 44-1], the hourly rates charged by defense counsel and staff are appropriate given the experience of defendant's attorneys and staff, and the quality of their work product. In fact, the rates charged by defendant's attorneys were actually lower than what has been approved for attorneys having similar experience levels in the Northern Virginia area. [Dkt. No. 44-1] at ¶¶ 8, 12, 16 (citing Vienna Metro LLC v. Pulte Home Corp., No. 1:10-cv-00502, 2011 WL 13369780, at *6 (E.D. Va. Aug. 11, 2011)). Given the nature of the issues addressed by the supplemental briefing [5] and counsels' success on behalf of their client, the Court finds that the hours expended and that the resulting "lodestar figure" proposed are entirely reasonable. Robinson, 560 F.3d at 243.

5 The Court acknowledges that FLSA cases are not usually known for the "novelty and difficulty of the questions raised," Barber, 577 F.2d at 226 n.28; however, correctly calculating premium overtime where "the bonus [is] necessarily ... deferred over a period of time longer than a workweek" raises thornier questions of statutory interpretation and mathematics than the average FLSA case. 29 C.F.R. § 778.209; see [Dkt. Nos. 42, 45] (transcripts in which both parties and Court frequently reference the case as "complicated" or involving complications). This level of complexity further justifies the lodestar figure.

Although Hennessy does not argue that the calculations in the Petition are flawed or that the rates used are unreasonable, he objects that the fee amount sought by defendant would "likely force him from the future practice of law." [Dkt. No. 46] at 9. That claim is not supported by Hennessy's declaration. [Dkt. No. 46-3]. Although he represents that the amount requested in the Petition would be a significant percentage of his annual income, id. at ¶ 2, there is no indication in the record suggesting that defendant would require the entire amount be paid in a single lump sum.

Because the Court finds that an award of fees is appropriate in light of Hennessy's litigation conduct, and finds that the amount requested in the Petition is reasonable, the Petition [Dkt. No. 43] is GRANTED, and it is hereby

***6** ORDERED that Hennessy shall pay defendant Enterprise RAC of Maryland attorneys' fees and costs in the total amount of $26,355.28, which represent the reasonable fees and costs incurred by defendant following the August 11, 2020 hearing.

All Citations

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