

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

Susan Doxtator, Arlie Doxtator, and
Sarah Wunderlich, as Special
Administrators of the Estate of Jonathon
C. Tubby,

Plaintiffs,

Case No. 19-CV-00137

v.

Erik O'Brien, Andrew Smith, Todd J.
Delain, Heidi Michel, City of Green
Bay, Brown County, Joseph P. Mleziva,
Nathan K. Winisterfer, Thomas Zeigle,
Bradley A. Dernbach, and John Does 1-
5,

Defendants.

**GREEN BAY DEFENDANTS' BRIEF IN RESPONSE AND OBJECTION TO
PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COST**

Defendants, the City of Green Bay, Erik O'Brien and Andrew Smith ("Green Bay Defendants") respectfully submit this Response to Plaintiffs' Motion To Compel Payment of Attorney's Fees and Costs (Dkt. 151) and objection to Plaintiffs' itemized bill of cost.

BACKGROUND

Plaintiffs' Motion to Compel

On January 14, 2020, Plaintiffs brought a motion pursuant to Fed.R.Civ.P. 37(a)(2) to compel deposition testimony relating to the significance of non-party witness, Green Bay Police Officer Scott Salzmann's tattoos. *See* (Dkts. 71-72) The Green Bay Defendants opposed the motion on the basis that the information sought was not relevant to the claims brought by

Plaintiffs. *See* (Dkt. 75) On February 21, 2020, the Court issued a decision and order compelling the discovery sought by plaintiffs and specifically instructed the following:

Officer Scott Salzmann is ordered to answer the questions posed at his continued deposition **regarding the tattoos on his forearm**. Officer Salzmann and the City of Green Bay are ordered to pay Plaintiffs' expenses, including attorney's fees, in bringing the motion to compel and for the costs associated with continuing Salzmann's deposition.

See (Dkt. 77, at 3)(emphasis added).

As noted above, the scope of the continued deposition was narrow and related only to Officer Salzmann's forearm tattoos. The Green Bay Defendants complied and produced Officer Salzmann for a continued deposition on August 4, 2020. (Baynard Decl. ¶ 3) The deposition was conducted remotely and took approximately 30 minutes. *Id.*

Although irrelevant to the current motion for costs, Plaintiffs' counsel misrepresents the continued deposition testimony and claims that Officer Salzmann confirmed their suspicion that Officer Salzmann's tattoos "commemorated" his involvement in two previous and unrelated officer-involved shootings. (Dkt. 152, pp. 3-4) To the contrary, during the continued deposition, Officer Salzmann testified to the following significance of his tattoos:

I've been involved in two officer-involved shootings, both of which have ended in the loss of a life. No one ever wants to be a part of officer-involved shootings and be responsible for the loss of life. What this, on my forearm, represents is the post-traumatic stress, the anxiety, and the depression that go along with the weight of these critical incidents. For me, it's a way to help me cope with all that and quote-unquote "battle" traumatic stress, anxiety, and depression on a daily basis.

See Baynard Decl. ¶ 2, Baynard Decl. Ex. 1, at 175: 11-177:25, 178:1-11, 181:17 – 182:22. This testimony in no way supports Plaintiffs’ suspicion for the continued deposition, yet they continue to misrepresent that testimony to the Court.¹

Plaintiffs’ Submissions In Support of Costs Sought

On Friday September 4, 2020, Plaintiffs’ counsel provided an itemization of their billing costs and fees associated with the motion to compel Officer Salzmann’s continued deposition. (Baynard Decl. ¶ 4) The amount of claimed fees and expenses totaled \$12,827.05, between three attorneys and one paralegal. (Baynard Decl. ¶ 5)

After reviewing the itemization, Green Bay Defense counsel communicated with the Green Bay City Attorney’s office that oversees the processing of payments, regarding Plaintiffs’ itemization. (Baynard Decl. ¶ 7) On Friday, September 16, 2020, Defense counsel notified Plaintiffs’ counsel of their objections to the block-nature of the billing and requested an updated billing statement. *Id.* ¶ 8. Approximately 6 weeks later on October 27, 2020, Plaintiffs’ counsel provided a revised billing itemization. *Id.* ¶ 9. Over the next month communications occurred between the parties regarding the reasonableness of the attorneys hourly rate and hours claimed. During this time Defense counsel was also in the process of drafting dispositive motions. *Id.* ¶ 11. Ultimately, the Green Bay Defendants offered a compromise to pay \$6,413.75. *Id.* ¶ 12. Plaintiffs’ counsel objected to the amount and indicated he would be filing a motion with the Court, however, later, indicated he was willing to compromise for payment of \$10,000. *Id.* ¶ 13.

