# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 22-50765

JOEL HOENNINGER; MICHAEL KIVITZ; HAYDEN HYDE; ROBERT ROMANO; SAMUEL CASKEY; ET AL.,

*Plaintiffs—Appellants*,

*versus*

LEASING ENTERPRISES, LIMITED, *doing business as* PERRY'S RESTAURANT, L.L.C.,

*Defendant—Appellee*.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:14-CV-798

Before HIGGINBOTHAM, GRAVES, and DOUGLAS, *Circuit Judges*.

PER CURIAM:[*]

In this Fair Labor Standards Act suit, the district court rendered a final judgment awarding attorney's fees and court costs to Plaintiffs who obtained some, but not all, of the relief sought against their employer Leasing

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Enterprises, d/b/a Perry's Restaurant (hereinafter "Perry's"), and now challenge the district court's award of attorney's fees. We AFFIRM.

## I.

In August 2014, 350 plaintiffs brought a collective action against Perry's restaurant under the FLSA, challenging Perry's practice of paying its servers' credit-card tips daily, avoiding a wait for their bi-weekly paycheck. To provide employees with the daily payments without large volumes of cash on premises, Perry's had armored vehicles deliver cash to each of its restaurants three times per week. To offset the costs of the cash delivery services and credit card processing fees, Perry's deducted 3.25% from its servers' credit-card tips before paying the tips in cash.

Perry's policy was challenged in a 2009 Houston-based lawsuit. The district court concluded there that the policy violated the FLSA because the offset exceeded Perry's' credit card issuer fees.[1] This Court affirmed that ruling.[2]

With a bench trial set in the present case for October 2017, Plaintiffs moved for summary judgment on the issues of willfulness and good faith. It was denied. The Parties then agreed that the policy violated the FLSA, and the bench trial proceeded on the issues of willfulness and good faith. The district court held that Perry's did not willfully violate the FLSA and had a good-faith belief it was complying with the statute. The district court entered a final judgment awarding $640,234.48 in damages to 170 plaintiffs and found that 176 others were not eligible because they were employed during the wrong time.

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[1] *See Steele v. Leasing Enters., Ltd.*, 826 F.3d 237, 241 (5th Cir. 2016).

[2] *Id.* at 245–46.

Plaintiffs then sought $761,248.20 in attorney's fees and $48,680.43 in costs. In February 2021, the magistrate judge issued a Report and Recommendation ("First R&R") recommending the district court award $623,785.25 in total attorney's fees (aggregating the fees for multiple law firms) as well as $638.00 in costs but denied all other requested relief. The First R&R recommended the lower fee amount, reducing the requested amount by 15% or $114,187.20, to reflect the unsuccessful challenges to the district court's "no willfulness" and "good faith" findings. The district court then adopted the magistrate judge's First R&R. Perry's appealed. We found that the First R&R "ignore[d] the court's obligation to engage in [the] lodestar analysis" and thus vacated the district court's award of attorney's fees and remanded the case for "recalculation of the fee award using the proper methodology."[3] On remand, after conducting the lodestar analysis, the magistrate judge issued a new R&R ("Second R&R"), recommending that Plaintiffs be awarded $437,459.57 in attorney's fees and $638.00 in costs and denied all other relief. The district court adopted the magistrate judge's Second R&R. Plaintiffs timely appealed.

## II.

We review "the [d]istrict [c]ourt's award of attorney's fees for abuse of discretion and its factual findings for clear error."[4] To that end, we review the initial determination of reasonable hours and rates for clear error.[5] "To be clearly erroneous, a decision must strike us as more than just maybe or

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[3] *Hoenninger v. Leasing Enters., Ltd.*, No. 21-50301, 2022 WL 340593, at *5 (5th Cir. Feb. 4, 2022) (unpublished).

[4] *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006) (quoting *Singer v. City of Waco*, 324 F.3d 813, 829 (5th Cir. 2003)).

