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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

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On December 16, 2010, the court issued an order that set forth the manner in which the court will award attorney's fees to plaintiff. (Doc. No. 143). The court also requested supplemental briefing on two issues. First, the court ordered the parties to brief whether Dr. Mahla's expert report and/or testimony was related to the claims upon which judgment was entered in favor of plaintiff. For the reasons discussed below, the court finds that the report and testimony shall be taxed. Second, the court informed the parties of its intention to stay the fee award pending

1 resolution of defendant's appeal and invited the parties to file  
2 objections. No objections were filed, and thus the fee award is  
3 stayed pending resolution of defendant's appeal. This sequence,  
4 however, provides the court with an opportunity to further consider  
5 the motion for remittitur. As I explain, the recovery of Dr.  
6 Mahla's costs depends on an explanation of the jury's verdict. So,  
7 I begin with that.

8       On March 17, 2010, defendant filed a motion for a new trial  
9 or for remittitur. (Doc. No. 97). In support of that motion,  
10 defendant argued that the jury award to plaintiff for lost wages  
11 and benefits in the amount of \$174,000 was excessive and contrary  
12 to the evidence because plaintiff only prevailed on his claims of  
13 failure to engage in the interactive process and failure to provide  
14 reasonable accommodation. Accordingly, defendant contended that,  
15 "[T]here is indisputably no evidence in the record, nor any  
16 reasonable inference, to support a past wage loss of \$174,000 for  
17 being off work for less than a month." Id. at 4. Defendant's  
18 reasoning was that \$174,000 represented the economic losses  
19 plaintiff incurred as a result of his termination, and the jury  
20 found for defendant on plaintiff's claims relating to his  
21 termination, namely disability discrimination and retaliation.

22       The motion was heard on April 19, 2010. At this hearing, the  
23 court denied the motion on the grounds that, inter alia, the award  
24 was supported by the evidence. It is an explanation of that  
25 determination that determines the issue of the recovery of costs.

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1           The court would be less than frank if it did not find the  
2 issue of the economic damages awarded by the jury troublesome.  
3 Respect for the jury's function as fact finder, and appropriate  
4 modesty, requires any court to give significant deference to the  
5 verdict. Nonetheless, the fact that the law permits a judge to  
6 order remittitur on pain of granting a new trial is demonstration  
7 of the need for judges to be cognizant of the possibility of a jury  
8 awarding unjustified damages. Thus, to put it plainly, there must  
9 be some rationale for the jury's verdict. As I now briefly explain,  
10 I believe there is such a rationale.

11           It is difficult to deny that it appears that the jury's award  
12 of past lost damages must include those wages lost by virtue of  
13 plaintiff's termination by defendant. The question which the court  
14 answered by its denial of a remittitur was that the evidence was  
15 sufficient for the jury to draw an inference of a causal connection  
16 between the defendant's unlawful acts and the termination. This is  
17 so even though discrimination was not the motivation for the  
18 termination.

19           It is useful to examine the jury verdict forms and the  
20 instructions in considering the issue. For the two claims upon  
21 which the plaintiff prevailed, the jury found that defendant's  
22 unlawful activity was a "substantial factor" in causing plaintiff's  
23 harm. Examination of instruction 34 demonstrates that where various  
24 causes combine to cause harm each may be said to be a cause.

25           The defendant prevailed in the discrimination and retaliation  
26 claims. For these, the jury declined to find causation. The jury

1 verdict and instructions as to these claims describe causation as  
2 a "motivating reason" rather than a substantial factor. See Jury  
3 Instructions Nos. 21, 26. The instructions provide that "a  
4 motivating reason is a reason that contributed to the decision to  
5 take action, even though other reasons may have contributed to the  
6 action."

7 In sum, a reasonable juror might distinguish the causation  
8 element in the discharge from the failure to accommodate claims  
9 that do not require a particular intent on the part of the  
10 defendant. Nonetheless, the jury is asked if the defendant's  
11 failure to accommodate was one of the independently operating  
12 factors that caused harm. This is in accordance with California law  
13 which holds that the failure to provide reasonable accommodations  
14 is a violation in and of itself. King v. United Parcel Service,  
15 Inc. 152 Cal. App. 4th 426, 442 (2007). No inference of  
16 discriminatory intent is required.

17 All the above suggests that the jury made the distinction  
18 described above when they awarded damages for lost wages resulting  
19 from the termination on the failure to accommodate claim. Under  
20 such circumstances the jury's verdict must be upheld.

21 As the court previously discussed, plaintiff is only entitled  
22 to recover fees and costs relating to claims upon which he  
23 prevailed. See Cal Gov't Code § 12965(b). Thus, the court  
24 determined that the jury reasonably concluded that damages  
25 resulting from plaintiff's subsequent termination were recoverable  
26 for the claims upon which plaintiff prevailed. Dr. Mahla's expert

1 report and testimony concerned an analysis of economic losses  
2 plaintiff incurred as a result of his termination. Thus, Dr.  
3 Mahla's expert report and testimony is taxable.

4 For the foregoing reasons, the court ORDERS as follows:

5 (1) Defendant SHALL BE TAXED the cost of Dr. Mahla's expert  
6 report and testimony.

7 (2) The award of attorneys' fees is stayed pending  
8 resolution of defendant's appeal.

9 IT IS SO ORDERED.

10 DATED: February 8, 2011.

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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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