

1                                    IN THE UNITED STATES DISTRICT COURT  
2  
3                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

4                                    KIM MUNIZ,

5                                    Plaintiff,

6                                    v.

7                                    UNITED PARCEL SERVICE, INC.,

8                                    Defendant.  
9 \_\_\_\_\_/

No. C 09-01987 CW

ORDER ALLOWING  
FURTHER SUBMISSIONS  
ON PLAINTIFF'S  
MOTION FOR  
ATTORNEYS' FEES

10                                    Plaintiff Kim Muniz moves for attorneys' fees and non-  
11 statutory costs. Defendant United Parcel Service (UPS) opposes the  
12 motion. The motion was taken under submission on the papers.

13                                    As explained below, Plaintiff has not adequately supported her  
14 request for fees related to Stephen Jaffe's and Susan Jaffe's work.  
15 Accordingly, the Court allows further submissions on the  
16 reasonableness of Mr. Jaffe's hourly rate and the reasonableness of  
17 the number of hours billed by Mr. Jaffe and Ms. Jaffe.

18                                    "An award of attorneys' fees incurred in a suit based on state  
19 substantive law is generally governed by state law." Champion  
20 Produce, Inc. v. Ruby Robinson Co., Inc., 342 F.3d 1016, 1024 (9th  
21 Cir. 2003).

22                                    Under the FEHA, courts employ the lodestar method set forth in  
23 Serrano v. Priest, 20 Cal. 3d 25 (1977), to determine the amount of  
24 attorneys' fees to which prevailing parties are entitled. Chavez  
25 v. City of L.A., 47 Cal. 4th 970, 985 (2010). "Using that method,  
26 the trial court first determines a touchstone or lodestar figure  
27 based on a careful compilation of the time spent by, and the  
28

1 reasonable hourly compensation for, each attorney, and the  
2 resulting dollar amount is then adjusted upward or downward by  
3 taking various relevant factors into account." Id.

4 California law encourages prevailing parties to seek  
5 reasonable attorneys' fees in the first instance. "A fee request  
6 that appears unreasonably inflated is a special circumstance  
7 permitting the trial court to reduce the award or deny one  
8 altogether." Serrano v. Unruh, 32 Cal. 3d 621, 635 (1982); accord  
9 Chavez, 47 Cal. 4th at 990. "'If . . . the Court were required to  
10 award a reasonable fee when an outrageously unreasonable one has  
11 been asked for, claimants would be encouraged to make unreasonable  
12 demands, knowing that the only unfavorable consequence of such  
13 misconduct would be reduction of their fee to what they should have  
14 asked for in the first place. To discourage such greed, a severer  
15 reaction is needful.'" Unruh, 32 Cal. 3d at 635 (quoting Brown v.  
16 Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980)) (alterations by  
17 Unruh court).

18 I. Reasonable Hourly Rate for Stephen Jaffe

19 UPS objects to the \$650.00 hourly rate sought by Plaintiff for  
20 Mr. Jaffe, asserting that it is unreasonable.

21 To ascertain an attorney's reasonable hourly rate, courts  
22 consider "the hourly prevailing rate for private attorneys in the  
23 community conducting noncontingent litigation of the same type."  
24 Ketchum v. Moses, 24 Cal. 4th 1122, 1133 (2001) (emphasis in  
25 original). The moving party has the burden "to prove the  
26 appropriate market rate to be used in calculating the lodestar."  
27 MBNA Am. Bank, N.A. v. Gorman, 147 Cal. App. 4th Supp. 1, 16  
28 (2006). To support a fee request, that party may submit expert

1 witness testimony regarding attorneys' fees and declarations  
2 containing "verifiable information regarding rates allowed by  
3 courts." Children's Hosp. & Med. Ctr. v. Bonta, 97 Cal. App. 4th  
4 740, 782-83 (2002). In "assessing a reasonable hourly rate, the  
5 trial court is allowed to consider the attorney's skill as  
6 reflected in the quality of the work, as well as the attorney's  
7 reputation and status." Gorman, 147 Cal. App. 4th Supp. at 13  
8 (citing Ketchum, 24 Cal. 4th at 1139); see also Blum v. Stenson,  
9 465 U.S. 886, 896 (1984) (noting that the reasonableness inquiry  
10 requires consideration of the rates charged for "similar services  
11 by lawyers of reasonably comparable skill, experience and  
12 reputation").