[5] *Id.*

probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish."[6]

We review challenges to a district court's lodestar adjustment for abuse of discretion, and only to "determine if the district court sufficiently *considered* the appropriate criteria."[7] A district court abuses its discretion if it: "(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts."[8]

## III.

As the parties agree to the Plaintiffs' counsel rates, the dispute here revolves only around the determination of the number of the hours reasonably expended. Plaintiffs argue that the district court erred in calculating the lodestar because it considered one factor set forth in *Johnson v. Georgia Highway Exp., Inc.*,[9] in the initial calculation of the lodestar, rather than in the separate *Johnson* analysis. We disagree.

### A.

The FLSA provides that the district 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."[10] To be considered reasonable, the fees and

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[6] *United States v. Hernandez*, 48 F.4th 367, 373 (5th Cir. 2022) (internal quotation omitted).

[7] *Black v. SettlePou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013) (quoting *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 329 (5th Cir. 1995)).

[8] *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003)).

[9] 488 F.2d 714 (5th Cir. 1974).

[10] 29 U.S.C. § 216(b).

costs must be properly documented and supported.[11] "Due to the district court's superior knowledge of the facts and the desire to avoid appellate review of factual matters, the district court has broad discretion in setting the appropriate award of attorneys' fees."[12]

Fee applications in our circuit are analyzed using the "lodestar" method.[13] Courts calculate the "lodestar" by "multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers."[14] The party seeking the fee award has the burden of establishing the reasonableness of the number of hours billed by showing an exercise of "billing judgment."[15] To establish billing judgment, a fee applicant must produce "documentation of the hours charged and the hours written off as unproductive, excessive, or redundant."[16] There is a strong presumption that the lodestar award established by the district court is the reasonable fee,[17] but after determining the lodestar, the district court will look to several factors identified in our *Johnson* opinion to decide if appropriate adjustments to the lodestar are necessary.[18] The Supreme Court has

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[11] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[12] *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

[13] *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 850 (5th Cir. 1998).

[14] *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998) (citing *Kellstrom*, 50 F.3d at 324).

[15] *Saizan*, 448 F.3d at 799.

[16] *Id.*

[17] *Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1044 (5th Cir. 1999).

[18] *Combs v. City of Huntington, Texas*, 829 F.3d 388, 393 (5th Cir. 2016). The *Johnson* factors are: (1) the time and labor required to represent the client or clients; (2) the novelty and difficulty of the issues in the case; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee charged for those services in the relevant community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the

emphasized that "the most critical factor" in determining an attorney's fee award "is the degree of success obtained."[19] "The lodestar may not be adjusted due to a *Johnson* factor, however, if the creation of the lodestar amount *already took that factor into account*; to do so would be impermissible double counting."[20] We first address the district court's lodestar calculation. We then address the district court's *Johnson* analysis. We conclude by addressing the overall award of attorney's fees.

**B.**

At the outset, we conclude that there was no error in the initial lodestar calculation. Plaintiffs argue that the district court erred by removing all billing entries reflecting work on the issues of willfulness and good faith when calculating the lodestar, rather than deploying the *Johnson* factors after the lodestar was calculated. Relying on two out-of-circuit cases, Plaintiffs contend that since their claims did not derive from separate theories and were unable to be brought as separate lawsuits, the trial court could not deduct those hours in the lodestar calculation.[21] Defendants counter that the district

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amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19.

[19] *Hensley*, 461 U.S. at 436.

[20] *Saizan*, 448 F.3d at 800 (emphasis added).

[21] Plaintiffs seek to support their position by invoking a published Ninth Circuit opinion and an unpublished Sixth Circuit opinion. In *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 224 (9th Cir. 2013), the Ninth Circuit concluded that "before hours may be deducted for unsuccessful claims [when awarding attorney's fees], the claims must be suitable for entirely separate lawsuits." And in *West v. Hess Env't Servs., Inc.*, 111 F.3d 132, 1997 WL 189507 (6th Cir. 1997) (unpublished table opinion), the Sixth Circuit concluded that "the finding of no willfulness does not provide an appropriate basis for a reduction of the fee award in this case." *Id.* at *3. Setting aside that these cases are not binding on this Court, they are unpersuasive and conflict with decisions of this Court. *See, e.g.*, *Hensley*,

court properly reduced those hours because Plaintiffs did not win on every issue, and the process undertaken was sound. Defendants' argument prevails.