¹ For a more detailed argument regarding Plaintiffs’ misrepresentation of Officer Salzmann’s testimony see Defendants’ Reply Memorandum In Support of Motion for Summary Judgment (Dkt. 146, pp. 6-7) and Defendants’ Response to Plaintiffs’ Proposed Findings of Fact (Dkt. 147, ¶ 7).

Defense counsel informed Plaintiffs' counsel that the counter-offer would be shared with the City Attorney's Office during a January 4, 2021 meeting. *Id.* ¶ 14.

Defense counsel worked in good faith to achieve a fair resolution to this issue during a time period that encompassed several holidays and numerous briefing deadlines. *Id.* ¶ 18. Evenso, on December 31, 2020, Plaintiffs filed their Motion to Compel Payment of Attorney's Fees and Costs and supporting documents. *See* (Dkts151-153) The Green Bay Defendants object to the Plaintiffs' Motion for the following reasons: (1) the hourly rate claimed by Plaintiffs' counsel is disproportionate to their experience; and (2) the number of hours expended drafting a routine motion to compel is grossly excessive.

DISCUSSION

The starting point for determining whether Plaintiffs' counsel is entitled to reasonable expenses, including reasonable attorney fees, in obtaining the July 10, 2020 order to compel, is Federal Rule of Civil Procedure 37(a)(4), which provides in relevant part that:

If the motion [to compel] is granted, the court shall ... require the party ... whose conduct necessitated the motion ... to pay ... the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. (emphasis added).

Under Rule 37(a)(4), upon granting a motion to compel, the court may award the movant reasonable expenses incurred in bringing the motion. *See E.E.O.C. v. Accurate Mech. Contractors, Inc.*, 863 F. Supp. 828, 834 (E.D. Wis. 1994). The court must determine whether the amounts sought are reasonable. *Id.* In a related context, the Supreme Court has held that an award of attorney's fees under the fee-shifting provisions of the civil rights statutes should begin with a calculation of the hours reasonably expended at a reasonable hourly rate. *Blanchard v.*

Bergeron, 489 U.S. 87, 94, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989). An award of fees under Rule 37(a)(4) is not identical to an award under the civil rights statutes, as the motive behind each award may differ. However, the rationale used to calculate fee awards in civil rights cases can be helpful in calculating awards under Rule 37(a)(4).

When seeking attorneys fees under Federal Rule of Civil Procedure 37(a)(4), “[t]he lawyer must not abandon self-restraint or careful billing judgment because of the expectation that the obligation to pay the fee will be statutorily shifted to the losing party.” *Hall v. Borough of Roselle*, 747 F.2d 838, 841 (3d Cir. 1984). As one court has noted, fee-shifting provisions are designed to “ensure effective access to the judicial process ... not to serve as a full employment or continuing education programs for lawyers and paralegals.” *Lipsett v. Blanco*, 975 F.2d 934, 938 (1st Cir. 1992) (citation omitted); *see also Protective Nat’l Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 283 (D. Neb. 1989)(court limited expenses to those related to obtaining order and did not permit expenses for second deposition).

When adjusting an award of attorney’s fees, the Court employs a two-step analysis. First, the Court will look to the reasonableness of the attorney’s hourly rate. Second, the Court will examine individual time entries to determine whether each entry is detailed enough for the court to determine independently whether the amount of time claimed is justified.

A. Reasonableness of Attorney Rate.

A reasonable hourly rate is one that is derived from the market rate for the services rendered. *Six Star Holdings, LLC v. City of Milwaukee*, No. 10-C-0893, 2015 WL 5821441, at *3 (E.D. Wis. Oct. 5, 2015), citing *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir. 2011). “The best evidence of an attorney's market rate is his or her actual billing rate for **similar**

work.” *Johnson v. GDF, Inc.*, 668 F.3d 927, 933 (7th Cir. 2012); *see also Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989) ([a] reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, i.e., “in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.”)