13 Mr. Jaffe graduated from Wayne State University Law School in  
14 1970. Since 1989, he has focused primarily on representing  
15 individuals in employment law cases. He has taken over one  
16 thousand depositions and has gone to trial in thirty five cases.  
17 However, he does not indicate the disposition of any of his cases.

18 To show that Mr. Jaffe's \$650.00 rate is reasonable, Plaintiff  
19 offers declarations from Mary Dryovage, a solo employment law  
20 practitioner, and James Wagstaffe, a partner at and co-founder of  
21 the law firm at which Daniel Zaheer, one of Plaintiff's other  
22 attorneys, is an associate. The Dryovage and Wagstaffe  
23 declarations state, in boilerplate language, that Mr. Jaffe's rate  
24 is reasonable for local employment law attorneys with similar  
25 reputation, experience and skill. However, neither Ms. Dryovage  
26 nor Mr. Wagstaffe articulate the basis for their conclusion.  
27 Although these declarants may have expertise related to attorneys'  
28 fee awards, courts are not required to rely on opinion evidence

1 that is simply "the ipse dixit of the expert." Gen. Elec. Co. v.  
2 Joiner, 522 U.S. 136, 146 (1997); see also Hensley v. Eckerhart,  
3 461 U.S. 424, 440 n.15 (1983). Thus, these declarations do not  
4 prove that a \$650.00 rate for Mr. Jaffe is reasonable. Notably,  
5 Ms. Dryovage, who, like Mr. Jaffe, is a solo employment law  
6 practitioner, did not indicate her hourly rate. Such information  
7 could be useful in determining the reasonableness of Mr. Jaffe's  
8 rate.

9 Plaintiff suggests that Mr. Jaffe's years in practice justify  
10 his hourly rate. She compares his rate to those of UPS's  
11 attorneys, noting their years in practice. However, there is no  
12 evidence that UPS's counsel's rates are reasonable. Furthermore,  
13 the number of years an attorney has practiced, on its own, is not  
14 sufficient. Career longevity does not necessarily correlate with  
15 an attorney's skill, experience and reputation. As noted above,  
16 although Mr. Jaffe indicates that he has participated various  
17 proceedings, none of the declarants, including Mr. Jaffe, has  
18 indicated his level of success in them. See Campbell v. Nat'l  
19 Passenger R.R. Corp., 718 F. Supp. 2d 1093, 1099 (N.D. Cal. 2010)  
20 (offering supporting declarations indicating the level of success  
21 achieved by attorney). The declarants do not describe Mr. Jaffe's  
22 skills or reputation in the legal community.

23 UPS argues that Mr. Jaffe is entitled to an hourly rate of  
24 "\$425 at most." Opp'n 19. UPS cites surveys, published in the  
25 National Law Journal, suggesting that the average hourly rate for  
26 partners at two San Francisco employment litigation firms is around  
27 \$445.00; see also Mitchel v. City of Santa Rosa, 2010 WL 2740069,  
28 at \*2 (N.D. Cal.) (awarding \$420.75 per hour for Bay Area law firm

1 partner with thirty-six years of experience in defense-side  
2 employment law litigation).

3 Plaintiff has not proved that Mr. Jaffe's \$650.00 rate is  
4 reasonable, and there is not sufficient evidence to determine a  
5 reasonable rate. To recover fees for his services, Plaintiff must  
6 offer competent evidence that the rate he seeks is reasonable. For  
7 instance, Ms. Dryovage and Mr. Wagstaffe may supplement their  
8 declarations to describe Mr. Jaffe's skills and reputation.  
9 Plaintiff may also offer surveys showing the market rates for  
10 attorneys situated similarly to Mr. Jaffe.

