

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CILICIA A. DeMons, et al.,
for themselves and on behalf of all others
similarly situated,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 13-779C

**PLAINTIFFS’ UNOPPOSED MOTION FOR
APPROVAL OF THE SETTLEMENT
AGREEMENT, CONTINGENT ATTORNEYS’
FEE TO BE TAKEN FROM THE
SETTLEMENT FUND, ATTORNEY
EXPENSES, AND ADMINISTRATIVE FEES
AND EXPENSES**

(Judge Susan G. Braden)

Plaintiffs, for themselves and on behalf of the 10,190 members of the class who have been awaiting the resolution of damages by the parties for more than four years, as defined in the Court’s May 20, 2016 Order (ECF No. 34), respectfully submit this Motion for Approval of the Settlement Agreement; contingent attorneys’ fee to be taken entirely from the Settlement Fund with an agreed-upon credit to the class of statutory fees to be paid by the Government; reimbursable non-taxable costs; and administrative fees and expenses of the Class Action Administrator to be paid entirely from the Settlement Fund.

I. INTRODUCTION

This consolidated case is a follow-on case to two class action cases: *Adams et al. v. United States*, No. 10-60 (ECF No. 51, Judgment, October 16, 2012) and *Quimby et al. v. United States*, No. 02-101 (ECF No. 211, Judgment, November 7, 2012). This Court in *Adams*, and Judge Wolski in *Quimby*, certified classes of health care employees of the Veterans Health Administration (“VA”) who had been denied Saturday premium pay (*Adams*), and night premium pay and/or Saturday night premium pay (*Quimby*). In each case, members of the class had been denied such premium pay whenever they used approved paid leave instead of working their

regularly scheduled hours of work on Saturday and/or at night. Both cases covered a specified period of time ending on June 30, 2012. A Settlement Agreement ultimately was reached in each case over a protracted period of negotiation which extended well in excess of one year, and after the court conducted a Fairness Hearing.

This Court approved the proposed Settlement Agreement in *Adams* and awarded negotiated back pay equal to 85 percent of what class members would have earned if the premium pay law had been properly applied to their scheduled Saturday hours of paid leave. Final Memorandum Opinion and Order, October 11, 2012 (ECF No. 49). In both *Adams* and *Quimby*, the establishment of a separate Settlement Fund administered by the class action administrator was approved. Both courts approved a contingent attorneys' fee of thirty percent (30%) to be taken entirely from the respective Class Settlement Fund as well as reimbursement of nontaxable costs; and approval of fees and expenses of administration. Thereafter, the terms of the approved Settlement Agreements were implemented in each case.

On October 8, 2013, Plaintiffs in the *DeMons* case, No. 13-779, filed their initial "Class Action Complaint for Money Damages." The proposed class consists of civil service employees of the VA, excluding "physician[s], dentist[s], or nurse[s] in the Veterans Health Administration (VHA) of the Department of Veterans Affairs (DVA)" in positions listed in amended attachment A to the complaint.

Plaintiffs alleged that from July 1, 2012 and thereafter, they were regularly scheduled to work on Saturdays, and therefore, entitled to receive "additional pay" pursuant to 38 U.S.C. § 7453 or 7454 when performing such work. Plaintiffs complained that they were entitled to receive, but did not receive, such "additional pay" when they used approved paid leave.

On December 30, 2013, Plaintiffs in the *Garcia* case, No. 13-1024, filed their initial "Class

Action Complaint for Money Damages." The proposed class consists of a specific list of employees of the VA (excluding "physician[s], dentist[s], or nurse[s] in the Veterans Health Administration (VHA) of the Department of Veterans Affairs (DVA)") in positions listed in amended attachment A to the complaint. Plaintiffs in the *Garcia* case alleged that, from July 1, 2012 and thereafter, they were regularly scheduled to work at nights or on Saturdays or both, and therefore, entitled to receive "additional pay" pursuant to 38 U.S.C. § 7453 or 7454 when performing such work, but were denied such pay when they used approved paid leave.

On December 15, 2014, this Court certified an opt-in class in the *DeMons* case, and on April 9, 2015, the Court certified an opt-in class in the *Garcia* case. On December 1, 2015, this Court granted a joint motion for a protective order in both the *DeMons* and *Garcia* cases.

