



Westphal v. Ed's Mufflers Unlimited, Inc. et al

2018 | Cited 0 times | D. Oregon | June 11, 2018

1 FINDINGS AND RECOMMENDATIONS

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON PORTLAND DIVISION

ROBERT WESTPHAL, both in his individual capacity and, in addition, as a collective action on behalf of others similarly situated,

Plaintiff, v. Oregon corporation, and JANET KAYSER JOHNSON, an individual,

Defendants.

Case No. 3:17-cv-00299-YY FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

Plaintiff has filed a complaint alleging two claims under the Fair Labor Standards Act (FLSA) for failure to pay minimum wages under 29 U.S.C. § 206 and failure to pay overtime wages under 29 U.S.C. § 207, and a third claim for fraudulent filing of information returns under 26 U.S.C. § 7434. Defendant failed to answer the complaint, and this court issued an order of default on August 23, 2017. ECF #12. The second defendant, Janet Kayser Johnson, was dismissed with prejudice by stipulation on January 31, 2018. ECF #15.

2 FINDINGS AND RECOMMENDATIONS

Westphal has filed a motion for default judgment and a motion for attorney fees. ECF ##17, 27. For the reasons that follow, the court should grant the motions and award a judgment in the amounts set forth below.

FINDINGS I. Default Judgment

Upon entry of default, this court must take the well-pleaded factual allegations of the complaint as true. See *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) general rule of law is that upon default the factual allegations of the complaint, except those



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Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (- pleaded factual allegations s decision whether to enter a default judgment is a discretionary one. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising its discretion, the court may consider the following factors:

(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471 72 (9th Cir. 1986) (citing 6 Moore's Federal Practice ¶ 55- 05[2], at 55-24 to 55-26)).

The court may hold a hearing to determine the amount of damages. FRCP 55(b)(2)(B). hearing unless the amount claim Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir. 1981).

3 FINDINGS AND RECOMMENDATIONS

In this case, Westphal submitted a declaration and exhibits in support of his request for default judgment. The court held two telephonic hearings. During the first hearing, the court , and at the second hearing, n, along with a supplement declaration and spreadsheet.

As discussed in detail below, when the Eitel factors are considered, they weigh strongly in favor of the court exercising its discretion to enter a default judgment. A. Factor One: Possibility of Prejudice to Plaintiff In assessing this factor, courts have considered whether the plaintiff would be without recourse for recovery if the motion for default judgment is not granted. See, e.g., J & J Sports Prods., Inc. v. Cardoze, 2010 WL 2757106, at *5 (N.D. Cal. July 9, 2010); PepsiCo, Inc. v. California Sec. Cans, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). That is true here, where Westphal has no recourse to obtain damages on his claims other than through this action. B. Factors Two and Three: Merits of Claims and Sufficiency of Complaint In his complaint, Westphal alleges that defendant failed to pay him minimum wage and overtime. Westphal also contends that defendant withheld money from his paycheck for taxes but did not pay that money to the government; instead, defendant falsely reported on taxes had been paid. Complaint, ¶¶ 6-12. 1. FLSA Claims Minimum Wage and Overtime

Adair v. City of Kirkland, 185 F.3d 1055, 1059 (9th Cir. 1999).

4 FINDINGS AND RECOMMENDATIONS Id. (citing 29 U.S.C. §§ 206, 207). The overtime limit under section 7 of the FLSA is forty hours per week; work done in excess of forty hours must be compensated at a rate at least one- and-a-half times the regular work rate. Id. (citing 29 U.S.C. § 207(a)(1)). Westphal worked as shop manager,

which he held until December 2015. D #19. Westphal was not given any real supervisory authority. Id.



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supervisor, no other aspects of his job changed. He was still required to report his hours, yet no longer received paid time-and-a-half for the overtime he worked. Instead, defendant adjusted the hourly pay rate in each paychecks so that the math worked out to his salary amount. Id. Indeed, the paychecks that Westphal has submitted show that the hourly rate for the period during which he was purportedly a shop manager fluctuated from paycheck to paycheck, but the gross remained the same. For example, his gross was reported as \$3,200, but his hourly wage ranged from \$10.07 in early July 2015, to \$10.99 in late July 2015, to 10.79 in September 2015, to 12.52 in November 2015. Id., Ex. A, 16, 18, 17, 19, 20. Defendant also required Westphal to write down a one-hour lunch break on his time card whether he was able to take it or not. Id. ¶5. Westphal estimates that on half of his work days, he did not receive a full 30-minute break, and on the other half, he received a 45-minute break; however, he never received the full hour that was deducted from his time card. Id. Additionally, Westphal was required to take paychecks to the secr house twice a month, and month-end paperwork to her house once a month. Id. ¶ 6. Each time, he worked