11 II. Reasonable Number of Hours for Stephen and Susan Jaffe

12 In challenges to the reasonableness of the number of hours  
13 billed, "it is the burden of the challenging party to point to the  
14 specific items challenged, with a sufficient argument and citations  
15 to the evidence." Premier Med. Mgmt. Sys., Inc. v. Cal. Ins.  
16 Guarantee Ass'n, 163 Cal. App. 550, 564 (2008). "General arguments  
17 that fees claimed are excessive, duplicative, or unrelated do not  
18 suffice." Id. If the opposing party cannot provide specific,  
19 persuasive reasons to disallow recovery for some of the hours  
20 billed, courts should normally award fees for the total number of  
21 hours billed or, at most, impose a ten-percent reduction. See  
22 Moreno v. City of Sacramento, 534 F.3d 1106, 1112, 1116 (9th Cir.  
23 2008).

24 A. Stephen Jaffe

25 For this action, Mr. Jaffe did not maintain any time records.  
26 Instead, for Plaintiff's fee request, Mr. Jaffe estimated the  
27 number of hours he worked by using a so-called "protocol," which  
28 varied based on the task he performed. Jaffe Decl. ¶ 28. With

1 regard to "depositions, travel, court appearances, etc.," Mr. Jaffe  
2 "used the actual time spent together with any associated travel  
3 time and preparation." Id. However, except for his use of  
4 transcripts to estimate the number of hours he worked on  
5 depositions, Mr. Jaffe did not rely on any verifiable evidence to  
6 support his estimate of hours related to these tasks. To determine  
7 the amount of time he spent drafting pleadings, motions and  
8 correspondence, Mr. Jaffe counted the number of documents he  
9 thought to be relevant to this action. This figure, according to  
10 Mr. Jaffe, allowed him to make estimates with "meaningful  
11 accuracy." Id. Mr. Jaffe's reconstruction consists of a table  
12 listing various services and the total number of hours -- over the  
13 course of the entire litigation -- he worked to provide each  
14 service. For example, Mr. Jaffe represents that for "[t]elephone  
15 conferences with opposing counsel, client, witnesses, staff,  
16 process servers, and miscellaneous (entire case)," he expended 148  
17 hours. Id. at 7:19-21. Except for depositions, Mr. Jaffe does not  
18 indicate on which dates he worked these hours, nor does he identify  
19 any of the particular tasks he performed.

20 Under California law, Mr. Jaffe's failure to maintain  
21 contemporaneous time records does not preclude Plaintiff from  
22 recovering amounts for his services. See, e.g., Martino v. Denevi,  
23 182 Cal. App. 3d 553, 559 (1986). However, his effort at  
24 reconstructing the hours he worked is insufficient. First, Mr.  
25 Jaffe aggregation of hours for broad categories of tasks precludes  
26 an objective determination of the reasonableness of the hours he  
27 claims. It is impossible to determine, from Mr. Jaffe's generic  
28 descriptions, whether his work was reasonable in light of this

1 litigation, or whether it was duplicative or unnecessary. He does  
2 not itemize any of the tasks he performed. In essence, Mr. Jaffe  
3 offers block billing for Plaintiff's entire case.<sup>1</sup>

4 Second, Mr. Jaffe offers little data from which the Court can  
5 judge the accuracy of his reconstruction "protocol," which  
6 precludes an evaluation of the protocol's reliability. Relying on  
7 printouts of file directories and lists of emails exchanged, Mr.  
8 Jaffe states that this case produced "between 20,000 and 32,000  
9 pages of documents" and 3,617 emails. Jaffe 1st Supp. Decl. ¶¶ 5-  
10 6. However, the number of hours worked, let alone the  
11 reasonableness of those hours, cannot be extrapolated solely from  
12 the number of documents filed, disclosed or generated in an  
13 action.<sup>2</sup>

14 Thus, in addition to failing to establish the reasonableness  
15 of his hourly rate, Plaintiff fails to demonstrate the  
16 reasonableness of the number of hours Mr. Jaffe worked. Mr. Jaffe  
17 must employ a reliable methodology to reconstruct the hours he  
18 worked. For instance, to recount the hours he devoted to

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19  
20 <sup>1</sup> Block billing is a time-keeping method where an attorney  
21 enters the total daily time spent working on a case, rather than  
22 itemizing the time spent on a specific task. See Mendez v. Cnty.  
23 of San Bernardino, 540 F.3d 1109, 1129 n.2 (9th Cir. 2008); see  
also Christian Research Inst. v. Alnor, 165 Cal. App. 4th 1315,  
1325 (2008).

