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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RANDY COSBY,

Plaintiff,

v.

AUTOZONE, INC., JIM KULBACKI
and DOES 1-100, inclusive,

Defendants.

NO. CIV. S-08-505 LKK/DAD

O R D E R

_____ /

This case concerns the award of fees to plaintiff after a jury trial. For the reasons discussed below, the court intends to award fees to plaintiff in the manner described below. The court does not calculate the amount at this time, however, because a issue remains that will affect the final award.

I. BACKGROUND

On January 26, 2010, the court began trial in the above captioned case. Plaintiff tried several claims under California's Fair Employment and Housing Act ("FEHA"). On

1 February 12, 2010, the jury reached a verdict. The jury found
2 for plaintiff on his claims of failure to engage in the
3 interactive process of accommodation and failure to provide
4 reasonable accommodation. The jury awarded plaintiff \$174,000 in
5 economic losses and \$1,326,000 in mental suffering damages. No
6 punitive damages were awarded. The jury found for defendant on
7 the remaining claims of failure to prevent discrimination based
8 upon his physical disability and retaliation for engaging in
9 protected activity, and disability discrimination-disparate
10 treatment.

11 On April 21, 2010, plaintiff moved for attorneys' fees and
12 costs. On May 10, 2010, defendant filed an opposition to
13 plaintiff's motion. This motion was heard on May 24, 2010.
14 Subsequently, the court ordered supplemental briefing on the
15 questions of (1) whether and/or under what conditions may the
16 court reduce the fees awarded to plaintiff by a percentage of
17 fees billed and (2) whether Perdue v. Kenny A., 559 U.S. ___
18 (2010), should apply to the calculation of fees in the instant
19 case. The parties filed supplemental briefing on these
20 questions.

21 **II. STANDARD**

22 Under FEHA, "the court, in its discretion, may award to the
23 prevailing party reasonable attorneys' fees and costs"
24 Cal. Gov't Code § 12965(b). The Americans with Disabilities Act
25 ("ADA"), the federal analog for disability claims under FEHA,
26 provides for an identical test. 42 U.S.C. § 2000e-5(a) ("In any

1 action or proceeding under this title, the court, in its
2 discretion, may allow the prevailing party . . . to pay a
3 reasonable attorney's fee as part of the costs. . . ."); see
4 also, Asberry v. City of Sacramento/Sanitation Dept., No.
5 S-01-2343 LKK/PAN, 2004 WL 3636054, *1 (E.D. Cal. Apr. 5, 2004)
6 (applying same test for fees under ADA and FEHA). The propriety
7 of awarding attorney's fees turns on three questions: (1) Is the
8 party to whom attorney fees will be awarded a prevailing party?;
9 (2) Should the court exercise its discretion to award the fees?;
10 and (3) What is a reasonable award?

11 The Supreme Court has articulated the standard for a
12 finding of "prevailing party" as whether the party has
13 "succeed[ed] on any significant issue in litigation which
14 achieves some of the benefit the parties sought in bringing
15 suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (citing
16 Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)). The Ninth
17 Circuit, in discussing whether a party has achieved "prevailing"
18 status, has noted that a party can achieve that status by
19 establishing a "clear, causal relationship between the
20 litigation brought and the practical outcome realized."
21 Rutherford v. Pitchess, 713 F.2d 1416, 1419 (9th Cir. 1983).

22 Although the statutes use the terms "discretion" and "may,"
23 courts in interpreting the statutes have looked to the
24 legislative history and concluded that in the absence of special
25 circumstances, a prevailing party should ordinarily recover
26 attorney fees. Toussaint v. McCarthy, 826 F.2d 901 (9th Cir.

1 1987); Cummings v. Benco Bldg. Serv's, 11 Cal. App. 4th 1383,
2 1387 (1992).

