CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative,	:	07 Civ. 4672 (NGG) (PK)
Plaintiff,	:	
- against -	:	
HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER,	:	
Defendants.	:	

PLAINTIFFS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

ISAACS BERNSTEIN, P.C.
2108 Yardley Road
Yardley, Pennsylvania 19067
(917) 693-7245

Of Counsel: Jonathan A. Bernstein

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

I. Defendants' Contention that Fee-Shifting Does Not Apply to Its Motion to Reopen the Case Is Mistaken and Ignores the Law of this Case

Defendants argue that, since liability for unpaid overtime premium pay was adjudicated years ago and the appeal on which this fee application is based was of a collateral issue, 29 U.S.C. § 216(b) and the American Rule preclude an award of fees. In other words, argue Defendants, Plaintiffs are not entitled to a fee award for hours expended on the successful defense of an FLSA appeal if the appeal is of something other than the employer's liability for overtime. That argument is wrong for several reasons.

First, once a plaintiff is determined to be a prevailing party on the merits of a fee-shifting claim, she is entitled to an award of attorneys' fees for all work done on appeal or in monitoring and enforcing the judgment. It is irrelevant that the merits of the claim were adjudicated earlier in the litigation. Accordingly, in *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 428 (2d Cir. 1999), the Second Circuit awarded attorneys' fees under Title VII's fee-shifting provision for services rendered in connection with the appeal of the district court's fee calculation. That is, the cited *Quaratino* appeal concerned the fee question only; it did not concern the pregnancy discrimination that impelled the lawsuit in the first instance (which was the subject of *Quaratino v. Tiffany & Co.*, 71 F.3d 58 (2d Cir. 1995)).

Second, it is the law of this case that fees for work defending appeals of collateral matters are awardable pursuant to *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 208 (2d Cir. 2009). On July 31, 2020, this Court awarded fees for services rendered in connection with the successful

defense of the "double-dipping appeal," in which Defendants sought sanctions against Plaintiff's counsel for allegedly having failed to remit the full judgment amounts to his clients. ECF No. 280. Judgment for overtime wages had been awarded by this Court in 2012 and affirmed by the Second Circuit in 2014. The Supreme Court denied certiorari in 2015. It was not until 2017 that Defendants advanced the "double-dipping" allegations. *Id.* at 4. Neither the "double-dipping" appeal nor the defense of that appeal pertained directly to liability for overtime pay. Attorney fees for successful defense of the appeal were awarded nevertheless.

Similarly, it is law of the case that Plaintiffs' counsel is entitled to a fee award for services rendered in connection with enforcement of a judgment for overtime premium pay. In 2015, this Court determined that Plaintiff's counsel's time so spent was reasonable and compensable. ECF No. 225 at 5. That is, attorneys' fees for services rendered in connection with procurement of the overtime judgment were awarded in 2013. *Id.* at 1-2. The 2015 fee award was for post-judgment legal work: "enforcing the district court judgment, … communicating various matters to the approximately 50 individual Plaintiff opt-ins [and] making the instant fee application." *Id.* at 5.

Third, as to Defendants' public-policy contentions: Congress has abrogated the American Rule in FLSA cases. 29 U.S.C. 216(b). That abrogation reflects a Congressional judgment that working people are entitled to their full wages with liquidated damages (if they must sue to recover those wages) and should not have to pay attorneys' fees, which are typically unaffordable to the average worker. *E.g.*, *Roofers Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984). It would make no sense to force those same workers to pay out attorneys' fees to defend those wages against collateral attacks.

II. Claudia Gayle Filed Her Consent to Be a Party to This Collective Action in 2008

Defendants urge that no fee award is proper in this case because Claudia Gayle, the lead plaintiff, purportedly did not consent to be a party to this collective action. Defendants offer no authority for the proposition that that alleged procedural defect vitiates Plaintiffs' status as prevailing parties. More to the point, Claudia Gayle did file her consent with this Court in 2008 (more than six months before the collective action was certified).