24 <sup>2</sup> Despite being put on notice by Magistrate Judge Donna Ryu at  
25 a January 27, 2011 hearing that his lack of time records may pose  
26 difficulties in evaluating Plaintiff's fee award, Mr. Jaffe  
27 continues to decline to maintain such records. In a Second  
28 Supplemental Declaration, intended to support Plaintiff's request  
for fees incurred in litigating her fee request, Mr. Jaffe relies  
on the number of documents filed in this action to substantiate the  
seventy-six hours he claims he has worked since September 29, 2010.  
As noted above, the number of documents filed in an action offers  
limited insight into to the reasonableness of the hours worked.

1 depositions, Mr. Jaffe resorted to reviewing deposition  
2 transcripts, which indicate the hours during which the deposition  
3 took place. Using a similar method, Mr. Jaffe may rely on  
4 documents providing an objective recount of time, such as the  
5 Clerk's Trial Sheet (Docket No. 134) or the trial transcript, to  
6 establish the number of hours he worked with respect to trial. Mr.  
7 Jaffe may add to this figure an estimate of the number of hours he  
8 spent preparing, so long as that estimate is reasonable.  
9 Reconstructions shall contain specific dates and indicate, in some  
10 form, the particular nature of the tasks performed. Although this  
11 reconstruction will undoubtedly take time, Plaintiff shall not  
12 recover from UPS fees related to this task; this additional work  
13 results from Mr. Jaffe's failure to substantiate his hours, which  
14 is not attributable to UPS.

15 B. Susan Jaffe

16 Susan Jaffe, a paralegal who worked on Plaintiff's case, does  
17 not offer any time records or make any effort to reconstruct the  
18 hours she worked. The only evidence of her work is Mr. Jaffe's  
19 representation that she assisted in trial preparation and attended  
20 the trial, which amounted to "465 hours of service." Jaffe Decl.

21 ¶ 34. Trial in this action consisted of seven days of presentation  
22 and one day of jury deliberations. By comparison, in Campbell, an  
23 employment discrimination case that entailed a twelve-day trial,  
24 the plaintiff sought fees for 105.40 hours worked by paralegals.  
25 Case No. C 05-5434 CW, Docket No. 268-11, at 1.

26 Without any time records or reconstruction of hours worked, it  
27 is impossible for the Court to determine whether Ms. Jaffe's hours  
28 were reasonable. Accordingly, to recover Ms. Jaffe's fees,



1 Plaintiff shall proffer Ms. Jaffe's time records. If Ms. Jaffe  
2 does not have time records, she may reconstruct the time she worked  
3 using a reliable methodology based on verifiable evidence. For  
4 example, if she attended every hour of trial, she could say so, and  
5 substantiate the hours from the Clerk's Trial Sheet (Docket No.  
6 134) or trial transcript. Although any reconstruction will  
7 undoubtedly take time, Plaintiff shall not recover from UPS fees  
8 related to this task.

9 CONCLUSION

10 For the foregoing reasons, the Court allows further  
11 submissions on Plaintiff's motion for attorneys' fees and costs.  
12 (Docket No. 184.)

13 Within fourteen days of the date of this Order, Plaintiff may  
14 tender additional evidence to support the reasonableness of Mr.  
15 Jaffe's hourly rate. In addition, she may proffer evidence  
16 supporting the reasonableness of the hours billed by Mr. and Ms.  
17 Jaffe. Along with this evidence, Plaintiff may include  
18 documentation regarding fees incurred to litigate her fee request.  
19 She may not, however, recover fees related to curing deficiencies  
20 related to her fee request. Fourteen days after Plaintiff files  
21 her supplemental material, UPS may file a brief, not to exceed ten  
22 pages, containing its objections, if any. Seven days thereafter,  
23 if necessary, Plaintiff may reply in a brief not to exceed ten  
24 pages.

25 The parties shall not brief any issue not related to the  
26 reasonableness of Mr. Jaffe's hourly rate or the reasonableness of  
27 the number of hours worked by Mr. and Ms. Jaffe. The failure to  
28 abide by this direction will result in the striking of the

1 offending party's submission in its entirety.

2 IT IS SO ORDERED.

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4 Dated: March 25, 2011

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CLAUDIA WILKEN  
United States District Judge