

657 F.Supp.2d 1328
 (Cite as: 657 F.Supp.2d 1328)



United States District Court,
 S.D. Florida.
 Raymond ORTIZ, on his own behalf and others
 similarly situated, Plaintiff,
 v.
 D & W FOODS, INC., a Florida Corporation, and
 William Sand, individually, Defendants.
 Case No. 09-60008-CIV.
 Sept. 22, 2009.

Background: In employee's action under the Fair Labor Standards Act (FLSA), defendants brought motion for dismissal or summary judgment, and in response, employee filed notice of stipulation of dismissal with prejudice. Defendants filed motion to construe employee's notice as a motion for voluntary dismissal, and sought attorney fees as condition of dismissal.

Holding: The District Court, Alan S. Gold, J., held that the action was frivolous, and thus, as condition of voluntary dismissal, employee's attorneys would be required to pay attorney fees and costs to defendants, under statute allowing for imposition of attorney fees and costs against an attorney who unreasonably and vexatiously multiplies the proceedings in a case.

Motion for attorney fees granted in part.

West Headnotes

[1] Federal Civil Procedure 170A **2766**

170A Federal Civil Procedure
 170AXX Sanctions
 170AXX(B) Grounds for Imposition
 170Ak2766 k. Multiplication of proceedings in general. [Most Cited Cases](#)
 Statute allowing for imposition of attorney fees and costs against an attorney who unreasonably and vexatiously multiplies the proceedings in a case

provides relief against an attorney who knowingly or recklessly pursues a frivolous claim. [28 U.S.C.A. § 1927](#).

[2] Federal Civil Procedure 170A **1712**

170A Federal Civil Procedure
 170AXI Dismissal
 170AXI(A) Voluntary Dismissal
 170Ak1711 Terms and Conditions
 170Ak1712 k. Payment of costs and expenses. [Most Cited Cases](#)

Federal Civil Procedure 170A **2771(9)**

170A Federal Civil Procedure
 170AXX Sanctions
 170AXX(B) Grounds for Imposition
 170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
 170Ak2771 Complaints, Counterclaims and Petitions
 170Ak2771(9) k. Labor and employment cases. [Most Cited Cases](#)

Federal Civil Procedure 170A **2816**

170A Federal Civil Procedure
 170AXX Sanctions
 170AXX(D) Type and Amount
 170Ak2811 Monetary Sanctions
 170Ak2816 k. Multiplication of proceedings. [Most Cited Cases](#)

Action under Fair Labor Standards Act (FLSA) was frivolous, and thus, as condition of voluntary dismissal, employee's attorneys would be required to pay attorney fees and costs to defendants, under statute allowing for imposition of attorney fees and costs against an attorney who unreasonably and vexatiously multiplies the proceedings in a case; attorneys' pre-suit investigation did not relate to ultimate question of whether defendants' revenue exceeded \$500,000, as would have subjected defendants to enterprise coverage under FLSA, and attorneys did not submit an affidavit attesting to their

pre-suit investigations or to their good faith belief that the action was not frivolous. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; 28 U.S.C.A. § 1927; Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1712

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1711 Terms and Conditions

170Ak1712 k. Payment of costs and expenses. [Most Cited Cases](#)

Federal Civil Procedure 170A 2816

170A Federal Civil Procedure

170AXX Sanctions

170AXX(D) Type and Amount

170Ak2811 Monetary Sanctions

170Ak2816 k. Multiplication of proceedings. [Most Cited Cases](#)

The 6.5 hours expended by defendants' counsel, between employee's filing of action under Fair Labor Standards Act (FLSA) and employee's filing of notice of stipulation of dismissal with prejudice, was reasonable, for purposes of determining lode-star for award of attorney fees payable by employee's attorneys under statute allowing for imposition of attorney fees and costs against an attorney who unreasonably and vexatiously multiplies the proceedings in a case, which award of attorney fees was a condition of voluntary dismissal; for example, defendants' counsel billed only 0.6 hours for preparing defendants' motion to dismiss. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; 28 U.S.C.A. § 1927; Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

*1329 Keith Michael Stern, Gregg I. Shavitz, Shavitz Law Group, Boca Raton, FL, for Plaintiff.

Chris Kleppin, Glasser Boreth Ceasar & Kleppin, Plantation, FL, for Defendants.

ORDER GRANTING IN PART DEFENDANTS' VERIFIED MOTION FOR FEES [DE 30]

ALAN S. GOLD, District Judge.

This cause is before the Court on Defendant's Verified Motion for Attorney's Fees Against the Shavitz Law Group, P.A., and Plaintiff [DE 30]. This is an FLSA action brought by Raymond Ortiz against Defendants D & W Foods, Inc. and William Sand on January 5, 2009 [DE 1]. Plaintiff is a waiter at Defendants' small restaurant,*1330 the Wine Cellar. On February 1, 2009, Defendant filed a Motion to Dismiss or in the Alternative for Summary Judgment [DE 7], seeking to dismiss the action because Plaintiff was not entitled to individual coverage, and Defendants are not subject to enterprise coverage, in part because Defendants' revenue is not over \$500,000. Defendants filed affidavits and tax returns in support of the Motion. On March 6, 2009, Plaintiff filed a Notice of Stipulation by Plaintiff of the Dismissal with Prejudice of this Action [DE 19]. Defendant then moved to construe Plaintiffs Notice of Stipulation of Dismissal as a Motion for Voluntary Dismissal pursuant to Fed.R.Civ.P. 41(a)(2) and sought attorneys fees as a condition of dismissal [DE 23].^{FN1} Plaintiff filed a Reply [DE 25], and Defendants (with leave of Court) filed a Sur-reply [DE 26]. I held a telephonic status conference on April 17, 2009 and requested supplemental briefing on the grant of attorneys fees. The parties have provided such briefing [DE 30, 31, 32], and the issue is ripe for adjudication. Having reviewed the parties' arguments, I grant in part Defendants' Verified Motion for Attorney's Fees [DE 30] ("Motion"), as set forth below.