In determining the reasonableness of an attorney's requested rate, his standard rate, or the rate that he would earn from other paying clients, is the “best measure.” *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993); *EEOC v. Accurate Mechanical Contractors, Inc.*, 863 F.Supp. 828, 834 (E.D.Wis.1994) (Gordon, J.). **This amount, however, must be capped “at the prevailing market rate for lawyers engaged in the type of litigation in which the fee is being sought.”** *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir.1996) (emphasis added). Hourly rates awarded in similar cases may help the court determine the prevailing market rate. *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1312 (7th Cir. 1996). For example, in *Six Star Holdings*, an Eastern District of Wisconsin Section 1983 case, the court found that the following rates were reasonable: \$575 for Jeff Scott Olson (a well-known Plaintiffs’ civil rights attorney), \$385 for Crandall (attorney), \$350 for Farrell (attorney), and \$150 for law clerks and paralegals. *See Six Star Holdings, LLC v. City of Milwaukee*, No. 10-C-0893, 2015 WL 5821441, at *3 (E.D. Wis. Oct. 5, 2015).

1. Plaintiffs' Counsel's Hourly Rates

In support of their motion, Plaintiffs submitted the biographies of the two partners (Tahdooahnippah and Durocher) and one associate (Huerter) who billed hours drafting Plaintiffs' motion to compel. *See* (Dkt. 153-13) A review of the biographies indicates that none of the attorneys have speciality in federal civil rights litigation, in particular:

- Attorney Tahdooahnippah is a partner in the firm's Intellectual Property Litigation Group and his hourly rate is \$515. (Dkt. 153-13, pp. 2; *see* Baynard Decl. ¶ 5, Ex. 2). Attorney Tahdooahnippah's firm biography indicates that in addition to intellectual property, he helps clients navigate federal Indian law. (Dkt. 153-13, p. 2).
- Attorney Durocher is a partner in the firm's Litigation and Regulatory Practice Groups and his hourly rate is approximately \$770. (Dkt. 153-13, p. 10; *see* Baynard Decl. ¶ 5, Ex. 2). Attorney Durocher's firm biography indicates that his practice focuses on complex civil litigation, with a particular emphasis on the defense of consumer class actions against financial services companies under the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and state unfair practices statutes. (Dkt. 153-13, p. 10)
- Attorney Huerter is an associate in the firm's trial group who has been practicing for approximately three years. His hourly rate is \$350. (Dkt. 153-13, p. 10; *see* Baynard Decl. ¶ 5, Ex. 2). Attorney Huerter's firm biography indicates that he represents clients in the food, agriculture, and financial services industries in securities litigation, government investigations, corporate governance disputes, advisor fee litigation, disputes pertaining to mergers and acquisitions, director and fiduciary liability cases, and commercial contract disputes.

The Green Bay Defendants do not challenge that these three attorneys are skilled and experienced. However, Dorsey & Whitney is a large is Minneapolis, Minnesota law firm whose website advertises numerous practice areas, but not civil rights litigation. *See* (Baynard Decl. ¶ 17; *see also* Dkt. 153-13, pp.4, 8-9,13) Nor is there *any* indication that any of the above attorneys specializes in civil rights litigation that warrants a heightened hourly rate. *Id.*

In their submissions in support of their motion, Plaintiffs' counsel redacted the attorneys' rates, and merely claims that the rates sought in support of the fees are the standard rates they charge to their clients. (Dkt, 153 ¶¶ 3-4) Although these may be the prevailing market rates for attorneys engaging in the practice areas that Dorsey & Whitney advertises (intellectual property and regulatory practices) in an major metropolitan area, those rates are not standard for the Wisconsin Eastern District civil rights litigation market in which the fee is being sought. *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996).