5 FINDINGS AND RECOMMENDATIONS Id. ailure to compensate Westphal for all of the time he actually worked constitutes a violation of the FLSA. See *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975) An employee cannot be docked for lunch breaks during which he is required to continue with Finally, defendant frequently deducted the cost of uniforms and tools from W paycheck. Westphal Decl. ¶ 8. By deducting the cost of uniforms and tools wages, defendant reduced his wage below the minimum wage rate and thereby violated the FLSA. See *Marshall v. Root's Restaurant, Inc.*, 667 F.2d 559 (6th Cir. 1982) (holding restaurant violated FLSA by requiring waitresses to purchase uniform as a condition of employment, deducting c s wages, and thereby reducing wages below the minimum wage rate). 2. Fraudulent Filing of Information Returns Under 26 U.S.C. § 7434 f any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return. To state a claim under 26 U.S.C. § 7434, a plaintiff must allege: (1) the defendant issued an information return; (2) the information return was fraudulent; and (3) the defendant willfully issued the fraudulent information return. *Gidding v. Zurich Am. Ins. Co.*, 2015 WL 6871990, at *5 (N.D. Cal. Nov. 9, 2015). Here, defendant gave Westphal an annual W-2 indicating that it had paid his taxes; however, Westphal discovered late in his employment that defendant never paid those taxes. Westphal Decl. ¶ 9, ECF #19. As a result, Westphal was unable to obtain tax refunds for the last two years of his employment. Id. Westphal asked the owner, Ed Hickam , about this

6 FINDINGS AND RECOMMENDATIONS several times, and each time Hickam represented that all taxes had been paid correctly. Westphal learned this was untrue from the office secretary, who told Westphal that she had spoken with Hickam about this, but he continued pocketing the unpaid taxes. Id. Through these facts, Westphal has sufficiently alleged a claim that defendant willfully filed a fraudulent tax return in violation of 26 U.S.C. § 7434. C. Fourth Factor: Sum of Money at Stake Under the fourth Eitel relation PepsiCo, 238 F.Supp.2d at 1176 77; see also *J&J Sports Productions, Inc. v. Cardoze*, 2010 WL 2757106, at *5 (N.D. Cal. July, 2010) in damages); Board of Trustees of the



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Sheet Metal Workers v. Vigil, 2007 WL 3239281, at *2

(N.D. Cal. Nov. 1, 2007)

Here, Westphal is seeking \$20,981.92 in minimum-wage damages, \$14,798.88 in overtime damages, and \$14,186.48 for his fraudulent filing claim, for a total of \$49,967.28. The amount of violations over a period of two years. \$11,019.75 \$616.22 in costs is also commensurate with the extent of the underlying damages.

D. Fifth Factor: Possibility of Dispute Over Material Facts In addressing the fifth factor, the court considers the possibility that there is a dispute -pleaded facts PepsiCo, 238 F.Supp.2d at 1177 fifth factor . . . weighs in favor of default judgment when the claims in the

7 FINDINGS AND RECOMMENDATIONS complaint are well-pleaded Joe Hand Prods. v. Holmes, 2015 WL 5144297, at *7 (D. Or. Aug. 31, 2015). Because all allegations in a well-pleaded complaint are taken as true after the court clerk enters default judgment, there is no likelihood that any genuine issue of fact exists. Grp., Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D. Cal. 2005). Here, Westphal filed a well-pleaded complaint alleging all of the elements necessary for him to prevail on his claims. Thus, the possibility of a dispute over material facts is low, if it exists at all. E. Sixth Factor: Excusable Neglect The sixth factor pertains to the possibility that the default resulted from excusable neglect. Here, Westphal mailed a copy of the complaint registered agent on address on May 18, 2017. ¶ 2, 4, ECF #11. Additionally multiple telephonic and email communications with two separate attorneys who represented defendant, yet defendant did not file an answer. Id. ¶5. Plaintiff waited two months after personally serving defendant to file a motion for default, which he copied by via facsimile and email. Id. at 4. Defendant did not file an objection. Under these circumstances, the likelihood of excusable neglect is remote. F. Policy Favoring Decision on the Merits