3 Both federal and California courts have adopted the
4 "lodestar" method for calculating attorney's fees. Hensley, 461
5 U.S. at 433; Serrano v. Priest, 20 Cal. 3d 25, 48-49 (1977). To
6 determine the appropriate fee amount, the court multiplies the
7 number of hours reasonably expended in the litigation by a
8 reasonable hourly rate. Id. However, California's law of
9 attorneys' fee awards under FEHA has diverged from federal law
10 as developed under civil rights fee-shifting statutes in that
11 the use of multipliers in calculating fees under 42 U.S.C. §
12 1988 does not control fee awards under FEHA. Flannery v. Calif.
13 Highway Patrol., 61 Cal. App. 4th 629, 645-46 (1998) (stating
14 that there is no evidence that the California legislature
15 "intended or intends federal standards to apply to limit the
16 trial court's exercise of discretion in calculating the amount
17 of reasonable attorney fees under California fee-shifting
18 statutes generally or under the FEHA provision in particular").

19 Under California law, after developing the touchstone
20 lodestar amount, the trial court may then augment or reduce the
21 fee award in light of a number of relevant factors. Nichols v.
22 City of Taft, 155 Cal. App. 4th 1233, 1240 (2007) (citing
23 Serrano v. Priest, 20 Cal. 3d 25, 48-49 (1977)); Vo v. Las
24 Virgenes Municipal Water Dist., 79 Cal. App. 4th 440, 445-446
25 (2000). Those factors include: ". . .(1) the novelty and
26 difficulty of the questions involved, (2) the skill displayed in

1 presenting them, (3) the extent to which the nature of the
2 litigation precluded other employment by the attorneys, [and]
3 (4) the contingent nature of the fee award. The purpose of such
4 adjustment is to fix a fee at the fair market value for the
5 particular action." Nichols, 155 Cal. App. 4th at 1240 (quoting
6 Ketchum v. Moses, 24 Cal. 4th 1122, 1132 (2001)) (internal
7 citations omitted).¹ "Of course, the trial court is not required
8 to include a fee enhancement to the basic lodestar figure for
9 contingent risk, exceptional skill, or other factors, although
10 it retains discretion to do so in the appropriate case. . . . In
11 each case, the trial court should . . . consider the degree to
12 which the relevant market compensates for contingency risk,
13 extraordinary skill, or other factors under Serrano [v. Priest].
14 . . . [A] trial court should not consider these factors to the
15 extent they are already encompassed within the lodestar."
16 Ketchum, 24 Cal. 4th at 1138.

17 **III. ANALYSIS**

18 **A. Prevailing Party**

19 The jury awarded judgment to plaintiff in two of his
20 claims. It also awarded plaintiff damages in an amount of \$1.5
21

22 ¹ In Serrano v. Priest, the California Supreme Court listed
23 relevant factors that may weigh in favor of increasing or
24 decreasing the lodestar figure. 20 Cal. 3d at 49. The list is not
25 exclusive and a court may determine that other factors are relevant
26 in a particular case. See Thayer v. Wells Fargo Bank, 92 Cal. App.
4th 819, 834 (2001) (stating that there is "no hard-and-fast rule
limiting the factors that may justify an exercise of judicial
discretion to increase or decrease a lodestar calculation").

1 million. While the jury did award judgment to defendant in two
2 claims, it is clear that plaintiff is a prevailing party. In
3 fact, defendant does not oppose plaintiff's motion on this
4 ground.

5 **B. Discretionary Award**

6 The court also finds that it may properly exercise its
7 discretion to award fees. No special circumstances exist here to
8 suggest otherwise.

9 **C. Reasonable Fee**

10 **1. Attorney Billing Rate**

11 Plaintiff seeks to recover attorneys' fees at the following
12 rates: (1) Trial Counsel Lawrence A. Bohm ("Bohm"), \$375 per
13 hour; (2) Joseph Earley, III ("Earley"), \$400 per hour; and (3)
14 Charles Moore ("Moore"), \$450 per hour. Defendant only opposes
15 the hourly rate for Charles Moore. However, the court finds both
16 Earley's and Moore's hourly rates to be excessive. Specifically,
17 there are no grounds for counsel who assisted trial counsel to
18 bill at a rate higher than that for which trial counsel billed.
19 For this reason, the court reduces Earley and Moore's hourly
20 rates to \$375.