Attorney Durocher's hourly rate of \$770 is not within the range charged by even the most experienced plaintiffs' civil rights attorneys in the Eastern District. Attorney Tahdooahnippah's hourly rate of \$515 for an attorney with 10 years of experience, who does not specialize in civil rights litigation, exceeds his market value. Attorney Huerter's hourly rate of \$350, although more in-line with the market rate for experienced civil rights litigators, is not specialized in this practice area. Finally, Paralegal Ann Reckin's hourly rate of \$305 is far outside the range of reasonable fees charged for paralegal work in the Eastern District. *See Six Star Holdings, LLC v. City of Milwaukee*, 2015 WL 5821441(E.D. Wis. Oct. 5, 2015).

B. Reasonableness of the Number of Hours Expended.

The number of hours Plaintiffs claim to have expended in bringing the motion are grossly excessive and duplicative. Plaintiffs wish to be compensated at a top rate for their work on the motion to compel, yet the entries below demonstrate Plaintiffs' counsel's lack of "expertise" in briefing a straight forward discovery dispute, including the need to research local rules, and expend time to "[d]raft Rule 37 compliance certification and research local rule filing requirements for motion to compel " or to "[r]esearch local rules to determine response and reply

deadlines for motion to compel” and then to “[d]ocket dates and inform F. Tahdooahnippah.”
See (Baynard Decl. ¶ 10, Ex. 3)

1. Hours associated with the moving brief.

A total of 15.3 hours were billed between one associate and two partners for preparing the moving brief and supporting materials. The memorandum is approximately 11 pages, most of which is the reiteration of the legal standard. (Dkt. 72) The declaration of F. Tahdooahnippah is 2 pages. (Dkt. 74) The time entries reflect the following use of time:

- J. Huerter billed 5.4 hours for preparing to draft the motion including researching local rules and deadlines;
- J. Huerter billed 6.9 hours for drafting and revising the motion and supporting documents.
- F. Tahdooahnippah billed an additional 2.0 hours for reviewing and revising the motion and supporting documents
- S. Durocher billed an *additional* .9 for reviewing and revising the motion and supporting documents
- J. Huerter billed .1 for reviewing docketing dates and informing F. Tahdooahnippah.

See (Baynard Decl. ¶ 5; Baynard Decl. Ex. 2) It is unreasonable that it would take an associate such extensive time to research/draft the legal standard for a motion to compel. It is also unreasonable that two partners would have to review and revise such a routine motion.

2. Hours associated with the reply brief.

The Green Bay Defendants responded to Plaintiffs’ Motion with a 6-page brief on February 4, 2020. (Dkt. 75) On February 18, 2020, Plaintiffs filed their Reply memorandum. (Dkt. 76) A total of 13.9 hours were billed between one associate and one partner for preparing the

reply brief. The brief is approximately 11 pages, much of which reiterates the moving brief. (*Id.*)

The time entries reflect the following:

- J. Huerter billed 1.5 hours for reviewing Defendants' response and conducting additional research for the reply.
- J. Huerter billed 10.5 hours for drafting and revising the reply.
- F. Tahdooahnippah billed an additional 1.9 hours for reviewing and revising the reply.

See (Baynard Decl. ¶ 5; Baynard Decl. Ex. 2)

3. Costs associated with Salzmann's second deposition.

The Green Bay Defendants do not challenge the cost associated with the transcripts and taking the deposition of Officer Salzmann, however, note that the scope of the second deposition was for the limited purpose of Officer Salzmann answering questions about the significance of his tattoos. Specifically, the Court ordered Officer Salzmann to answer the questions posed at his continued deposition regarding the tattoos on his forearm. (Dkt. 77, at 3) No additional exhibits were used during the second deposition, and it seems unnecessary to expend time to "preparing for the second deposition of Officer Salzmann." *See* (Baynard Decl. ¶ 10; Baynard Decl. Ex. 3, entry date 8/4/2020).

Finally, on August 6, 2020, Ann Reckin, a paralegal, billed 1.0 hour at \$305 an hour to "[r]eview billing records to compile time entries related to the motion to compel the second deposition of S. Salzmann." *See* (Baynard Decl. ¶ 5; Baynard Decl. Ex. 2). Compiling a billing record is a task that must be completed when billing a client and not solely associated with the motion. Further \$305 is an unreasonably high hourly rate for a paralegal in this district (*see* section A, above).

