

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 95-B-2525

JOHN VASZLAVIK, et al.,

Plaintiffs,

v.

STORAGE TECHNOLOGY CORPORATION, a Delaware Corporation, doing business in Colorado,
Defendant.

ORDER GRANTING CLASS COUNSEL'S PETITION FOR ATTORNEY FEES AND COSTS

BABCOCK, Judge

I. INTRODUCTION

THIS MATTER is before the Court in connection with Class Counsel's Petition for attorney' Fees and Costs. In their Petition, class counsel, the law firm of Roman, Benezra & Culver, L.L.C., assisted by Todd J. McNamara, P.C., has asked this Court to compensate them for their role in obtaining a settlement of class claims under the Age Discrimination in Employment Act ("ADEA") and the Employee Retirement Income Security Act ("ERISA"). The settlement provides a \$5 million monetary recovery for the 417 member ADEA collective action, as well as significant affirmative relief for the approximately 1,226-member ERISA class.

Specifically, class counsel has asked this Court to award them a fee of 30% of the monetary settlement obtained or \$1.5 million. Class counsel has also asks this Court to award it \$309,252.41 for outstanding costs.

In a court approved notice regarding the terms of the ADEA settlement, collective action members were advised of class counsel's request and were given an opportunity to object. No objections were received regarding class counsel's request for fees and costs.

On March 8, 2000, this Court conducted a hearing regarding the Stipulation for Approval of Class Settlement, as well as class counsel's fee Petition. Based upon my observation of counsel's conduct during this litigation, my knowledge of the difficult legal issues facing the Plaintiffs, and a review of class counsel's Petition for attorney' Fees and Costs and Supplemental Information and Authority In Support of its Petition, I granted counsel's request. This Order explains my findings and conclusion that counsel's fee and cost request is reasonable and merited.

II. FINDINGS AND CONCLUSIONS

A. Class Counsel's Request For attorney' Fees

attorney' fees are awarded to class counsel under the common benefit doctrine. (Hall v. Cole, 412 U.S. 1, 5 (1973).) When a settlement yields a fund for class members, fees must be paid from the recovery. (Boeing Co. v. VanGemert, 444 U.S. 472, 481 (1980)).

Courts have applied one of two methods for determining attorney' fee awards in common fund cases: (1) by a "percentage of the fund"; or (2) by the "lodestar plus multiplier" or "enhanced lodestar", which multiplies the reasonable hours expended by a reasonable hourly rate, and finally by an additional percentage to compensate for risk. (Useton v. Commercial Loveless Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993); Rosenbaum v. MacAllister, 64 F.3d 1439, 1445 (10th Cir. 1995).) While enhanced lodestar cases remain instructive, the Tenth Circuit has expressed "a preference for the percentage of the fund method" in common fund cases. (Rosenbaum, 64 F.3d at 1445, quoting Gottlieb v. Barry, 43 F.3d 474, 483 (10th Cir. 1994).)

Fees for class action settlements generally range from 20%-50%. (Maywalt v. Parker and Parsley Petroleum Co., 963 F.Supp. 310 (S.D. N.Y. 1997); Naturalizer Production Liability Litigation, 1996 W.L. 780512, p. * 14 (E.D. Mich. 1996); In re Combustion, Inc., 968 F.Supp. at 1132.) Regardless of whether a percentage of the fund or enhanced lodestar approach is used, class action fee awards are typically 30% of the fund created by the settlement. (In re Activision Securities Litigation, 723 F.Supp. 1373, 1375-78 (N.D. Cal. 1989) (30% should be awarded "absent exceptional circumstances").)

The Tenth Circuit has concluded that whichever method for fee calculation is employed, the District Court must consider the 12 factors articulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). (Gottlieb, 43 F.3d at 483; Rosenbaum, 64 F.3d at 1445). The Johnson factors include: (1) the time and labor required; (2) the novelty and difficulty of the question presented by the case; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the 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. (Id.)

Applying the Johnson factors to this case, I find that an award of 30% of the common fund is reasonable and warranted.

1. Time And Labor Required

This litigation required class counsel to commit vast amounts of time and labor in order to obtain a favorable settlement. A Complaint on behalf of three named Plaintiffs alleging class-wide discrimination was filed on October 2, 1995. In the more than four years this case was litigated, Plaintiffs' counsel invested, at least, 6,043.90 hours, incurring attorney' fees of \$977,517.75. I find that this fee was reasonable. In fact, based on my knowledge of fees charged in complex litigation nationally, I find that the hourly rates charged by class counsel were on the low side, even in the District of Colorado.

Counsel's considerable investment of time and labor was reasonable and necessary in such a complex case. Plaintiffs' claims arose out of the layoff of more than 2,000 employees, and involved two certified classes. Both parties aggressively litigated the case. Plaintiffs produced 28,693 pages of documents, while Defendant produced 150,158 pages of documents. Plaintiffs' counsel took 91 depositions and defended 74 depositions taken by Defendant. There are 239 pleadings in Plaintiffs' files, including 66 motions filed by Plaintiffs and 48 filed by Defendant. Plaintiffs' counsel interviewed approximately 250 witnesses and secured affidavit testimony from 63 of those witnesses. The parties designated a total of nine expert witnesses. At the time of settlement, discovery had been completed, a Pretrial Order entered, trial exhibits exchanged, and with the exception of dispositive motion rulings, the parties were ready for trial.

