UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 15-00211 JGB (SPx)**	Date	July 19, 2018
Title	***Matthew Dashiell v. County of Riverside***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order GRANTING Plaintiff's Motion for Settlement Approval (Dkt. No. 50) (IN CHAMBERS)

Before the Court is Plaintiff Matthew Dashiell's ("Plaintiff")[1] Motion for Settlement Approval of Settlement Agreement under the Fair Labor Standards Act ("FLSA"). ("Motion," Dkt. No. 50.) On July 9, 2018, the Court held a hearing. After considering all papers filed in support of the Motion, as well as argument at the July 9, 2018 hearing, the Court GRANTS the Motion.

I. BACKGROUND

On February 4, 2015, Plaintiff filed a complaint on behalf of himself and all others similarly situated against the County of Riverside ("Defendant") and Does 1-10. ("Complaint," Dkt. No. 1.) Plaintiff alleged violations of the FLSA. (Id.) On July 8, 2015, Plaintiff filed a motion to conditionally certify the action as a FLSA collective action and to provide notice. (Dkt. No. 15.) Defendant opposed the motion. (Dkt. No. 19.) On September 18, 2015, the Court granted Plaintiff's motion and conditionally certified the action as a FLSA collective action. (Dkt. No. 22.) On October 8, 2015, Plaintiff filed a proposed notice with the Court. (Dkt. No. 23.) Between December 11, 2015 and January 26, 2016, Plaintiff filed notice of consents to join the action. (Dkt. Nos. 24-28.) Plaintiff's counsel represented at the hearing that six of the opt-

[1] The Court recognizes that it conditionally certified the action as a FLSA collective action. For purposes of this Motion, the Court refers to Plaintiff in the singular, as the Motion was brought by Plaintiff Dashiell. (Mot. at 2.)

ins elected to withdraw their consents to join and thus there are currently 23 opt-ins as well as Plaintiff Dashiell.

On December 11, 2017, the parties engaged in a settlement conference before Magistrate Judge Sheri Pym (Dkt. No. 43), after which, on February 26, 2018, Defendant filed notice of settlement (Dkt. No. 45). On June 18, 2018, Plaintiff filed this Motion. Plaintiff attached the following documents to his Motion:

- Declaration of Thomas J. Milhaupt ("Milhaupt Decl.," Dkt. No. 50-1);
- Settlement agreement ("Settlement Agreement," Milhaupt Decl., Exh. 1, Dkt. No. 50-1);
- Signed settlement agreements by all twenty-four Trainees (Milhaupt Decl., Exhs. 1-3, Dkt. Nos., 50-1, 50-2, 50-3);
- Time and expense records (Milhaupt Decl., Exh. 2, Dkt. No. 50-3);
- Memorandum ("Memo," Dkt. No. 50-4); and
- Proposed order (Dkt. No. 50-5).

On June 22, 2018, Defendant filed a notice of joinder in the Motion. (Dkt. No. 53.)

II. SETTLEMENT AGREEMENT

Pursuant to the Settlement Agreement, Defendant shall pay $515,000.00 to Plaintiffs and Plaintiff's Counsel within twenty days of the effective date. (Settlement Agreement ¶ 1(a).) Plaintiff Dashiell shall receive up to $7,000 as an incentive award. (Id. ¶ 1(b).) Plaintiff's counsel shall receive payment for costs and attorney's fees of up to $157,000.00 from the total payment. (Id. ¶ 1(c).)

"Each of the Plaintiffs agree to dismiss with prejudice their claims in the lawsuit." (Id. ¶ 2.) The release of claims by Plaintiffs states:

> Plaintiffs understand and agree that this Settlement Agreement is intended to be a full and complete settlement of all claims, whether known or unknown, arising from or Plaintiffs' claims that the County of Riverside violated the FLSA during the course of their employment as Deputy Sheriff Trainees, including all claims made in this lawsuit for unpaid overtime, liquidated damages and attorneys' fees and costs.
>
> This Agreement does not limit Plaintiffs' ability to bring an administrative charge with an administrative agency, but Plaintiffs expressly waive and release any right to recover any type of personal relief from the County, including monetary damages, in any administrative action or proceeding, whether state or federal, and whether brought by Plaintiffs or on Plaintiffs' behalf by an administrative agency, related in any way to the matters released herein. Furthermore, nothing in this Agreement prohibits Plaintiffs from reporting possible violations of law or regulation to any government agency or entity, including but not limited to the

> Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the Department of Labor and/or the Department of Justice, or making other disclosures that are protected under the whistleblower provisions of law.
>
> Plaintiffs further acknowledge that, upon execution and approval of this Settlement Agreement and payment of the sums specified herein, they expressly waive any and all rights granted them under section 1542 of the California Civil Code regarding their FLSA claims . . .