21 **2. Number of Hours**

22 **a. Defendant's Arguments**

23 Defendant raises several concerns about the number of hours
24 billed by plaintiff. First, defendant argues that it should not
25 be responsible for any fees incurred due to inefficiencies
26 resulting from Charles Moore's replacement of Joseph Earley, III

1 as co-counsel. Defendant does not, however identify any fees
2 that demonstrate such an inefficiency. Further, plaintiff argues
3 that there were no such inefficiencies. Accordingly, the court
4 finds that defendant is not entitled to a reduction in the
5 number of hours billed on this ground.

6 Second, defendant argues that there was no reason for both
7 Bohm and Earley to travel to Albuquerque, New Mexico to take the
8 deposition of Nicole McCollum. Plaintiff contends that it was
9 necessary for both counsel to attend this deposition because
10 "Earley's attendance was required to assist with preparation,
11 strategizing the day before as well as on the spot." Reply at 3-
12 4. Plaintiff continues to state that he reasonably believed that
13 he would require Earley's assistance "as a back up in case there
14 was any problem attending or completing the deposition" "[d]ue
15 to the remote location of the deposition." Plaintiff concludes
16 noting that defendant had two counsel at every deposition. The
17 court is not persuaded that two counsel were necessary at this
18 deposition. Plaintiff has not explained why the remote location
19 of the deposition in any way required the attendance of two
20 attorneys. Further, plaintiff has provided no information asidw
21 from geography as to why this deposition required two counsel
22 when every other deposition only required one. For this reason,
23 the court deducts the hours billed by Earley to attend this
24 deposition.

25 Third, defendants argue that it was unreasonable for Earley
26 to spend 16.5 hours accompanying a witness from Northern

1 California so that he could testify at trial. Plaintiff states
2 that it was necessary for Earley to do so because this witness
3 was suffering serious medical problems. Specifically, plaintiff
4 contends that the medical concerns "made interviewing and
5 preparing Mr. Gasero complicated and challenging." Plaintiff has
6 not, however, provided any indication that Earley was doing
7 legal work while accompanying this witness. In particular,
8 plaintiff has not demonstrated that a paralegal would not have
9 been capable of performing the same tasks as Earley. For this
10 reason, the court reduces Earley's lodestar for these 16.5 hours
11 to \$100, the rate billed by paralegals.

12 Fourth, defendant argues that Bohm engaged in significant
13 "overkill" in his trial presentation. Specifically, defendant
14 contends that much of plaintiff's trial brief concerned matters
15 outside the scope of the trial and most of his exhibits were not
16 used in the case. The court finds that plaintiff's trial
17 preparation was not so excessive to cause a reduction in fees.
18 However, as described below, the fee request is reduced as a
19 result of numerous problematic time entries not identified by
20 defendant.

21 Fifth, defendant argues that many of the fees billed in
22 this case concerned work done in Kell v. AutoZone, and is
23 therefore not properly billed here. Defendant, however did not
24 identify which entries should be stricken on this grounds, but
25 rather challenges that the time spent on document review should
26 be reduced. The court is troubled by many time entries listed by

1 plaintiff which appear to be related to the Kell matter. These
2 include numerous telephone calls with Kell (see, e.g., entries
3 dated 1/8/10, 1/10/10, 1/11/10, 1/14/10, 1/19/10, 1/21/10,
4 1/27/10, 2/2/10, 2/9/10). The court cannot determine from
5 plaintiff's fee petition whether he has double-billed work done
6 in Kell and in Cosby. Nonetheless, the court declines to reduce
7 plaintiffs' fees on this ground because the defendant and
8 counsel for defendant are identical in both cases and defendant
9 failed to identify any instances of double billing. The court
10 trusts, although somewhat reluctantly, that counsel for
11 defendant would have provided such evidence of double billing if
12 it existed.