Eitel, 782 F.2d at 1472. However, this policy, standing alone, is not dispositive, especially where a defendant fails to appear or defend itself in

8 FINDINGS AND RECOMMENDATIONS Joe Hand Promotions, Inc. v. Machuca, 2014 WL 1330749, at *6 (E.D. Cal. Mar. 31, 2014); see also PepsiCo, 238 F.Supp.2d at 1177 (noting that the mere existence of the mere existence of FRCP 55(b) indicates that this preference, standing alone, is not dispositive). Where a defendant has failed to appear, it is impractical, if Pepsi Co., 238 F.Supp.2d at 1177. Thus, given that all of the other factors weigh in favor of a default judgment, the sixth factor is not dispositive. II. Damages A. FLSA Damages Under 29 U.S.C. § 216(b), defendant is liable to Westphal for liquidated damages in an amount equal to his unpaid minimum wages and unpaid overtime wages. In support of his request for damages, Westphal has produced pay stubs and a spreadsheet, as well as details on how he arrived at his requested amounts. 1. Unpaid Hours Westphal has calculated his unpaid hours as 19.38 hours for every monthly paycheck, or 9.69 hours for every bi-monthly paycheck. Supp. Decl. of Jon Egan ECF #25. He arrived at this calculation as follows:



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a. Unpaid lunches As noted above, defendant required Westphal to record a one-hour lunch break on his time card, whether he was able to take a lunch break or not. Westphal Decl. ¶5, ECF #15. Westphal estimates that on half of his work days, he did not receive a full 30-minute break, and on the other half, he received a 45-minute break; however, he never received the full hour that was reflected on his time card. Id. Thus, Westphal conservatively seeks five hours every two weeks for those days on which a one-hour lunch was recorded but he did not take a lunch break,

9 FINDINGS AND RECOMMENDATIONS for a total of 130 hours (5 x 52) per year. On average, this equals 10.83 hours (130 hours ÷ 12 months) for those periods in which he received a monthly paycheck and 5.42 hours (130 hours ÷ 24 weeks) for those periods in which he received a bimonthly paycheck. Westphal also conservatively seeks 1.25 hours every two weeks for those days on which a one-hour lunch was recorded but only 45 minutes was taken, for a total of 32.5 hours per year (1.25 hours x 26 weeks). This equals 2.71 hours for each monthly paycheck (32.5 hours ÷ 12 months) or 1.35 hours for each bimonthly paycheck (32.5 hours ÷ 24 weeks). b. Unpaid Trips to Secretary As discussed above, Westphal was required to make unpaid trips to drop off paperwork at the e. He seeks one hour every week for the twice-a-week trips to the house (30 minutes each) to drop off sales paperwork, totaling 52 hours per year. This equals 4.33 hours per monthly paycheck (52 hours ÷ 12 months) or 2.17 hours per bimonthly paycheck (52 hours ÷ 24 weeks). Westphal additionally seeks one hour per month for the twice-a-month trips to the minutes each) to deliver the payroll paperwork, or 0.5 hours per bimonthly paycheck. Finally, Westphal seeks 0.5 hours per month, for the once-a-month trip to house to deliver the end-of-the-month paperwork, or 0.25 hours per bimonthly paycheck. 2. First Claim: FLSA Minimum Wage Westphal seeks \$20,981.92 in damages for his minimum wage claim. The pertinent formula to be applied depends on whether the violation was due to late payment or underpayment. Supp. Egan Decl. ¶ 6, ECF #25. ///

10 FINDINGS AND RECOMMENDATIONS /// a. Late Paychecks For late paychecks, which are highlighted in red spreadsheet, 1

Westphal received zero dollars when they were due. Therefore, the liquidated damages are equal to the federal minimum wage hourly rate multiplied by the hours he worked plus time-and-a-half for overtime hours and unpaid hours. This is reflected in the formula below:

(\$7.25 2

x hours worked) + ((\$7.25 x 1.5) x (overtime hours + unpaid hours)).