(Id. ¶ 3.)

III. LEGAL STANDARD

The FLSA was enacted to protect workers from substandard wages and oppressive working hours. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739. The FLSA establishes federal-minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by a contract. Beidleman v. City of Modesto, No. 1:16-cv-0110-DAD-SKO, 2018 WL 1305713, at *1 (E.D. Cal. Mar. 13, 2018) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 69 (2013)). Thus, employee claims under the FLSA cannot be waived for fear that employers may coerce employees into settlement and waiver. Selk v. Pioneers Mem'l Healthcare Dist., 159 F. Supp. 3d 1164, 1172 (S.D. Cal. Jan. 29, 2016) (quoting Lopez v. Nights of Cabiria, LLC, 96 F.Supp.3d 170, 175 (S.D.NY. 2015)). Accordingly, FLSA claims may only be waived or settled if settlement is supervised by the Secretary of Labor or approved by a district court. Id.

The Ninth Circuit has not established criteria for district courts to consider in determining whether a FLSA settlement should be approved. Beidleman, 2018 WL 1305713 at *2. Rather, district courts in this circuit have relied on the standard adopted by the Eleventh Circuit, which considers whether the settlement is a fair and reasonable resolution of a bona fide dispute. Id. (citing Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352-53 (11th Cir. 1982)). A bona fide dispute exists when there are legitimate questions about the existence and extent of the defendant's FLSA liability. Id. (quoting Selk, 159 F. Supp.3d at 1172.) A court will not approve a settlement if the FLSA unequivocally entitles plaintiffs to the compensation they seek because it would shield employers from the full cost of complying with the statute. Id.

After a court determines a bona fide dispute exists, it will often apply factors for assessing a proposed class action settlement pursuant to Federal Rule of Civil Procedure 23. Seguin v. Cty. of Tulare, No. 1:16-cv-01262-DAD-SAB, 2018 WL 1919823, at *2 (E.D. Cal. Apr. 24, 2018). When determining whether a proposed FLSA settlement is fair, adequate, and reasonable, courts balance several factors including the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the

stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. Id.

District courts in this circuit recognize that some of the Rule 23 factors do not apply because of the inherent differences between class actions and FLSA actions. Id. Accordingly, in determining whether the settlement is fair and reasonable, courts will consider the totality of the circumstances within the context of the FLSA. Seguin, 2018 WL 1919823 at *3. Courts often consider the following factors when evaluating settlements under FLSA: (1) the plaintiff's range of possible recovery; (2) the stage of proceedings and amount of discovery completed; (3) the seriousness of the litigation risks faced by the parties; (4) the scope of any release provision in the settlement agreement; (5) the experience and views of counsel and the opinion of participating plaintiffs; and (6) the possibility of fraud or collusion. Selk, 159 F. Supp. 3d at 1173. If after considering these factors the court determines that the settlement reflects a reasonable compromise over issues that are actually in dispute, the court may approve the settlement. Id.

IV. DISCUSSION

The Court first examines whether a bona fide dispute exists and then turns to whether the settlement is fair and reasonable under the six factors articulated above.

A. Bona Fide Disputes

"If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute[,] . . . the district court [may] approve the settlement in order to promote the policy of encouraging settlement litigation." Nen Thio v. Genji, LLC, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014) (internal quotation marks and citation omitted); see also Lynn's Food Stores, 679 F.2d at 1353 n.8 (requiring "settlement of a bona fide dispute between the parties with respect to coverage or amount due under the [FLSA]"). The reason for this requirement is to safeguard against an employee waiving his or her claims for wages, overtime compensation, or liquidated damages when there is no actual dispute between the parties. Lynn's Food Stores, 679 F.2d at 1353 n.8.

The Court finds this case includes a bona fide dispute between the parties. Plaintiff filed this action to recover overtime wages allegedly due to Deputy Sheriff Trainees ("Trainees") employed by Defendant within the past three years. (Compl. ¶ 14.) Plaintiff alleges Defendant directed the Trainees to perform several tasks outside of and in addition to scheduled Academy activities during work hours and Academy staff never attempted to record that work time. (Id. ¶¶ 14, 16.)