A 30% fee, or \$1.5 million, is highly appropriate given the time and labor expended. A 30% award only constitutes a 1.53 multiplier of the lodestar. Courts in common fund cases regularly award multipliers of two to three times the lodestar or more to compensate for risk and to reflect the quality of the work performed. (Ressler v. Jacobson, 149 F.R.D. 651, 653 fn. 4 (M.D. Fla. 1992) (compiling cases); In re Combustion, Inc., 968 F.Supp. at 1133-34) (compiling cases); Mister, et al. v. Illinois Central Gulf R.R., No. 81-3006 (S.D. Ill. August 5, 1993), (compiling cases).)

2. Novelty And Difficulty Of The Question Presented By The Case

As discussed in my Order Approving Class Settlement and Dismissing Class Claims With Prejudice, there were numerous difficult, complex, and uncertain legal and factual issues presented in this case. The law regarding pattern and practice ADEA and ERISA cases is particularly uncertain. In this case, there were numerous unresolved legal issues regarding the validity of Plaintiffs' statistical proof, the weight to be given the anecdotal evidence, and the propriety of maintaining class certification status. I find that the novelty and difficulty of the legal and factual issues presented by this case weighs heavily in favor of the fees requested.

3. The Skill Requisite To Perform The Legal Services Properly

As discussed, this case involved numerous extremely complex and difficult legal and factual issues, many of which have not been fully resolved by the Courts. Litigating such complex issues required a high degree of specialized skill in employment law and complex litigation.

4. The Preclusion Of Other Employment By The attorney Due To Acceptance Of The Case

Class litigation of this magnitude inherently entails significant opportunity costs. In this case, the opportunity costs were particularly significant, given that Plaintiffs' counsel was comprised of a small three-attorney law firm with the assistance of one other attorney and limited associate support. Class counsel's obligation to zealously pursue this enormous case no doubt cost them significant opportunities to earn other compensation through the litigation of less burdensome cases. The opportunity costs incurred by class counsel also weigh heavily in favor of the requested fee.

5. The Customary Fee

Based on my experience with common fund fee awards, I conclude that a 30% contingent fee is well within the normal range of fee awards.

6. Whether The Fee Is Fixed Or Contingent

Class counsel pursued this case on a contingent fee, whereby they would receive no compensation for their labor if they did not obtain a successful outcome, either through settlement or judgment. Given the risk of non-recovery, this factor weighs heavily in favor of the requested fee.

7. Time Limitations Imposed By The Client Or The Circumstances

I find that the size and magnitude of this case clearly imposed significant time limitations on the small civil rights law firm representing the class. The time limitations were particularly significant given the prospect for a two-month liability trial, subsequent appeals, and remedial proceedings for individual damages.

8. The Amount Involved And The Results Obtained

Through the efforts of class counsel, two classes were certified by this Court, one of which will divide a settlement of \$5 million and a second which will benefit from the implementation of significant affirmative

relief. Given the considerable risk that the Plaintiffs would recover nothing for their efforts, this result supports the requested fee.

9. The Experience, Reputation, And Ability Of The attorney

Based on my observation of their prosecution of this case, I find that Benezra & Culver, L.L.C. pursued this litigation in a tenacious and articulate manner. Their experience, reputation, and ability is exceptional.

10. The Undesirability Of The Case

I find that this was an undesirable case for counsel to undertake given the risk of no recovery and the uncertainty of the governing law.

11. The Nature And Length Of The Professional Relationship With The Client

Class counsel's only relationship with the class was in the context of this litigation.

12. Awards In Similar Cases

I find that the requested fee of 30% of the settlement is well within the ordinary range of common fund fee awards. A 30% common fund fee award is in the middle of the ordinary 20%-50% range and is presumptively reasonable.

B. The Requested Costs

As with attorney' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred. (See e.g. Blum, 465 U.S. at 573). Costs are awarded in addition to the attorney fee percentage. (In re Business Land Security Litigation, (1991) Fed. Sec. L. Rep. (CCH) § 96, 059 (N.D. Cal. June 14, 1991) (cases collected).)

Given my experience with actions of this magnitude and the inherent expense of pattern and practice employment discrimination actions, particularly with respect to the essential statistical expert analysis, I conclude that class counsel's request that it be reimbursed for \$309,252.41 in outstanding costs is fair and reasonable.

III. CONCLUSION

After consideration of counsel's Petition, I conclude that the requested attorney' fees and cost reimbursements are fair and merited. Accordingly, it is

ORDERED that the requested 30% attorney' fee, or \$1.5 million is **APPROVED**. It is

FURTHER ORDERED that the requested reimbursement of \$309,252.41 in outstanding costs is **APPROVED**

BY THE COURT:


The Honorable Lewis T. Babcock

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FOR THE DISTRICT OF COLORADO