13 **b. The Court's Concerns**

14 There are several time entries in plaintiff's application
15 that cause the court serious concern. These include time entries
16 for events at the court where the court knows that plaintiff has
17 over-billed and several entries which appear to the court to be
18 unreasonable. "[T]rial courts must carefully review attorney
19 documentation of hours expended; 'padding' in the form of
20 inefficient or duplicative efforts is not subject to
21 compensation." Ketchum v. Moses, 24 Cal. 4th 1122, 1132 (2001).
22 Even in civil rights cases, a trial court may "reduce the award
23 or deny one altogether" if the fee request "appears unreasonably
24 inflated." Chavez v. City of Los Angeles, 47 Cal. 4th 970, 990

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1 (Cal. 2010) (quoting Serrano v. Unruh,² 32 Cal. 3d 621, 635
2 (1982)); see also PLCM Group, Inc. v. Drexler, 22 Cal. 4th 1084,
3 1095 (2000). Here, it appears that plaintiff's counsel spent
4 excessive time on various tasks related to the litigation, which
5 are described below. In an effort to compensate for the known
6 overbilling, duplication of effort as a result of having three
7 attorneys working on the case, as well as any additional
8 "padding" in the fee petition that the court was unable to
9 ascertain, the court will reduce plaintiff's fees by 10% across-
10 the board. See Cal. Common Cause v. Duffy, 200 Cal. App. 3d 730,
11 752-54 (1987) (reducing award by 50% based on duplication of
12 effort, requests for compensation for time spent on media
13 relations, and unnecessary adversarial "skirmishes"); see also
14 Schwarz v. Secretary of Health & Human Services, 73 F.3d 895,
15 905 (1995); Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir.
16 1992).

17 **i. Known Exaggerated Fee Requests**

18 **Bohm**

20
21 ² The California Supreme Court provided several examples of
22 situations warranting such reductions. Serrano, 32 Cal. 3d 635 n.21
23 (citing Copeland v. Marshall, 641 F.2d 880, 902-903 (1979) (stating
24 that compensation is unavailable for hours spent litigating issues
25 on which plaintiff did not prevail or where attorneys' efforts are
26 unorganized or duplicative); Gagne v. Maher, 594 F.2d 336, 345
(1979) (finding that district court did not abuse its discretion
by reducing fee award based on excessive time spent litigating a
relatively simple case); Farris v. Cox, 508 F. Supp. 222, 227 (N.D.
Cal. 1981) (reducing fee award for "overreaching" on fee petition).

- 1 (1) 10/26/09: Attend final pretrial conference³: **1.1**
2 (2) 1/29/10: Attend Cosby trial: **8.0**
3 (3) 2/5/10: Attend Cosby trial: **8.0**
4 (4) 2/12/10: Attend trial for jury deliberation and verdict:
5 **8.0**

6 **Moore**

- 7 (1) 1/28/10: Attendance at Cosby trial: **8.0**
8 (2) 1/29/10: Attendance at Cosby trial: **8.0**
9 (3) 2/5/10: Attendance at Cosby trial: **8.0**

10 **Torres (paralegal)**

- 11 (1) 1/28/10: Attend trial: **8.0**
12 (2) 1/29/10: Attend trial: **8.0**
13 (3) 2/4/10: Attend trial: **8.0**

14 **Jennings (paralegal)**

- 15 (1) 3/9/10-4/14/10: Research, verify and document Cosby Billing
16 records for attorney fee motion: **137.0**