Defendant disputes that Trainees worked uncompensated overtime and the amount of overtime hours claimed. (Memo at 5.) For instance, Defendant claims that the time related to donning uniforms is not compensable and time spent in performing other tasks is also not compensable because it is instructional and/or voluntary. (Id.) Given these contending views on

the issues central to the case—particularly the amount of overtime hours claimed—the Court is convinced that this case reflects a bona fide dispute between the parties. See Beidleman, 2018 WL 1305713, at *3 (citing three bona fide disputes: (1) disagreement over how to calculate overtime compensation, (2) whether the defendant acted in good faith, and (3) applicability of the statute of limitations and stating that "[a]lthough defendants concede liability under the FLSA, they dispute whether the FLSA violation at issue in this case was willful")

B. The Proposed Settlement is Fair and Reasonable

The Court considers the six factors discussed above under the totality of circumstances approach and finds the Settlement Agreement to be fair and reasonable under the FLSA.

1. Plaintiff's Range of Possible Recovery

A court considers a plaintiff's range of potential recovery to ensure that the settlement amount is reasonable in relation to the true settlement value of the claims. See Selk, 159 F. Supp. 3d at 1174 (citations omitted). Thomas Milhaupt, Plaintiff's counsel, represents that if the trier of fact determined that compensability of the activities performed is beyond dispute and thus failure to pay for such work was willful, it may award a full-term Trainee who worked two hours per day overtime $17,120. (Milhaupt Decl. ¶ 8.) Plaintiff arrived at the $17,120 figure by estimating two hours per day of overtime multiplied by 107 days multiplied by $40 an hour. (Id.) Plaintiff then multiplied the total ($8,560) by two pursuant to statutory doubling, which amounted to $17,120. (Id.) Pursuant to the Settlement Agreement, each of the 21 out of 24 total Trainees who completed the entire 26 week training course will receiving $15,653.56, and the remaining Trainees who did not complete the entire course will receive a pro rata distribution of $602.06 per work week for each week of Academy training he or she completed. (Memo at 4.) The $15,653.56 award constitutes 91.4% of the estimated possible recovery. This appears to represent a fair and reasonable amount taking into consideration the uncertainties as to recoverable hours worked, whether the time the Trainees spent on certain tasks would be determined to be compensable, and whether Defendant's failure to pay would be deemed willful. (Memo at 4-5.) Thus, the Court finds this factor weighs in favor of approval of the FLSA settlement.

2. The Stage of the Proceedings and the Amount of Discovery Completed

The Court must also consider the stage of the proceedings and the amount of discovery completed to ensure the parties "have an adequate appreciation of the merits of the case before reaching a settlement." Selk, 159 F. Supp. 3d at 1177. Here, the parties engaged in extensive discovery. (Memo at 6.) Defendant has produced more than 4,500 pages of documents in response to Plaintiff's request for production of documents and as part of the parties' mandatory disclosures. (Id.) Plaintiff has acquired and produced various daily handwritten journals kept by Trainees throughout their Academy training. (Id.) Plaintiff has also taken the depositions of Academy staff member Michael Crabbe and former Academy Coordinator Tony Hoxmeier. (Id.) Defendant deposed Plaintiff Dashiell and five of the opt-in Trainees. (Id. at 7.) The Court finds

the parties have sufficient information to make an informed decision regarding settlement. Accordingly, this factor cuts in favor of approval.

3. The Seriousness of the Litigation Risks Faced by the Parties

"Courts favor settlement where 'there is a significant risk that litigation might result in a lesser recover[y] for the class or no recovery at all." Seguin, 2018 WL 1919823, at *4 (quoting Bellinghausen v. Tractor Supply Co., 306 F.R.D. 245, 255 (N.D. Cal. 2015)). Here, Defendant disputed the number of uncompensated overtime hours claimed as well as several predicate facts concerning each Trainee's individual practices during the Academy and each Trainee's perceptions and motivations for performing the tasks for which compensation was sought. (Memo at 12.) Plaintiff maintains that trying these issues may result in a lower damage awards, shortening of damage periods, and or failure to recover statutory penalties for certain types of work. (Id.) Further, Plaintiff predicts that a trial would require all twenty-four plaintiffs to fully participate and testify as to individual damages and liability. (Id.) Thus, consideration of the risks of litigation weighs in favor of approval.