The magistrate judge followed the above procedure, and entered a careful and thorough order analyzing Plaintiffs' fee request and Perry's objections. In its lodestar calculation, the magistrate first determined the billable entries to include, finding that "counsel[] included billing entries for time that is ineligible, and must be removed as part of the proper lodestar analysis." As we have long-held, "[t]he proper remedy when there is no evidence of billing judgment is to reduce the hours awarded . . . intended to substitute for the exercise of billing judgment."[22] In light of these rules, the magistrate judge reasoned that, having lost on the issues of willfulness and good faith at trial, time entries reflecting work on these issues should be removed. The magistrate judge then conducted a line-by-line analysis of Plaintiffs' billing records, filings, the complexity of the case, and the degree of success experienced by the parties to determine the reasonable number of hours expended.

While conducting its line-by-line analysis of Plaintiffs' counsel's billing records, the magistrate judge found three *Johnson* factors in its initial lodestar calculation was warranted: the results obtained, the time and labor involved, and the nature and length of the client relationship. The magistrate judge then found that a reduction was warranted to account for a lack of billing judgment exercised in applying for fees and that it was not difficult to identify specific hours that should be eliminated, even in a case like this,

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461 U.S. at 435–36 (making clear that courts may cut "excessive" hours when calculating the lodestar "even where the plaintiff's claims were interrelated.").

[22] *Walker v. U.S. Dep't of Hous. & Urb. Dev.*, 99 F.3d 761, 770 (5th Cir. 1996).

where the claims arguably shared a common core of facts and were based on related legal theories. After undertaking these steps, the magistrate judge decided that 1,864.6 hours were reasonably expended in the litigation. Accordingly, the Second R&R recommended an award of $437,459.57 in attorney's fees. Plaintiffs have not pointed with clarity to an error made in determining the reasonable hours.[23] We are persuaded that the court factored in the appropriate considerations and acted well within its purview in calculating the lodestar.[24]

**C.**

Next, we conclude that the district court did not abuse its discretion in declining to adjust the lodestar. After calculating the lodestar, the magistrate judge conducted its *Johnson* analysis to see if further reduction was warranted based on six factors identified by Plaintiffs as relevant. The Second R&R explained in detail each of its reductions in its decision.[25] Of salience, the magistrate judge took care to ensure that no *Johnson* factor

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[23] *See Weeks v. Southern Bell Tel. & Tel. Co.*, 467 F.2d 95, 97 (5th Cir. 1972) ("Determination of the reasonableness of attorney's fees is a matter which is left to the sound discretion of the trial judge." (quoting *Culpepper v. Reynolds Metals Co.*, 442 F.2d 1078, 1081 (5th Cir. 1971)). "Clear error exists when although there may be evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Black*, 732 F.3d at 496 (quoting *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 569 (5th Cir. 2011)).

[24] And when reviewing such a determination by the trial court, our "concern is not that a complete litany be given, but that findings be complete enough to assume a review which can determine whether the court has used proper factual criteria in exercising its discretion to fix just compensation." *Brantley v. Surles*, 804 F.2d 321, 325–26 (5th Cir. 1986).

[25] For example, the magistrate judge reasoned that no reduction or enhancement was warranted under the time limitations factor because there was not enough specific evidence as to counsel's loss of employment elsewhere, thus lending the court to conclude this factor to be neutral.

subsumed in the initial lodestar calculation was double counted in the second phase. To that end, the magistrate judge ultimately determined that an adjustment to the lodestar was unnecessary in its *Johnson* analysis, as it already considered a number of *Johnson* factors when calculating the lodestar, while other factors did not weigh heavily for one party or the other. The district court did not abuse its discretion in declining to adjust the lodestar.[26]

**D.**

And lastly, we conclude the record below supports the awarded attorney's fees. The district court, in adopting the magistrate judge's Second R&R, faithfully applied our Court's approach to awarding attorney's fees. The Supreme Court has long-recognized that while "district court[s] may consider [the *Johnson*] factors . . . *many* of these factors usually are subsumed within the initial calculation."[27] Our Court has emphasized time and again that "[s]ome of the[] [*Johnson*] factors are subsumed in the initial lodestar calculation."[28] In fact, our Court has stated that "of the *Johnson* factors, . . . 'results obtained [is] presumably fully reflected in the lodestar amount.'"[29] It thus makes sense that our Court has affirmed many awards where *Johnson*

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[26] *Cf. Heidtman*, 171 F.3d at 1044 (noting the "strong presumption that the lodestar award is the reasonable fee").