A motion to compel addresses a fairly straightforward legal issue. Here, the motion to compel was related to the narrow issue of obtaining testimony about the meaning of Salzmann's tattoos. This is a legal issue that should be able to be briefed by an associate, and even if reviewed by a partner, two partners reviewing and revising a motion to compel brief is unnecessarily excessive. See *E.E.O.C. v. Accurate Mechanical Contractors, Inc.*, 863 F. Supp. 828, 834–835 (E.D. Wis. 1994) (amount of attorney time reduced from 22 hours to five hours based on assistance of co-counsel and straightforward nature of legal issues); *Gordon v. Castle Oldsmobile and Honda, Inc.*, 157 F.R.D. 438, 439 (E.D. Ill. 1994) (court found request for award of 41 hours of attorney's fees unreasonable and reduced it to eight hours); See e.g., *Brown v. State of Iowa*, 152 F.R.D. 168, 174–175 (S.D. Iowa 1993) ("grossly excessive" request for simple motion to compel drafted by legal intern reduced).

In *E.E.O.C. v. Accurate Mech. Contractors, Inc.*, 863 F. Supp. 828, 834–35 (E.D. Wis. 1994), the court found that 22 hours was an unreasonably large amount of time to have been spent by two experienced attorneys in bringing a motion lacking highly complex legal issues; this was especially true in light of the fact that the motion was a joint motion to compel. In *Tuszkiewicz v. Allen-Bradley Co.*, 173 F.R.D. 239, 242 (E.D. Wis. 1997), the Court found that plaintiffs' counsel was able to recover for 10.25 hours for his having to bring the motion to compel. In reducing the Plaintiffs' original claim of approximately 20 hours spent, the Court explained:

The next question is whether the number of hours that Mr. Olson spent on preparing his motion to compel and in replying to the defendant's response is reasonable. The client billing worksheet attached to Mr. Olson's affidavit shows that he spent one hour reviewing the Mr. Krentze's deposition transcript, over eleven hours researching and writing his four- page brief and affidavit in support of the motion to compel, almost four hours reading the defendant's response and

researching the cases cited in the response, and over three hours writing his three-page reply brief. This does appear to be an excessive amount of time to spend on a motion that lacked highly complex issues or facts. I will therefore reduce the time that Mr. Olson spent on his original motion to four hours, the time he spent on reading and researching the defendant's response to one hour, and the time he spent on writing the reply to an hour and a half. I will allow him to seek fees for the hour that he spent reviewing Mr. Krentze's deposition transcript. This result seems especially reasonable given that once the defendant responded to his motion, Mr. Olson had the answers to the foundational questions that he originally asked, to no avail, at Mr. Krentze's deposition.

Id. at 24.

The touchstone inquiry is whether the time expended on particular tasks was reasonable. Here, two partners Attorneys Tahdooahnippah and Durocher billed for reviewing and revising the motion drafted by Attorney Huerter. (Baynard Decl. ¶ 5; Baynard Decl. Ex. 2) This is not reasonable. A partner who bills \$515/hr should not require another partner to review and revise the work that they have themselves already reviewed and revised. Parties cannot be reimbursed for nonproductive time or duplicative activities. See *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). While court have refused to lay down a flat rule of one lawyer per case, *Lenard v. Argento*, 808 F.2d 1242, 1244 (7th Cir.1987), the tendency of law firms to overstaff a case should cause a trial court to scrutinize a fees petition carefully for duplicative time. See *Hensley*, 461 U.S. at 434; see also *Roe v. City of Chicago*, 586 F.Supp. 513, 514 (N.D.Ill.1984).

In summary, Plaintiffs' Motion for Attorney's Fees and Cost is unreasonable because the hourly rate claimed by the attorneys, specifically Attorneys Durocher and Tahdooahnippah, is disproportionate to rates charged to paying clients by southern Wisconsin civil rights lawyers of comparable skill, reputation, and experience. Further, the number of 29.2 hours expended drafting and replying to a routine motion to compel is grossly excessive.

CONCLUSION

For all these reasons, the Green Bay Defendants request that the Court exercise its discretion in reducing the fees requested to reflect hourly rates commensurate with those approved by Courts in this area for attorneys expert in the field of civil rights litigation, and reduce the hours sought to a reasonable amount which reflects the work product filed with the Court.

Dated at Wauwatosa, Wisconsin this 15th day of January 2021.

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