4. The Scope of Any Release Provision in the Settlement Agreement

"A FLSA release should not go beyond the specific FLSA claims at issue in the lawsuit itself." Slezak v. City of Palo Alto, No. 16-CV-03224-LHK, 2017 WL 2688224, at *5 (N.D. Cal. June 22, 2017). Here, the release is limited to FLSA claims related to work as Deputy Sheriff Trainees. (Settlement Agreement ¶ 3; see also Memo at 12.) The Settlement Agreement also excludes protected whistleblower and other administrative rights. (Settlement Agreement ¶ 3; see also Memo at 12.)

5. The Experience and Views of Counsel and the Opinion of Participating Plaintiffs

"The opinions of counsel should be given considerable weight both because of counsel's familiarity with th[e] litigation and previous experience with cases." Selk, 159 F. Supp. 3d at 1176. Here, Plaintiff's counsel, Mr. Milhaupt, has significant experience litigating employment and class action cases. (Milhaupt Decl. ¶ 11.) He began practicing employment law in or around 1994. (Id.) In about 2003, Mr. Milhaupt's primary focus became wage and hour litigation. (Id.) He has handled well over 100 individual wage and hour claims and was the plaintiffs' co-lead counsel or sole class counsel in several actions that have been resolved through class settlement. (Id.) Mr. Milhaupt has represented to the court that this settlement is fair and reasonable. (See id. ¶ 9 ("In addition to the monetary risk/benefit analysis set forth in the preceding paragraph, there are many other reasons to approve the settlement.") Mr. Milhaupt states that every single opt-in Trainee as well as Plaintiff signed the Settlement Agreement and the opt-in Trainees have expressed satisfaction with the Settlement Agreement. (Id.) Thus, the Court is satisfied and finds this factor weighs in favor of approval.

6. The Possibility of Fraud of Collusion

"The likelihood of fraud or collusion is low . . . [when] the Settlement was reached through arm's-length negotiations, facilitated by an impartial mediator." Slezak, 2017 WL 26882244, at *5. Here, the Court determines fraud or collusion unlikely because a magistrate judge presided over and facilitated the settlement negotiations. See id. Following the conclusion of the depositions in November 2017, the parties were in a better position to discuss settlement. (Memo at 8.) Prior to the December 11, 2017 settlement conference, the parties exchanged settlement proposals and conferences. (Id.) The settlement conference ended in agreement and the parties then entered into the Settlement Agreement. (Id.) The settlement lacks any evidence of "subtle signs" of collusion." In re Bluetooth Prods. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011). For instance, there counsel here does not see "a disproportionate distribution of settlement" and class counsel will not be amply rewarded while the class receives no monetary distribution. Id.

In conclusion, the Court finds the factors weigh in favor of approval of the Settlement Agreement. The Court finds the Settlement Agreement constitutes a fair and reasonable resolution of a bona fide dispute over FLSA claims. See Lynn's Food Stores, 679 F.2d at 1355. The Court thus APPROVES the settlement.

C. Named Plaintiff Incentive Award

A court may exercise its discretion to award an incentive payment to the named plaintiff in a FLSA collective action to compensate him or her for the work completed on behalf of the class. Selk, 159 F. Supp. 3d at 1181; see also Jones v. Agilsys, Inc., No. C 12-03516, 2014 WL 2090034, at *3 (N.D. Cal. May 19, 2014). To determine whether an incentive award is appropriate, a court should take into account, among other things, "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)). A court will scrutinize large incentive payments to ensure that plaintiff did not accept a settlement at the detriment of the class. Id.

Here, Plaintiff Dashiell requests an incentive award of $7,000. (Memo at 4.) In his declaration, Plaintiff's counsel states Mr. Dashiell invested a significant amount of time in the case. (Milhaupt Decl. ¶ 10.)

> He spent numerous hours communicating with Plaintiff's counsel and in traveling to meetings with Plaintiff's counsel. He provided the declaration submitted with the Motion for Conditional Certification. His deposition was the first, longest, and most detailed, of the six Trainee depositions taken by Defense counsel in this case. He attended and fully participated in the mediation before Magistrate Judge Pym. Last, and certainly not least, he is the person who initiated this litigation.

(Id.) The Court finds Plaintiff put a great deal of time into the case. Further, in light of the significant recovery of the Trainees—21 out of the 24 total Trainees will receive $15,653.56 and the remaining Trainees will receive a pro rate distribution of $602.06 per work week for each week of Academy training completed—the Court determines the incentive award to be appropriate. Accordingly, the Court GRANTS $7,000 as an incentive award to Plaintiff Dashiell.