On August 15, 2008, Claudia Gayle filed her affidavit in support of her cross-motion for summary judgment and to authorize notice of a collective action pursuant to 29 U.S.C. § 216(b). ECF No. 33; Ex. 4. In that Affidavit, she stated under oath that

> I am the plaintiff in this action. I make and submit this affidavit … in support of my cross-motion to authorize notice of this action. . . . I believe that most of the field nurses employed by defendants are unaware that the pay practice [described in this affidavit] is unlawful, that many, if not most, of them lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

Id. ¶¶ 1, 8.

The FLSA does not prescribe a particular form by which a person consents to join an FLSA collective. *Mendez v. Radec Corp.*, 260 F.R.D. 38, 52 (W.D.N.Y. 2009). A consent form is sufficient where it clearly manifests the individual's consent to become a party plaintiff to the litigation. *Id.* (named plaintiff's signed declaration in support of collective action notice and Rule 23 certification held sufficient to satisfy Section 216(b) notwithstanding failure to file formal consent). It is respectfully submitted that Exhibit 4 manifests Ms. Gayle's consent to become a party plaintiff.

Defendants misconstrue the language of Section 216(b) providing that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." "Such," in the quoted sentence, refers to the collective actions created by the immediately preceding sentence of Section 216(b), not to individual actions. The quoted language does not mean that the lawsuit is a nullity unless the named plaintiff files a consent form and the complaint simultaneously; it means only that no person can be a party to a collective action unless that person has filed his or her consent. In fact, first-stage certification of a collective action (for which Ms. Gayle moved and perforce consented in August 2008) was ordered by Judge Sifton on March 9, 2009 (Dkt. No. 53 at 28).

III. Defendants Identify No Reason That the Lodestar/Presumptively Reasonable Fee Should be Reduced

Defendants allege that "the Second Circuit Court of Appeals rejected the jurisdictional arguments raised by Plaintiffs' counsel in reaching its decision." In fact, the Court of Appeals' Order and Mandate says that:

> [Defendants-]Appellants move for leave to file a late appellate brief and for leave to file a sur-reply regarding the [Plaintiffs-]Appellees' motion to dismiss. Appellees cross-move to dismiss the appeal for lack of jurisdiction … Upon due consideration, it is hereby ORDERED that Appellants' motion to file a sur-reply is GRANTED. It is further ORDERED that Appellees' motion to dismiss the appeal is also GRANTED. To the extent that Appellants seek to challenge the 2012 and/or 2013 judgments, this Court lacks jurisdiction; the time to file a notice of appeal challenging those judgments has long since elapsed. (Citation omitted.)
>
> To the extent that the Appellants seek to challenge the district

> court's May 2021 order denying their motion to reopen the action, this Court has jurisdiction, but the appeal is dismissed as frivolous.

Ex. 1 at 1-2. This hardly qualifies as a rejection of Plaintiffs' jurisdictional arguments.

Defendants contend that the Court of Appeals "rejected" Plaintiffs' distinction between procedural and substantive orders and determined that the arguments lacked merit. Apparently, the basis for this contention is that the terse order quoted above does not say in so many words that the Court of Appeals adopted the distinction. In any event, it is unclear why this purported fact should operate to reduce the lodestar/presumptively reasonable fee. The relevant inquiry is whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures. *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992).[1] Surely Defendants do not contend that Plaintiffs' counsel should have ignored the Second Circuit's directive to brief the issue. In any event, Defendants do not contend that the time spent briefing the issue was excessive.

IV. Defendants' Other Contentions Are Without Merit

A. The Pro Se Contention

Harry's Nurses Registry, Inc. is a corporation. It cannot appear pro se. Its attempts to do so were repeatedly rejected. *E.g.,* ECF No. 75. If Mr. Dorvilier believes that his former attorneys

[1] The Court of Appeals, rather than decide Plaintiffs' motion to dismiss in the first instance, requested briefing on the jurisdictional question in light of *Yonkers Bd. of Education*. Plaintiffs supplied a memorandum. Ex. 5. That memorandum noted that, as a consequence of the procedural/substantive distinction announced in *Yonkers Bd. of Educ.,* the Court had no jurisdiction to entertain challenges to the various issues that had been decided or waived in earlier litigation. Plaintiffs had already asserted in their moving papers that the issue purportedly appealed (the correctness of this Court's Order refusing to reopen the case) had been forfeited because Defendants did not brief it. Ex. 6 at 6-7.

ought to have advanced his contentions in this Court, his remedy is malpractice, not appeal.