For example, for the month of December 2013, Westphal worked 177 regular hours, 27 overtime hours, and 19.38 unpaid hours. Thus, his liquidated damages for that month is computed as follows: (\$7.25 x 177 regular hours) + ((\$7.25 x 1.5) x (27 overtime hours + 19.38 unpaid hours)) = \$1,787.63 b. Timely Underpayments For payments that defendant made on a timely basis but were less than the amount Westphal should have received, liquidated damages constitute the amount of wages that



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Westphal did not receive. This is computed by taking the federal minimum wage due, as set forth above, and subtracting the amount actually received. The amount actually received is derived by adding the gross pay plus commissions that Westphal received minus any unauthorized deductions (i.e., and taxes. 1 Supp. Egan Decl., ECF #25, Ex. 2 2 The federal minimum wage is \$7.25.

11 FINDINGS AND RECOMMENDATIONS . See Westphal Decl., ¶ 8, ECF #19. Defendant also deducted purported payroll advances from West the uncontroverted evidence in the reco [defendant] deducted amounts from my paycheck supposedly for cash advances, but I never received any of thos Id. at ¶ 8. Thus, those bogus payroll advances are also included in therefore as follows:

$$(\$7.25 \times \text{hours worked}) + ((\$7.25 \times 1.5) \times (\text{overtime hours} + \text{unpaid hours}))$$

(Gross + Commission Adjustments Taxes)

3. Second Claim: FLSA Overtime Westphal seeks \$14,798.88 in overtime wages. He calculates this amount by multiplying the overtime hours worked by the overtime hourly rate:

$$(\text{Overtime hours} + \text{Unpaid hours}) \times \text{Overtime Rate}$$

For example, for the December 2013 paycheck, the computation is: (27 overtime hours + 19.38 unpaid hours) x 14.48 overtime rate = \$671.58 4. Third Claim: Fraudulent Information Returns Damages for a claim under 26 U.S.C. § 7434 sustained by the plaintiff as a proximate result of the filing of the fraudulent information

return whichever is greater. 26 U.S.C. § 7434(b).

Westphal seeks \$14,186.48 in actual damages for his third claim. He contends this is the total amount of taxes that defendant withheld from his paychecks that he has been unable to

12 FINDINGS AND RECOMMENDATIONS Decl. ¶ 2, ECF #18.

The court should award these damages. Defendant withheld paychecks but never paid it to the government. This money should be reimbursed to Westphal as it constitutes unpaid wages. Westphal may ultimately be liable for income taxes for the wages he received during this time period; however, it is neither necessary nor realistic for this court to engage in that analysis. III. Attorney Fees and Costs The FLSA is a fee-shifting statute. Upon finding a violation of the Act, the district court shall, in addition to any judgment awarded to the plaintiff . . . , allow a reasona s fee 29 U.S.C. § 216(b). Additionally, 26 U.S.C. § 7434(b) allows for costs and . The court calculates number of hours worked by a reasonable hourly rate. See *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010) (holding that hen determining reasonable fees). In determining uryly rate to u *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013) (citations and internal quotation marks omitted). The court *McCown v. City*



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of Fontana, 565 F.3d 1097, 1102 (9th Cir. 2009)(quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). [T] Perdue, 559 U.S. at 556. [A] multiplier may be used to adjust the lodestar amount upward or downward only in rare and

13 FINDINGS AND RECOMMENDATIONS exceptional cases, supported by both specific evidence on the record and detailed findings by the Summers v. Carvist Corp. (quoting Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000) lodestar amount] must be carefully tailored . . . and [made] only to the extent a factor has not

Rouse v. Law Offices of Rory Clark, 603 F.3d 699, 704 (9th Cir. 2009) (citing Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 982 (9th Cir. 2008)). The court may adjust the lodestar calculation by considering the following factors, known as the Kerr factors:

(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to 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 attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), abrogated on other grounds by City of Burlington v. Dague, 505 U.S. 557 (1992). [factors], so long as it discusses those most Quesada v. Thomason, 850 F.2d 537, 539 (9th Cir. 1988) mere statement that a court has considered the Kerr guidelines does not make a decision within the court Id. Id. (citation omitted). den of documenting the appropriate hours expended United

