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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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VICTORIA McCARTHY, KATHERINE
SCHMITT,

NO. CIV. 2:09-2495 WBS DAD

Plaintiffs,

MEMORANDUM AND ORDER RE:
MOTION FOR ATTORNEY'S FEES

v.

R.J. REYNOLDS TOBACCO CO., and
DOES 1-10,

Defendants.

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Plaintiffs Victoria McCarthy and Katherine Schmitt brought this action against their former employer, defendant R.J. Reynolds Tobacco Co., alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3, for sexual harassment and retaliation, under California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940, for disability discrimination and failure to accommodate, and for tortious adverse employment actions in violation of public policy. Following entry of judgment pursuant to a jury verdict

1 in plaintiffs' favor on their Title VII claims for a total of
2 \$800,000.00, including \$500,000.00 in punitive damages,
3 plaintiffs now move for attorney's fees.

4 Title VII provides for reasonable attorney's fees to a
5 prevailing party. See 42 U.S.C. § 2000e-5(k); see also Cal.
6 Gov't Code § 12965 (FEHA attorney's fees provision). "Because
7 the provision for attorney's fees in [42 U.S.C. § 1988] was
8 patterned upon the fee provision in 42 U.S.C. § 2000e-5(k),
9 standards for an award of fees under section 1988 are the same as
10 those under section 2000e-5(k)." Proctor v. Consolidated
11 Freightways Corp. of Del., 795 F.2d 1472, 1478 (9th Cir. 1986).

12 To determine reasonable attorney's fees, the court must
13 first calculate the lodestar by taking the number of hours
14 reasonably expended by the litigation and multiplying it by a
15 reasonable hourly rate. Fisher v. SJB-P.D. Inc., 214 F.3d 1115,
16 1119 (9th Cir. 2000) (citing Hensley v. Eckerhart, 461 U.S. 424,
17 433 (1983)). Except as discussed in section II below, the court
18 finds the number of hours spent here to be reasonable. A
19 reasonable rate is typically based upon the prevailing market
20 rate in the community for "similar work performed by attorneys of
21 comparable skill, experience, and reputation." Chalmers v. City
22 of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986); see also
23 Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984) ("[T]he burden is
24 on the fee applicant to produce satisfactory evidence . . . that
25 the requested rates are in line with those prevailing in the
26 community.").

27 I. Reasonable Hourly Rate

28 Plaintiffs request the court to award \$375.00 as a

1 reasonable hourly rate for plaintiffs' counsel, Aldon L. Bolanos,
2 and \$75.00 as a reasonable hourly rate for counsel's law clerk,
3 Roger Kosla. The court finds the law clerk's hourly rate of
4 \$75.00 to be reasonable. See Yeager v. Bowlin, No. Civ.
5 2:08-102 WBS JFM, 2010 WL 2303273, at *6 (E.D. Cal. June 7, 2010)
6 ("[T]he paralegal rate 'favored in this district' is \$75 per
7 hour."). However, for Mr. Bolanos's hourly rate, plaintiffs have
8 failed to meet their burden of establishing a prevailing market
9 rate in the community for "similar work performed by attorneys of
10 comparable skill, experience, and reputation." Chalmers, 796
11 F.2d at 1210; see Blum, 465 U.S. at 896 n.11.

12 The declarations submitted in other cases that
13 plaintiffs have filed with this court do not assist plaintiffs.
14 First, in Millard v. Poswall, No. Civ. 2:03-01467 WBS GGH, slip
15 op. (E.D. Cal. Apr. 6, 2005), an Americans with Disabilities Act
16 of 1990 case, and in the related cases, this court used hourly
17 rates of \$250 and \$225. Second, in Taylor v. Chainq, the court
18 used a \$335 hourly rate. No. Civ. 2:01-2407 JAM GGH, 2009 WL
19 453050, at *11 (E.D. Cal. Feb. 23, 2009), adopted by No. Civ.
20 2:01-2407 JAM GGH, 2009 WL 1119390 (E.D. Cal. Apr. 24, 2009),
21 aff'd by 405 F. App'x 167 (9th Cir. 2010). Taylor was a highly
22 publicized case involving California's escheat system and did not
23 involve employment discrimination or personal injury. Third, in
24 Cosby v. Autozone, Inc., No. Civ. 2:08-505 LKK DAD 2011 WL 445088
25 (E.D. Cal. Feb. 8, 2011), an employment discrimination case, the
26 court stayed the motion for attorney's fees pending appeal, which
27 was recently decided. See Cosby v. Autozone, Inc., No. 10-16189,
28 2011 WL 3267704 (9th Cir. Aug. 1, 2011) (reversing on the issue

1 of damages).

