IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

RAYMOND POULIN, *Plaintiff,* v. GENERAL DYNAMICS SHARED RESOURCES, INC. *Defendant.*	CASE NO. 3:09-cv-00058 ORDER JUDGE NORMAN K. MOON

This matter is before the Court upon the Amended Joint Motion and Memorandum for Approval of Settlement Agreement and General Release, filed April 30, 2010 (docket no. 25). For the following reasons, the Amended Joint Motion will be and hereby is DENIED, without prejudice.

The parties ask the Court to approve the Settlement Agreement and enter the Agreed Order submitted by the parties in connection therewith, whereby Defendant would pay to Plaintiff a gross sum of $50,000, and Defendant would pay directly to Plaintiff's counsel attorney's fees of $25,000. *See* Agreed Order; Settlement Agreement and General Release, ¶ 4. The parties argue in support of the Motion to Approve Settlement Agreement simply that the Settlement Agreement "was reached at arms length and has been voluntarily executed by all parties."

Plaintiff's claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. (hereinafter "FLSA") cannot be settled absent Court approval. In considering the instant Motion, the Court is required to "determine[ ] that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982).

"[T]he district court may enter a stipulated judgment after *scrutinizing* the settlement for fairness." *Id*. at 1353 (citing *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 n.8, 66 S.Ct. 925 (1946)) (emphasis added). When considering a motion to approve an FLSA settlement agreement, courts weigh a number of factors, including: "(1) the extent of discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiffs;" and finally, "the probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery." *Lomascolo v. Parsons Brinckerhoff, Inc.*, No. 1:08-cv-1310, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009).[1] While the parties may not have had these specific factors in mind when filing the Joint Motion to Approve Settlement Agreement, the Motion is clearly deficient in setting forth facts or arguments upon which the Court could evaluate the Settlement Agreement for fairness.

Furthermore, as requested by the parties, 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." 29 U.S.C. § 216(b). Because the language of the FLSA contemplates that "the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs," *Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946), the FLSA "requires judicial review of the reasonableness of counsel's legal fees to assure both that counsel is compensated adequately and that no conflict of interest taints the amount the wronged employee recovers under a settlement agreement." *Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009). As the Court must review the proposed attorney's fees in this case for reasonableness, it "will use the

[1] While the court in *Lomascolo* was considering a motion to approve a settlement agreement of FLSA claims in the class action context, these factors are similarly applicable in the context of settlements of individual FLSA claims. *See e.g., Richardson v. Florida Hospital Waterman, Inc.*, No. 6:08-cv-1459, 2009 WL 3241979, at *2 (M.D. Fla. Oct. 5,

principles of the traditional lodestar method as a guide." *Almodova v. City and County of Honolulu*, No. 07-00378, 2010 WL 1372298, at *7 (D. Hawai'i Mar. 31, 2010). *See also Soto v. Cemex, Inc.*, 6:08-cv-669, 2010 WL 1742095, at *3 (M.D. Fla. Apr. 1, 2010); *Comstock v. Florida Metal Recycling, LLC*, No. 08-81190-CIV, 2009 WL 1586604, at *2 (S.D. Fla. June 5, 2009). The parties have offered no justification underlying their request for an award of attorney's fees, much less the factual basis required for the Court to apply the lodestar analysis as a guide in determining the reasonableness the requested attorney's fees.

Finally, the Settlement Agreement, as presently drafted, contains a confidentiality agreement. This, in pertinent part, provides that "Plaintiff agrees that he shall not disclose the fact of, and/or the terms and conditions of this Settlement Agreement and General Release except that Plaintiff may state that the Poulin action has been dismissed and may disclose the terms and conditions of this Settlement Agreement" under limited enumerated circumstances. Under the Settlement Agreement, "Plaintiff further agrees and acknowledges that confidentiality is a material term of this Agreement and any breach of the confidentiality provisions herein will be considered a material breach of the terms of this Agreement and he will be required to reimburse Defendant for any and all compensation and benefits paid to him or for his benefit under the terms of this Agreement." Settlement Agreement and General Release, ¶ 13. Further, it provides that the Settlement Agreement, "as executed by the Parties, will be filed under seal." *Id*. at ¶ 5.

The Court cannot approve these terms of the Settlement Agreement. The provision that "confidentiality is a material term of [the] Agreement" is in conflict with the Court's opinions dated March 26, 2010 (docket no. 20) and April 23, 2010 (docket no. 23), which held that the parties had not identified significant interests to outweigh the public interest in access to judicial records, and

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2009); *Hamilton v. Frito-Lay, Inc.*, No. 6:05-cv-592, 2007 WL 328792, at *2 (M.D. Fla. Jan. 8, 2007).

required the proposed Settlement Agreement be made publicly available on the docket. Furthermore, a confidentiality provision in an FLSA settlement agreement undermines the purposes of the Act, for the same reasons that compelled the Court to deny the parties' motion to seal their Settlement Agreement. *See e.g., Valdez v. T.A.S.O. Prop., Inc.*, No. 8:09-cv-2250, 2010 WL 1730700, at *1 (M.D. Fla. Apr. 28, 2010); *Dees v. Hydradry, Inc.*, --- F.Supp.2d ----, 2010 WL 1539813, at *9 (M.D. Fla. 2010) ("A confidentiality provision in an FLSA settlement agreement both contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory effort to notify employees of their FLSA rights."). Finally, the confidentiality provisions are likely unenforceable in light of the public filing of the Settlement Agreement. *See e.g., Head v. V&L Services III, Inc.*, No. 6:08-cv-917, 2009 WL 3582133, at *3 (M.D. Fla. Oct. 27, 2009) (noting that "the settlement agreements contain terms that this Court would not approve, such as the confidentiality provisions, which are partially unenforceable in light of the public filing of the agreements"). The Court cannot approve of a settlement agreement which includes these terms.

For the aforementioned reasons, the Amended Joint Motion and Memorandum for Approval of Settlement Agreement and General Release will be and hereby is DENIED, without prejudice.

Accordingly, the parties are DIRECTED to file an amended joint motion to approve settlement agreement, within 14 days of the issuance of this Order, which includes a sufficient factual predicate upon which the Court could determine that the Settlement Agreement is a "fair and reasonable resolution" of the dispute and that the requested award of attorney's fees is reasonable under the lodestar method, and which strikes the offending confidentiality provisions of the Settlement Agreement. The parties are further DIRECTED, no later than the date upon which the amended joint motion is filed, to contact Heidi Wheeler with the Clerk of Court, at 434-296-9284, to schedule a hearing upon the amended joint motion.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

Entered this __5th_ day of May, 2010.

_____/s/_____
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE