

Oct 2022 | [Articles Blog: The Westchester Litigator](#)

## Win Some Lose Some: Second Circuit Affirms FLSA Fee Award Where Work on Successful and Unsuccessful Claims is “Inextricably Intertwined”

According to the Fair Labor Standards Act (FLSA) and New York’s Labor Law (NYLL), statutory fee-shifting trumps the default American rule that each party bears its own fees and costs and obligates defendants to pay the attorneys’ fees of prevailing plaintiffs. What happens when plaintiffs prevail on some claims but not others? A recent decision from the Second Circuit Court of Appeals examined such a case, shedding light on how trial courts should analyze fee applications in FLSA cases where the winning and losing claims are “inextricably intertwined.”

### **The Case: *Kolick et al., v. Cellular Sales of New York, LLC, et al.***

In *Kolick v. Cellular Sales*, No. 21-948-cv (NDNY Sept. 7, 2022), the plaintiffs brought a class action complaint under the FLSA and NYLL claiming unfair wage deductions, unpaid compensable work, untimely commissions, unjust enrichment, and failure to pay minimum wage and overtime.

The crux of the complaint turned on whether the plaintiffs were employees (as they claimed) or independent contractors (as the defendants claimed) under the applicable labor laws.

Ultimately, the district court determined the plaintiffs were employees entitled to unpaid wages and overtime but dismissed the remainder of the claims and denied class certification. The court awarded the named plaintiffs \$11,121 plus liquidated damages and interest.

The plaintiffs then sought \$961,450 in attorneys’ fees as the “prevailing parties,” and the district court awarded \$576,870.30 – a 40% reduction from the plaintiffs’ demand. In making its determination, the district court rejected the defendants’ request for a further reduction based on the plaintiffs’ unsuccessful claims, finding those claims were “inextricably intertwined” with the successful claims:

*“Plaintiffs’ claims were all based upon the terms of the contracts between Plaintiffs and Defendants, the circumstances under which commissions were earned, and the formula by which Plaintiffs were paid. These claims would largely require similar discovery and proof and would be difficult to sever in the billing records. These claims are, generally, sufficiently intertwined with Plaintiffs’ claims that were ultimately successful – their overtime claims and minimum wage claims – that a further reduction is not needed to account for the dismissed claims.”*

On appeal, the Second Circuit affirmed. In particular, the appellate court rejected the defendants' argument that the successful and unsuccessful claims were not intertwined because "the only common legal issue is whether plaintiffs were employees or independent contractors, and the elements for each of the claims do not overlap. Rather, in line with the US Supreme Court's holding in *Hensley v. Eckerhart*, 461 12 US 424, 437 (1983), the analysis turns on "whether the legal theories are related, not whether they raise identical legal issues," and whether the claims arise from a "common core of facts."

The court of appeals concluded that in this case, there was a common legal issue — whether the plaintiffs were employees or independent contractors, a common core of facts – the conditions of the plaintiffs' employment with the defendants, and all the legal theories were related to wage and hour claims brought under the FLSA and NYLL.

Based on those findings, the district court properly concluded that the successful and unsuccessful claims were inextricably intertwined, and the plaintiffs were entitled to recoup the attorney' fees incurred for all claims.

### **Takeaway**

Because of the FLSA's and NYLL's fee-shifting provisions, the amount of attorneys' fees the defendants must reimburse to the plaintiffs are often hard fought – at both the settlement table and before the court. While defeating some claims may seem a cause for celebration, defendants should bear in mind that if the plaintiffs' winning and losing claims are sufficiently intertwined, defendants may still be on the hook for all the fees incurred in prosecuting those claims.