D. Attorney's Fees and Costs

"'Where a proposed settlement of FLSA claims includes the payment of attorney's fees, the court must also assess the reasonableness of the fee award.' Wolinsky [v. Scholastic], 900 F. Supp. 2d [332,] 336 [(S.D.N.Y. 2012)]; see also 29 U.S.C. § 216(b) (providing that, in a FLSA action, 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')." Selk, 159 F. Supp. 3d at 1180. When a settlement produces a common fund for the benefit of the entire class, a court has the discretion to apply either the percentage-of-recovery method or the lodestar method to determine a reasonable attorney's fee. Id. "Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%." In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 949 (9th Cir. 2015).

The Settlement Agreement provides for $151,000.76 in attorney's fees for Plaintiff's counsel this constitutes 29.3% of the total recovery of the $515,000 total recovery. (Memo at 8, 14; Milhaupt Decl. ¶ 12.) The total of fees and costs ($157,000) constitutes approximately 30.4% of the total settlement. (See Memo at 14; Milhaupt Decl. ¶ 12.) While the requested fees are slightly above the benchmark, they do not appear unreasonable. See, e.g., Seguin, 2018 WL 1919823, at *6-7 (approving attorney's fees and costs of approximately twenty-nine percent of the maximum settlement); Beidleman, 2018 WL 1305713, at *6 (approving attorney's fees and costs totaling thirty percent of the total settlement amount); Slezak, 2017 WL 2688224, at *3 (approving attorney's fees and costs in an FLSA collective action settlement which totaled thirty-one percent of the total settlement amount).

The Court now turns to the lodestar amount. Plaintiff's counsel has spent 312.9 hours litigating this case and charged $600 per hour. (Milhaupt Decl. ¶ 12.) "Where a lodestar is merely being used as a cross-check, the court may use a rough calculation of the lodestar." Beidleman, 2018 WL 1305713, at *6 (internal quotation marks and citation omitted).

Mr. Milhaupt has been practicing employment law since 1994, and began to focus primarily on wage and hour litigation in 2003. (Id. ¶ 11.) Thus, the Court finds his rate of $600 per hour to be appropriate. See Barbosa v. Cargill Meat Sols. Corp., 297 F.R.D. 431, 452 (E.D. Cal. 2013) (awarding $720 per hour for attorney with over 20 years of experience); see also Emmons v. Quest Diagnostics Clinical Labs., Inc., No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018, at *8 (E.D. Cal. Feb. 27, 2017) (awarding between $370 and $495 for associates, and between $545 and $695 for senior counsel and partners). Upon review of the hours Plaintiff's

counsel expended, the Court has identified a couple entries by "MEC" at a rate of $450 per hour. The Court is unclear who "MEC" is or his or her qualifications or job title. "MEC" expended a total of 3.5 hours ($1,575). (See Exh. 2 to Milhaupt Decl.) The Court finds it cannot determine the reasonableness of "MEC's" hourly billing rate without more information. However, even if the Court were to subtract the $1,575 from the total amount, it still finds the total amount sought to be reasonable.

Plaintiff's counsel represents that he incurred over $163,920.00 in fees and $5,999.24 in costs. (Milhaupt Decl. ¶ 12.) However, $600/per hour multiplied by 312.9 hours equals $187,740. Plaintiff's counsel's seeks $151,000.76 in fees, which results in a lodestar multiplier of less than 1. This modifier supports the award of $151,000.76 in attorney's fees. Thus, the Court APPROVES $151,000.76 in attorney's fees.

As to the costs requests, $5,999.24, the Court also finds this amount reasonable. The costs involve attorney service fees for filing, travel expenses, videography for depositions, and deposition transcript. (See Exh 2 to Milhaupt Decl.) The Court finds these costs to be fair.

In sum, the Court finds the settlement in this case involves a fair and reasonable resolution of a bona fide dispute and includes a reasonable award attorney's fees and costs. Accordingly, the Court GRANTS the Motion.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion. The Court:

(1) APPROVES Plaintiff's Motion for Approval of Settlement Agreement under the FLSA;

(2) ORDERS Defendant to make the payments and perform the conditions contained within the Settlement Agreement within twenty days of the date of this order;

(3) DISMISSES WITH PREJUDICE the action upon Defendant's making said payments; and

(4) AWARDS Plaintiff's counsel attorney's fees in the amount of $151,000.76 and costs in the amount of $5,999.24.

IT IS SO ORDERED.