14 FINDINGS AND RECOMMENDATIONS Steelworkers of Am. v. Ret. Income Plan For Hourly-rated Emps. Of Asarco, Inc., 512 F.3d 555, 565 (9th Cir. 2008)(quotations omitted). in the amount of \$9,352.50. The requested hourly rate for his attorney, Jon Egan , is \$435, and Egan represents that he worked 21.5 hours on this case. This court uses the most recent Oregon State Bar (OSB) Economic survey as a marily charged in the locality. Precision Seed Cleaners v. Country Mut. Ins. Co., 976 F.Supp.2d 1228, 1244 (D. Or. 2013). Egan was admitted to the Oregon State Bar in 2000. According to the 2017 OSB Economic Survey, the hourly rate for Portland-area attorneys practicing between 16 and 20 years is \$400 for those in the 75th percentile and \$500 for those in the 95th percentile, and the median rate is \$415. Oregon State Bar 2017 Economic Survey, 39. The rate for plaintiffs attorneys practicing civil law (excluding personal injury) is \$350 for those in the 75th percentile and \$500 for those in the 95th percentile, and the median is \$300. Id. at 41. of \$435 falls squarely within the range for attorneys with similar years of experience in this area of practice, Additionally, the spreadsheet provided in support of the request for fees shows billing entries for tasks pertinent to the case and in time increments that are not excessive for the tasks involved. For



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those entries involving tasks that pertain to both the federal and state court case, Egan has already reduced the amounts by half. Decl. of Jon Egan, 3, ECF #28. Some entries (totaling 6.6 hours) pertain to the other defendant, Janet Kayser Johnson, who was dismissed from this case with prejudice by stipulation on January 31, 2018. Defendant should nevertheless pay t fees for these entries. As Egan explains,

15 FINDINGS AND RECOMMENDATIONS he only pursued a case against Johnson because of false representations made by defendant. Supp. Egan Decl. ¶¶ 3-8, ECF #29. In early 2017, told Egan that Hickam and his company had been the unwitting victims of a rogue manager, Janet Kayser Johnson, who Id. ¶ 3. Johnson denied these long-time bookkeeper, which detailed how payroll duties were divided between Hickam and his employees, thereby, and otherwise providing facts that supported dismissal of Ms. Johnson. Id. ¶ 7. In sum, Johnson Id. ¶ false representations, it is reasonable to reimburse Westphal for these fees. Westphal also requests fees for paralegal work performed by Michèle Lauzier at \$195 per hour for 8.55 hours, or a total of \$1,667.25 degree and has been a paralegal in firm for 12 years, specializing in wage-and-hour law.

She has worked on numerous wage-and-hour class and collective actions, and has attended, viewed, or listened to the same CLEs as Egan over the years she has worked for him. Accordingly, Lauzier provides value for each hour she works and helps to keep down. Importantly, when there is a task that both Egan and Lauzier spend time on, he bills only

his time.

Judges in this District have held that a reasonable hourly rate for a paralegal should not exceed that of a first-year associate. Precision Seed Cleaners, 976 F.Supp.2d at 1248. According to the 2017 OSB Economic Survey, the average hourly rate for a lawyer with one- to three-years experience is \$210. Based on

16 FINDINGS AND RECOMMENDATIONS expertise and knowledge in the field of wage and hour law, \$195 is a reasonable rate. Additionally, a review of her time entries shows that the amount of time she spent on each task is commensurate with the complexity of the task.

Westphal does not ask for fees in excess of the lodestar calculation. Nevertheless, consideration of the Kerr factors does not indicate that the award should be increased or decreased. The time and labor required for this case and the novelty and difficulty of the case is average, i.e., neither particularly easy nor complex. While certainly there is skill required to properly provide legal services in a wage-and-hour case such as this one, that factor is reflected in the hourly rate, as discussed above. Finally, the amount involved and the results obtained are commensurate with the award that is being sought. 3

Westphal asks for costs in the amount \$616.22. As indicated in the spreadsheet submitted in support



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of this request, these costs are for postage (\$13.22), the filing fee (\$400), PACER fees (\$1.15), service (\$74.38), address searches (\$18), and Westlaw searches (\$109.47). These are reasonable charges and recoverable. See *Gove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 580 (9th Cir. 2010) (holding that non-taxable costs, including Westlaw research, are allowed in fee-shifting cases).

RECOMMENDATIONS This court should enter a default judgment in the amount of \$20,981.82 in liquidated damages for the FLSA minimum-wage claim, \$14,798.88 in liquidated damages for the FLSA overtime claim, and \$14,186.48 in actual damages for the fraudulent information returns claim. Additionally, the court should award \$9,352.50 1,667.25 in paralegal fees, and \$616.22 in costs.

3 There is no information in the record about the remaining factors.

17 FINDINGS AND RECOMMENDATIONS

SCHEDULING ORDER These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Monday, June 25, 2018. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED June 11, 2018.

Youlee Yim You United States Magistrate Judge