17 **ii. Dubious Fee Requests**

- 18 (1) 1/8/07: Research Regulations and Statutes Re Admin
19 Exhaustion: **2.8**
20 (2) 3/6/08: Review court documents commencing removal and
21 instructions for further proceedings in federal court: **3.4**
22 (3) 7/28/08: Review Status Order: **3.9**
23 (4) 4/7/09: Review seven notices of deposition: **0.7**
24 (5) 5/7/09: Prepare draft mid litigation statement (only law
25 and motion matter concerned whether a defendant should be
26 dismissed as "fraudulent"): **0.7**
27 (6) 6/29/09: Review M. Nelson, M.D. Exhibits: **4.4**
28 (7) 8/17/09: Review Deposition of Bonnie Shaw in preparation
29 for pretrial statement: **3.8**
30 (8) 8/18/09: Review Deposition of Rick Smith in preparation for
31 pretrial statement: **5.2**
32 (9) 8/19/09: Review Deposition of Kathy Pope in preparation for
33 pretrial statement: **1.4**
34 (10) 8/19/09: Review Deposition of Dr. Marcia Nelson in
35 preparation for pretrial statement: **1.1**

3 At oral argument, plaintiff's counsel expressed that many of these entries represent the correct number of hours, yet were sloppy records. For example, when he wrote "Attend final pretrial conference," he included billing for hours preparing for the conference. The court cannot correct for the sloppiness of plaintiff's counsel. Counsel testified under penalty of perjury only that they engaged in certain conduct. It is not appropriate for the court to infer preparation and other activity based on the representations of plaintiff's counsel at oral argument.

- 1 (11) 8/19/09: Review Deposition of Nicole McCollum in
preparation for pretrial statement: **4.2**
2 (12) 8/20/09: Review Deposition of Sheri Lemond in preparation
for pretrial statement: **3.4**
3 (13) 8/21/09: Review Deposition of Steve Bender in preparation
for pretrial statement: **1.2**
4 (14) 9/11/09: Review sample pretrial statements from other
federal cases pulled from PACER: **6.4**
5 (15) 9/21/09-9/28/09: Prepare case summary: **19.4**
6 (16) 11/13/09: Review Nazir v. United Airlines - For Opposition
to Defendant Reply: **5.6**
7 (17) 1/22/10: Billed **19.1** hours in one day.

8 **iii. Travel Time**

- 9 (1) 5/25/09: Travel to Albuquerque, NM for McCollum Depo: **9.0**
10 (2) 6/29/09: Travel to Ontario for Deposition of Rick Smith:
4.0
11 (3) 6/29/09: Travel time from Ontario: **4.0**

12 The travel billing rates were not reduced by 50%. Rather,
13 plaintiff billed for travel at their full lodestar.

14 **iv. Conclusion**

15 As an initial matter, the court reduces the lodestar for
16 travel time by 50%.

17 Further, in light of the problems identified above, the
18 court intends to reduce the lodestar of all attorneys and
19 paralegals by 10%. The court finds that doing so is appropriate
20 in light of the problems it identifies above. This reduction is
21 in addition to any specific reductions discussed in this order.

22 **3. Paralegal Hours**

23 Defendant argues that the hours billed by plaintiff's
24 paralegals should not be recovered because they performed
25 administrative functions for plaintiff's office. Defendant also
26 argues that they should not be recovered because only one of the

1 three paralegals is specifically trained as a paralegal. These
2 arguments are without merit. Plaintiff's paralegals performed
3 functions specific to this case, such as interviewing witnesses
4 and attending trial. These fees are recoverable. Additionally,
5 the rate of \$100 per hour for paralegal time is a reasonable
6 rate in Sacramento.

7 **4. Expert Costs**

8 Defendant argues that plaintiff should not recover costs
9 from its expert, Dr. Mahla, because his testimony concerned
10 plaintiff's past and future economic losses resulting from his
11 termination. The jury found against plaintiff on grounds that
12 his termination was unlawful. Plaintiff does not provide any
13 substantive response to this argument. Plaintiff is only
14 entitled to recover fees and costs relating to claims upon which
15 it prevailed. Again, the parties do not provide sufficient
16 information upon which the court can decide whether these costs
17 should be awarded to plaintiff. Plaintiff is thereby ordered to
18 file a statement within twenty-one (21) days of the issuance of
19 this order explaining why Dr. Mahla's expert report and/or
20 testimony were related to the claims upon which judgment was
21 entered in his favor. Defendant may file a response to this
22 statement within fourteen (14) days of service of plaintiff's
23 statement.