On February 19, 2016, this Court granted a joint motion to consolidate the *Garcia* case, No. 13-1024, with the *DeMons* case, No. 13-779. On May 20, 2016, the Court re-certified an opt-in class in the consolidated case for two sub-classes, one for each of the classes previously certified, (collectively, "the classes"), and approved an amended notice to the classes.

To identify potential members of the classes (Potential Class Members), Defendant produced a list of 21,990 employees or former employees of the Department of Veterans Affairs (DVA), employed during the relevant period, and an estimate of the retroactive back pay that may not have been paid to such individuals for the period of July 1, 2012, to February 28, 2016. The list of the Potential Class Members was provided by Defendant to the Court-appointed class action administrator, "Epiq Class Actions & Mass Torts Solutions."

The Court-appointed class action administrator mailed Official Notices approved by the Court to the 21,990 Potential Class Members. Thereafter, ten thousand one hundred ninety (10,190) individuals (including estates of deceased individuals) of the Potential Class Members

filed their opt-in claim on or before September 15, 2016 (including those claim forms postmarked accordingly), which was the time and date ordered by the Court for those potential class members to file a timely claim for back pay and interest with the class action administrator. The time to file a timely claim has expired.

The parties agreed that only those 10,190 individuals (and estates) who timely filed claims with the class action administrator are “Class Members.” Plaintiffs and the United States entered into discussions to attempt to resolve all claims contained in the complaints of the *DeMons* case and the *Garcia* case for back pay and interest with respect to the Class Members.

As a result of these discussions, Plaintiffs have offered to settle all claims of the Class Members in exchange for payment by the United States of \$6,568,366.51, inclusive of all damages, interest, attorney fees, and expenses (the Settlement Amount). The Settlement Amount to be paid by the United States consists of the following: \$5,214,723.63 in back pay; \$491,533.32 in interest; \$582,973.00 for the employer’s contribution of employment related taxes; and \$279,136.56 in statutory attorneys’ fees from April 30, 2013 to and including November 3, 2016 (which shall be credited to the class against any contingent fee).

Plaintiffs respectfully submit this unopposed motion for approval of the Settlement Agreement, and for approval of a thirty percent (30%) contingent attorneys’ fee, as described more fully, *supra*, to be paid from the back pay and interest portion of the Government’s payment to the Settlement Fund. Plaintiffs also request approval of reimbursable attorneys’ expenses which were incurred or expended by Plaintiffs’ attorney from October 8, 2013 to and including March 7, 2017 of \$22, 435.52 (Pls. Ex. 2) and the fees and expenses of administration, which are to be recovered by the Class Action Administrator from the Settlement Fund.

The parties’ settlement negotiations were conducted as arms-length settlement discussions.

After reviewing eligible (and ineligible) claims filed by more than 11,000 claimants, the parties finally agreed upon the terms of settlement, which are reflected in the Settlement Agreement.

Plaintiffs respectfully move for approval of the Settlement Agreement, and for approval of the 30% contingent fee, because it is the product of an informed, non-collusive negotiation, provides no preferential treatment to any category of class members, and is well within the range permissible for approval. Moreover, any payment of statutory legal fees by the United States will be credited to the class against a contingent fee approved by the Court.

Plaintiffs respectfully move the Court to set an early date for a Fairness Hearing, with notice to be provided to the members of the class by the administrator by the Internet, at which time the Court will consider whether to grant approval of the Settlement Agreement, and to resolve any objections to the agreement timely filed by members of the class.

II. PROCEDURAL BACKGROUND

A. Notice to the Class and The Number of Claims Filed

The postcard notices originally approved by the Court referred potential claimants to the website www.myleavepay.com. The VA then carefully developed and implemented a template that permitted accurate back pay and interest calculations with respect to each of the 10,190 individuals who filed a timely claim. Preparation and testing of the template took months of painstaking effort by VA personnel and expert consultants who were retained to assist in the process. It was determined that these individuals were employed during the requisite time period in one or more appropriate job classifications who used authorized paid leave instead of working regularly scheduled Saturday and/or night hours in conformity with the Court's decision with respect to liability. The template was then utilized to analyze the payroll records of those claimants and the VA then determined Defendant's potential exposure to each of them for Saturday and/or night

differential back pay and interest from July 1, 2012 to February 28, 2016. Upon the completion of its detailed analysis, Defendant then produced spreadsheets identifying the amount of back pay due each claimant.