[27] *Hensley*, 461 U.S. at 434 n.9 (emphasis added).

[28] *Migis*, 135 F.3d at 1047. The Supreme Court has also twice stated that the "degree of success obtained" is "the most critical factor" in determining the reasonableness of attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (quoting *Hensley*, 461 U.S. at 436).

[29] *Heidtman*, 171 F.3d at 1043 (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)); *see also Blum v. Stenson*, 465 U.S. 886, 898–900 (1984); *Shipes v. Trinity Indus.*, 987 F.2d 311, 320; *Alberti v. Klevenhagen*, 896 F.2d 927, 930 (5th Cir.), *vacated in part on reh'g*, 903 F.2d 352 (5th Cir. 1990).

factors were subsumed in the initial lodestar calculation—including results obtained.[30]

That is just what happened here.[31] The district court made clear that it evaluated three *Johnson* factors when calculating the lodestar. The district court also made clear that it considered six factors separately in its *Johnson* analysis but did not double count where one was subsumed in the initial

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[30] *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010) (noting that "an enhancement [of the lodestar] may not be awarded based on a factor that is subsumed in the lodestar calculation"); *Saizan*, 448 F.3d at 799–800 (affirming an award where, after "[r]eviewing the time records, the District Court faulted Plaintiffs for vagueness, duplicative work, and not indicating time written off as excessive or unproductive"); *see also Monroe v. Houston Indep. Sch. Dist.*, No. 21-20642, 2023 WL 1434280, at *5 (5th Cir. Feb. 1, 2023) (unpublished) (per curiam) (affirming an award where the court subsumed two *Johnson* factors in its lodestar calculation); *Rodney v. Elliott Sec. Sols., L.L.C.*, 853 F. App'x 922, 924 (5th Cir. 2021) (unpublished) (per curiam) (affirming an award where this Court concluded "the district court acted well within its purview in calculating the lodestar" by analyzing whether each entry demonstrated billing judgment, was block-billed or vague, was for administrative work instead of legal work, was more properly characterized as routine or associate-level work, and was productive and successful); *Shelton v. Louisiana State*, 814 F. App'x 883, 884 (5th Cir. 2020) (unpublished) (per curiam) (affirming an award where "[t]o calculate the lodestar, the district court used local rates—thus rejecting Shelton's request to use New York rates—and reduced the calculated amount by 15% to reflect a lack of billing judgment"); *Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 258 (5th Cir. 2018) (affirming an award where the district court "excluded several items, such as (1) a 29.1% reduction for time expended . . . dismissed claims; (2) a 10% reduction for 'block billing'; and (3) a 20% reduction for 'lack of reasonable billing judgment.' The court also excluded hours claimed for legal assistants given the lack of evidence of their prevailing market rate"); *Saldivar v. Austin Indep. Sch. Dist.*, 675 F. App'x 429, 431 (5th Cir. 2017) (unpublished) (per curiam) (affirming an award where the district court "[f]inding 'scant evidence of billing judgment,' initially reduced the number of hours billed by 5% and then reduced the lodestar by $1,991.25 as an appropriate offset for the performed clerical work"); *Shipes*, 987 F.2d at 320 (affirming an award where four of the *Johnson* factors were subsumed in the initial calculation of the lodestar).

[31] The district court "explain[ed] with a reasonable degree of specificity the findings and reasons upon which the award [was] based." *Shipes*, 987 F.2d at 320.

lodestar, meaning the methodology falls within the scope of permissible procedure.

At bottom, Plaintiffs ask this Court to treat three distinct FLSA issues as one so that failure to win on any one issue would not result in a reasonable-hours reduction of attorney's fees. We decline to do so. The district court did not err in calculating the lodestar or abuse its discretion in declining to adjust it.

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We AFFIRM.