24 **D. Multipliers**

25 Plaintiff seeks a multiplier of 2 of the lodestar rates for
26 attorneys' fees incurred prior to trial. Plaintiff contends that

1 he is entitled to an increase in attorneys' fees because of "the
2 contingent nature of the fee award, the novelty and difficulty
3 of the issues presented, and the quality of representation."
4 Application at 8. The court is not persuaded. "[T]he trial court
5 is not required to include a fee enhancement to the basic
6 lodestar figure for contingent risk, exceptional skill, or other
7 factors. . . . In each case, the trial court should . . .
8 consider the degree to which the relevant market compensates for
9 contingency risk, extraordinary skill, or other factors under
10 Serrano [v. Priest]. . . . [W]hen determining the appropriate
11 enhancement, a trial court should not consider these factors to
12 the extent they are already encompassed within the lodestar."
13 Ketchum, 24 Cal. 4th at 1138.

14 As for the contingency risk, the court finds that the
15 hourly rate that counsel will be awarded is "higher than a fee
16 for the same legal services paid as . . . performed" in light of
17 the apparent padding and, thus, the risk is encompassed within
18 the original lodestar and a fee enhancement would be
19 inappropriate. See Ketchum, 24 Cal. 4th at 1132. As to
20 difficulty and novelty, there is no novelty in this case -
21 plaintiff did not change the law or expand the coverage of FEHA
22 or bring a sort of case that has never been brought before.
23 Further, prevailing parties are not entitled to a multiplier
24 merely because they were busy during trial - such is the norm.
25 Lastly, while plaintiff's counsel achieved a great result for
26 their client, the quality of representation does not warrant

1 enhancement of the lodestar in this case. Plaintiff's counsel
2 did not demonstrate exceptional skills "beyond those that might
3 be expected of attorneys of comparable expertise or experience."
4 Weeks v. Baker & McKenzie, 63 Cal. App. 4th 1128, 1176 (1998);
5 see also Ketchum, 24 Cal. 4th at 1139 ("[A] trial court should
6 award a multiplier for exceptional representation only when the
7 quality of representation far exceeds the quality of
8 representation that would have been provided by an attorney of
9 comparable skill"). Plaintiff has not shown that the
10 results obtained justify a fee enhancement. This is especially
11 so when it appears to the court highly likely that plaintiff has
12 padded his fee petition.

13 Defendant moves to decrease the fees sought by plaintiff by
14 50% because plaintiff lost on two of his claims. Defendant
15 contends that these claims were the ones that required the most
16 work. However, the only specific item that defendant challenges
17 as not appropriate on this ground is the expert report discussed
18 above. The court cannot determine which efforts plaintiff
19 exhausted in pursuing the unsuccessful claims. In fact, it
20 appears to the court that the unsuccessful claims are strongly
21 related to the successful ones. Because defendant cannot refer
22 the court to any specific entries that are problematic because
23 they only concern unsuccessful claims, the court declines to
24 reduce the amount of fees sought by plaintiff on this ground.

25 **IV. CONCLUSION**

26 For the foregoing reasons, the court ORDERS that plaintiff

1 SHALL FILE a statement within twenty-one (21) days of the
2 issuance of this order explaining why Dr. Mahla's expert report
3 and/or testimony were related to the claims upon which judgment
4 was entered in his favor. Defendant may file a response to this
5 statement within fourteen (14) days of service of plaintiff's
6 statement. Upon receipt of these briefs, the court will
7 calculate plaintiff's fee award.

8 The court intends to stay the fee award in this case
9 pending resolution of defendant's appeal. The parties may
10 indicate any objections to the court doing so along with their
11 briefing on the expert question.

12 IT IS SO ORDERED.

13 DATED: December 15, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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