The VA represented that it has fully implemented the Court's decision as to the applicability of Saturday and/or night differential pay to the workforce composed of the job occupations represented by the class certified by this Court, effective March 1, 2016, and going forward thereafter.

B. The Negotiated Settlement of Back Pay Act Claims

The parties negotiated the settlement of this case at arm's length for more than six months.

***Id.* The Settlement Agreement provides for payment by the United States of back pay amounting to \$5,214,723.63 in back pay to the Class Settlement Fund ("Fund"), which represents one-hundred percent (100%) of the Government's exposure of back pay as calculated by the VA.**

This "settlement" yields precisely the same substantive benefit for the plaintiff class as they each would recover if they fully and successfully litigated this case at trial in all respects.

In addition, the Settlement Agreement provides that the Government also will pay the amount of \$491,533.32 as pre-judgment interest pursuant to 5 U.S.C. § 5596 (the Back Pay Act). The Government also has agreed to contribute to the Fund an additional amount of \$582,973.00 in order to satisfy its obligation to pay the employer's portion of payroll taxes. In addition, the Government has agreed to pay \$279,136.56 to the Fund as partial reimbursement of statutory attorneys' fees, which is to be applied as a credit against a contingent attorneys' fee of 30 percent.

The resulting total payment to the Fund pursuant to the Settlement Agreement amounts to \$6,568,366.51.

Payment is to be made to the Class Action Administrator to distribute in proportionate shares to eligible members of the class, or their heirs, based on the amount of back pay owed to each individual as calculated by the VA from individual payroll records, after payment of attorneys' fees, nontaxable reimbursable expenses of \$22, 435.52 from the Fund, and reasonable administrative fees and costs incurred by the Class Action Administrator. The Administrator shall compute each individual's withholding tax and report the taxes withheld on Forms 1099 or W-2; shall pay such withheld funds, plus the statutory employer's contribution which has been paid to the Fund by the United States, to the appropriate taxing authorities to comply with State, Federal and city tax laws; and shall withhold in a "Reserve Fund" (as approved by the Court) such sums as necessary to pay all costs of administration. (Settlement Agreement, ¶24).

C. The Settlement Agreement Approval Process

The Settlement Agreement was approved by the United States Attorney General.

D. Plaintiffs' Claim for Attorneys' Fees and Costs

The Settlement Agreement provides that Plaintiffs are to apply to the Court for an award of the costs of administration and statutory attorney costs incurred in the prosecution of this action, as well as for an award of contingent attorneys' fees, at the Fairness Hearing. concurrently with the motion for approval of the Settlement Agreement. (Settlement Agreement, ¶¶28-35). As noted, *infra*, the United States has agreed to make payment to the Fund of an additional amount of \$279,136.56 as partial payment of attorney fees which shall be credited to the Class against a contingent fee awarded by the Court. Plaintiffs' have moved for approval of contingent attorneys' fees of 30% of the back pay and interest paid to the Fund. The United States has agreed not to oppose such a motion for contingent attorneys' fees so long as Plaintiffs' motion is not greater than

30% of the back pay and interest paid by the Government pursuant to the Settlement Agreement. *Id.*

Each and every claimant who is entitled to back pay and interest has agreed affirmatively as part of his or her consent to join this collective action to the payment of a contingent attorney's fee equal to 30% of his or her back pay and interest recovery, less a credit to be applied against the contingent fee of whatever statutory attorney fees are paid by the United States to the Fund pursuant to the Settlement Agreement.

5. Class Counsel's Expenses Are Reasonable and Were Necessarily Incurred To Achieve the Benefit Obtained

Class counsel has incurred expenses in an aggregate amount of \$22,435.52 in prosecuting the litigation. Pls. Ex. 2. The parties agreed: "Within 15 days of receipt of this amount, the class action administrator will pay from the Qualified Settlement Trust any of its fees or costs approved by the Court, any attorney fees and costs awarded to class counsel, and any other reasonable settlement-related costs." (Settlement Agreement, ¶ 16).¹ The appropriate analysis to apply in deciding which expenses are compensable in a common fund case is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. Here, the categories of expenses for which class counsel seek reimbursement are the same types of expenses routinely charged to hourly-paying clients and therefore should be reimbursed out of the common fund.