B. The Hourly Rate Contention

Defendants contend that fees should be awarded at the rate previously approved by this Court. Defendants appear unaware that on this motion Plaintiffs seek $350 per hour, which is the rate previously approved by this Court. Moving MOL at 9-10.

C. The "Plaintiffs' Counsel Should Not Have Read Harry's Brief" Contention

Defendants contend that Plaintiffs' counsel should somehow have known that their 95 pages of briefing were

> not filed to provide the legal basis for granting the Appeal, but rather was provided to call attention to substantive errors that Defendant believes had been made by the District Court and Second Circuit Court of Appeals in issuing their FLSA wage and compensation judgments. … A detailed review of said briefing while of interest and informational to those taking the time to review same, was clearly presented as a document that was suitable for optional review in the discretion of the reviewer and was strictly relevant to the issue raised on appeal as to whether the case status designation should be changed from "closed" to "open."

Affirmation of George A. Rusk ¶ 16(d). Mr. Rusk does not explain why it was merely optional for appellate counsel to review briefing that was "strictly relevant to the issue raised on appeal." To the extent that Mr. Rusk asserts that it was clear that such review was merely optional, he does not indicate how Plaintiff's counsel should have divined this -- especially since it is contradicted by the Brief itself.

The Preliminary Statement to the Brief states that

> The purpose of this appeal is to set the record straight on what can only be aptly referred to as "bad law" that currently remains on record in the Second Circuit dockets; to do so, Defendants ask that a series of court decisions be corrected because the decisions

> currently on record are not supported by law and cannot be allowed to stand….[T]here are **no less than ten (10) separate, valid reasons to reopen this case**." (Emphasis in original.)[2] It is Defendants' position that these ten (10) reasons are not only legally valid but they clearly demonstrate that the "litigation to judgment" by EDNY and the Second Circuit was far from conclusive, was not supported by applicable federal and state law and **DID NOT** reach just verdicts that properly addressed the merits of federal employment law and personal liability and criminal liability law that are at the heart of this case.

Ex. 7 at 7. The "Concise Factual and Procedural Background" section of the Brief stated:

> Defendants seek a ruling that the "litigation to judgment" rendered in the instant case to date is flawed and must be re-examined and corrected because it either ignored or failed to properly consider substantive, applicable legal precedent and case law; and the egregious nature and extent of the legal errors in this case point to the need for a fundamental, in-depth assessment and overhaul of the second circuit pro se program - to ensure that such errors are not repeated in the future.

Id. at 9. Otherwise stated, Mr. Rusk represented to the Court of Appeals that the case should be reopened on the basis of the matters raised in his brief, but he now represents to this Court that familiarity with the matters raised in his brief was "optional" for the Court and the opposing party.

D. The Satisfaction of Judgment Contention

Defense counsel insists, notwithstanding his admission that the true motive of his attempt to have the case reopened was to facilitate his motion to move this case to the Panel on Multidistrict Litigation for the purpose of revisiting the well-settled body of FLSA law, that the primary motive of his attempt to reopen the case was for the purpose of demanding satisfaction of judgment. Defense counsel appears unaware that that can be done even when a case is closed – and has been

[2] Those ten reasons are recounted at Footnote 1 of the Rusk Affirmation.

done in this case.

E. The "Time Spent Reviewing Administrative Orders" Contention

Defense counsel contends that a fee award for time spent reviewing administrative orders should be limited to 30 minutes. However, he does not identify any specific time entries he believes to be excessive. In fact, the fee application seeks an award for only 18 minutes so spent (0.2 hours on June 29, 2021; 0.1 hours on October 4, 2021). Ex. 2.

CONCLUSION

For the foregoing reasons, Plaintiffs request an award of reasonable attorneys' fees in an amount of $18,043.00 and an award of taxable costs in the amount of $55.61.

Dated: Yardley, Pennsylvania
May 5, 2022

Respectfully submitted,

ISAACS BERNSTEIN, P.C.

By: _____/s/_____

2108 Yardley Road
Yardley, PA 19067
(917) 693-7245
jb@lijblaw.com
Attorneys for Plaintiffs