2 This court recognizes that some courts have used hourly
3 rates in excess of \$300. See, e.g., Cosby No. Civ. 2:08-505 LKK
4 DAD, 2010 WL 5232992 (E.D. Cal. Dec. 16, 2010) (previous order in
5 Cosby setting forth method of calculation in which court stated
6 that it would use an hourly rate of \$375, reducing the hourly
7 rate of the attorneys who assisted lead counsel to the rate
8 billed by lead counsel); Beecham v. City of W. Sacramento, No.
9 Civ. 2:07-1115 JAM EFB, 2009 WL 3824793, at *4 (E.D. Cal. Nov.
10 16, 2009) (\$375 hourly rate in a case involving excessive force
11 and false arrest claims); Alaniz v. Robert M. Peppercorn, M.D.,
12 Inc., No. Civ. 2:05-02576, 2008 WL 5000191, at *3 (E.D. Cal. Nov.
13 21, 2008) (\$275 and \$350 hourly rates in Title VII case); cf.
14 Jadwin v. Cnty. of Kern, 767 F. Supp. 2d 1069, 1130-31 (E.D. Cal.
15 2011) (Wanger, J.) (\$275 and \$350 hourly rates for Fresno
16 community in employment discrimination case).

17 However, plaintiffs have failed to demonstrate that Mr.
18 Bolanos possesses comparable skill, experience, and reputation to
19 the attorneys in the above cases. Plaintiffs' counsel has "a
20 relatively short career of seven years[] practicing law," (Pls.'
21 Mot. at 5:9-10 (Docket No. 109)), and appears to have had minimal
22 trial experience as either lead or co-counsel. The legal briefs
23 submitted by plaintiffs' counsel did not demonstrate a
24 particularly high level of expertise, and his degree of
25 preparation did not demonstrate any particular intensity or

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1 comprehensiveness.¹

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3 ¹ Without unnecessarily going into extensive detail, a
4 brief history of Mr. Bolanos' performance in this action might
5 shed light on the reasons for the court's refusal to award fees
6 at the requested rate of \$375 per hour. In response to
7 defendant's motion for summary judgment, Mr. Bolanos filed a six-
8 page opposition one day late, and then asked for additional time
9 to file a more complete opposition, which the court granted.
10 (Docket Nos. 23, 28, 31.) He did not propound any discovery,
11 instead relying solely on defendant's depositions of plaintiffs
12 in his opposition to the summary judgment motion. At the hearing
13 on the motion, after the discovery period had closed, Mr. Bolanos
14 asked the court for leave to conduct discovery in order to
15 present evidence responsive to defendant's evidentiary
16 objections. The court granted leave to conduct three limited
17 depositions. (Docket No. 44.) Mr. Bolanos ultimately conducted
18 only one of his proposed depositions. (Docket No. 51.)

19 Contrary to Federal Rule of Civil Procedure 26(a)(1),
20 Mr. Bolanos failed to provide defendant with initial disclosures.
21 Instead, he simply told defendant that over two thousand pages of
22 documents in several banker's boxes were available for defendant
23 to copy. As a result of this failure to disclose, defendant
24 requested that the court prevent plaintiffs from presenting any
25 witnesses or evidence at trial, as was within the court's
26 discretion. See Fed. R. Civ. P. 37(c)(1). The court denied
27 defendant's request and allowed Mr. Bolanos to call the
28 plaintiffs and one other witness at trial. (Docket No. 60.) Mr.
29 Bolanos ultimately called the two plaintiffs but not the other
30 witness at trial.

31 Mr. Bolanos filed his pretrial statement ten days late,
32 (Docket No. 56), his proposed voir dire three days late, (Docket
33 No. 72), and his trial brief seven days late. (Docket No. 84.)
34 During the trial, when settling jury instructions, Mr. Bolanos
35 held himself out as an expert on the issue of sexual orientation
36 discrimination. He stated to the court that Title VII prohibits
37 discrimination on the basis of "sex or gender." In fact, Title
38 VII mentions only sex, not gender. See 42 U.S.C. § 2000e-2(a).