^{FN1}. Defendants alternatively requested that the Court deny the Motion for Voluntary Dismissal and rule on the summary judgment motion, but did not fully brief this request.

[1] In the Motion, Defendants seek fees against Plaintiff and Plaintiffs counsel. As a preliminary matter, I conclude that fees are not warranted against Plaintiff personally, as both offers to settle

the matter requested Plaintiff to compromise on matters outside of the case at hand. I turn, then, to Defendants' request for fees against Plaintiff's counsel pursuant to 28 U.S.C. § 1927, which provides for the imposition of fees and costs against an attorney who unreasonably and vexatiously multiplies the proceedings in a case.^{FN2} Section 1927 provides relief against an attorney who knowingly or recklessly pursues a frivolous claim. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir.2003); *Torres v. City of Orlando*, 264 F.Supp.2d 1046, 1053 (M.D.Fla.2003) (imposing fees under § 1927 and stating, "Plaintiffs counsel had no reasonable basis to pursue this litigation, and from the record, the court may infer that [counsel] intentionally-although perhaps without malice-filed and prosecuted claims that lacked any plausible legal or factual support.").

FN2. 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.

28 U.S.C. § 1927.

[2] Here, Defendants argue that the filing of suit was frivolous, as Plaintiff's counsel was on notice of the enterprise coverage standard of the FLSA and could have engaged in pre-suit actions, such as the filling of a pure bill of discovery or a demand letter, to ascertain whether Defendant D & W Foods, Inc. had gross revenue that exceeded \$500,000. Plaintiff's counsel does not dispute that no bill of discovery or demand letter was sent, but argues that counsel and his firm engaged in some research and investigation [DE 31, p. 2]. I first note that the pre-suit investigation alleged by Plaintiff does not relate to the ultimate question of whether Defendant grossed \$500,000. More importantly, Plaintiff's counsel did not submit an affidavit attest-

ing to his pre-suit investigations or to his good faith belief that the action was not frivolous.

As no affidavit was filed with Plaintiff's Response, and upon the record in front of *1331 me, I conclude that Plaintiff's suit was frivolous and warrants the award of fees and costs against Plaintiff's counsel pursuant to § 1927 and as a condition of dismissal. See *Tesma v. Maddox-Joines, Inc.*, 254 F.R.D. 699 (S.D.Fla.2008) (awarding payment of Defendant's reasonable costs and attorney's fees incurred in the defense of this action as a condition of dismissal with prejudice).^{FN3} However, as many of the filings for which Defendants seek compensation were requested by the Court and were not necessitated by Plaintiff's counsel, I do not award the full \$7,404 requested by Defendants. Rather, I conclude that the time expended by Defendants' counsel from the filing of suit in January 2009 until Plaintiff's filing of a Notice of Voluntary Dismissal With Prejudice on March 6, 2009 warrants relief under § 1927.

FN3. While the cited *Tesma* opinion speaks in terms of fees against plaintiff, the order awarding fees [DE 23] indicated Judge Zloch awarded fees against plaintiff's counsel.

To calculate a reasonable fee, I use the "lodestar" method, which requires that I determine a reasonable hourly rate and the number of hours reasonably expended. See *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir.1988). Here, Defendants' counsel seeks an hourly rate of \$300 for each of Christopher Kleppin, Lloyd Glasser, Harry Boreth and Barry Feingold [DE 30, p. 10]. Upon review and noting that Plaintiff does not oppose the hourly rate sought, I conclude based on the efficiency exhibited by Defendants' counsel, as indicated by the time billed, as well as the rates charged and approved in this district for comparable work and skill, that \$300 is an appropriate hourly rate for each of these attorneys in this case.

[3] As to whether Defendants expended a reas-

onable number of hours in completing the work, counsel's billing records indicate 6.5 hours was expended between the filing of suit and March 6, 2009. I have reviewed the time entries, and I conclude the time expended is reasonable.^{FN4} As Defendants do not seek an adjustment to the lodestar, the total award is \$1,950 (6.5 hours x \$300 per hour). Accordingly, it is hereby:

^{FN4}. As an example, I note that Defendants' counsel billed conservatively (only 0.6 hours) for the preparation of the Motion to Dismiss.

ORDERED AND ADJUDGED:

1. Defendant's Verified Motion for Attorney's Fees Against the Shavitz Law Group, PA, and Plaintiff [DE 30] is GRANTED in PART.
2. Defendants are awarded \$1,950 in attorneys fees against Plaintiff's Counsel The Shavitz Law Group, Gregg I. Shavitz, and Keith Michael Stern.
3. The Clerk of the Court is instructed to CLOSE this case.

S.D.Fla.,2009.

Ortiz v. D & W Foods, Inc.

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