Class Counsel's expenses include the filing fees, costs of copying and shipping copies of the complaint to the Clerk of Court, consulting services with professional information technology consultants with respect to the computation of back pay and interest in view of the importance in this case of reliance on the VA's "template" methodology, the cost of reimbursing the Administrator for part of the printing and mailing of more than 20,000 postcards to potential members of the class after class certification in order to inform them of the Court's Official Notice

¹ "A Settlement Agreement should, by its own terms, resolve any issue relating to costs and in the absence of special agreement, each party must bear its own costs. The clerk may not tax costs on any action terminated by settlement." RCFC 54(d)(1)(D).

and the maintenance of the website where class members safely and securely could file an opt-in claim for back pay and interest, as well as travel to meet and confer with Defendant's counsel and damages consultants. Mr. Lechner's travel expenses are reasonable in amount and carefully exclude any charges for meals. Mr. Lechner's travel expenses are properly charged against the Fund. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y.1990) (reimbursement approved of expenses by class counsel for travel, photocopying, long distance telephone services, expert consultation, computer legal research and express delivery services approved). Duplication of documents and pleadings was necessary for the effective prosecution of this case. Thus, Plaintiffs submit that they are entitled to an award reimbursing class counsel for \$22,435.52 from the Settlement Fund as reimbursement for the costs and expenses incurred during the course of this case.

Plaintiffs' counsel pursued this litigation to an excellent conclusion resulting in payment of 100% of back pay and interest. Accordingly, we respectfully submit that for the reasons set forth above, the Court should award Plaintiffs' counsel a contingent fee award of attorneys' fees of 30 percent of the "back pay and interest" paid by the Government to the "Settlement Fund," and reimbursement of \$22,435.52 for reasonable out-of-pocket litigation expenses to be paid entirely from the Settlement Fund. The payment by the Government of \$279,136.56 to the Fund as statutory attorney fees will be credited to the class against the contingent fee. Moreover, Plaintiffs request that the Court approve the award of such costs as have been incurred, and will be incurred, by the Administrator in the administration of this case and in the administration of the Settlement Fund, subject to review and approval by Class Counsel, and an accounting at the conclusion of the case by both Class Counsel and Defendant. (Agreement, ¶ 37).

IV. CONCLUSION

The parties' Agreement constitutes a fair and reasonable resolution of this class action. For the reasons provided above, and pursuant to paragraph 27 of the Settlement Agreement, Plaintiffs respectfully move that upon holding the required "Fairness Hearing," the Court then grant approval of the Settlement Agreement, the payment of a 30% contingent attorney fee, reimbursement of \$22,435.52 for reasonable out-of-pocket litigation expenses to be paid entirely from the Settlement Fund, and the reasonable costs of administration of this class action by the Administrator.

In addition, Plaintiffs respectfully move that the Court issue an Order at the earliest possible time setting a date within 45 days from the date of the Order for conducting a "Fairness Hearing" and approval of a Website Notice to the Class, a draft of which is attached (Pls. Ex.3). Thereafter, as provided in paragraphs 29 to 35 of the Agreement, the class action administrator will promptly provide Notice by the Internet within three days to the members of the class of the text of the Settlement Agreement, including the text of this motion and the text of Plaintiffs' Memorandum of Law. The administrator also will provide notice of the right of any class member to register any objections to the Settlement as provided in paragraphs 32 to 35 of the Agreement. No objections were filed to the approval of the Settlement Agreement in *Adams*.

Dated: March 7, 2017

Respectfully submitted,

s/Ira M. Lechner
IRA M. LECHNER, ESQ.
Class Counsel
1127 Connecticut Avenue, NW, Ste. 106
Washington, DC 20036
Tel: (858) 864-2258
Fax: (858) 997-2691
Iralechner@yahoo.com
Attorney for Plaintiffs and Class Counsel