39 After trial, Mr. Bolanos sought a postponement of
40 defendant's post-trial motion and an opportunity to file a second
41 opposition on the ground that defendant had cited two LexisNexis
42 cases in its memorandum of points and authorities and Mr. Bolanos
43 does not have a subscription to LexisNexis. (Docket No. 140.)
44 The court denied Mr. Bolanos's request and provided him with four
45 suggestions for ways in which he could have found the cases.
46 (Docket No. 142.) His opposition also complained that
47 "[t]hickening the plot, the defense motion contains an asterisk
48 (*) next to these two cases as if to denote some additional
49 reference. . . . Plaintiffs request the Court consider sua
50 sponte Rule 11 sanctions for this apparent bad faith." (Pls.'
51 Opp'n to Def.'s Mot. for New Trial at 14 n.4 (Docket No. 139).)
52 That argument reflected a complete lack of understanding of the
53 citation rules regarding unpublished cases, which state that

1 Accordingly, the court finds that an hourly rate of
2 **\$285.00** is a reasonable hourly rate under the circumstances of
3 this case. See O'Quinn v. Raley's, No. Civ. 2:02-0308 MCE KJM,
4 2008 WL 3889573, at *2 (E.D. Cal. Aug. 19, 2008) (\$250 in Title
5 VII case); cf. Riker v. Distillery, No. 2:08-cv-00450 MCE JFM,
6 2009 WL 4269466, at *2 (E.D. Cal. Nov. 25, 2009) ("Courts within
7 the Eastern District have repeatedly capped the award of a
8 reasonable fee for an experienced ADA attorney at \$250.00 per
9 hour."); Davis v. Sundance Apartments, No. Civ. 2:07-1922, 2008
10 WL 3166479, at *4 (E.D. Cal. Aug. 05, 2008) ("[A]fter
11 consideration of Mr. Fagan's eighteen years of experience, the
12 last ten of which have been devoted exclusively to fair housing
13 discrimination claims, and similar cases decided in this
14 district, the court finds that \$275.00 per hour is a reasonable
15 hourly rate in this case."). The two factors which cause the
16 court not to assess a lower rate are the undeniably successful
17 result Mr. Bolanos achieved in this case and defendant's apparent
18 lack of any vigorous opposition to the hourly rate proposed.

19 II. Partial or Limited Success

20 The remaining issue is the effect of plaintiffs'
21 failure to succeed on the FEHA and tort claims. "[T]he extent of
22 a plaintiff's success is a crucial factor in determining the
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24 "page numbers, if the database assigns them, should be preceded
25 by an asterisk." See The Bluebook: A Uniform System of Citation
26 R. 10.8.1(a), at 104 (Columbia Law Review Ass'n et al. eds., 19th
27 ed. 2010).

28 In short, Mr. Bolanos' repeated failure to comply with
the Local Rules and this court's orders could have resulted in
this case being dismissed or plaintiffs being required to proceed
to trial without the ability to call witnesses or present
evidence.

1 proper amount of an award of attorney's fees under 42 U.S.C. §
2 1988." Hensley, 461 U.S. at 440. Attorney's time spent on the
3 unsuccessful state law claims will not be disallowed if the same
4 time would have been spent on the successful federal claim.
5 Conversely, time spent on the unsuccessful claims which could not
6 reasonably be expected to be spent on the successful claims
7 should not be allowed. See Schwarz v. Sec. of Health & Human
8 Servs., 73 F.3d 895, 904 (9th Cir. 1995) ("Once a district court
9 concludes that a plaintiff has pursued unsuccessful claims that
10 are unrelated to the successful claim, its task is to exclude
11 from the calculation of a reasonable fee all hours spent
12 litigating the unsuccessful claims."). But cf. Thomas v. City of
13 Tacoma, 410 F.3d 644, 649 (9th Cir. 2005) ("However, a
14 determination that certain claims are not related does not
15 automatically bar an award of attorney's fees associated with
16 those unrelated claims; work performed in pursuit of the
17 unrelated claims may be inseparable from that performed in
18 furtherance of the related or successful claims.").

19 Here, plaintiffs have identified 10.7 hours that were
20 spent on the unsuccessful claims that were not necessary for
21 plaintiffs' counsel to spend on the successful claims. The court
22 will eliminate these hours from the calculation. Otherwise, the
23 parties have not pointed to any time spent on the unsuccessful
24 claims which would not have been spent on the successful claim.

25 Accordingly, the court will award fees for **489.3 hours**
26 at an hourly rate of **\$285** for plaintiffs' counsel, totaling
27 **\$139,450.50**. The court will award fees for **110.5 hours** at an
28 hourly rate of **\$75** for the law clerk, totaling **\$8,287.50**. The

1 total fees awarded will be **\$147,738.00**.

2 IT IS THEREFORE ORDERED that plaintiffs' motion for
3 attorney's fees be, and the same hereby is, GRANTED, and
4 plaintiffs are awarded fees in the amount of \$147,738.00.
5 Pursuant to the July 18, 2011, Stipulation and Order, (Docket No.
6 127), fees are payable from the bond.

7 DATED: September 13, 2011

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9 WILLIAM B. SHUBB
10 UNITED STATES DISTRICT JUDGE
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