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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ANTONELLA MADDALENA,

9 Plaintiff,

10 v.

11 VALVE CORPORATION,

12 Defendant.

C16-1166 TSZ

ORDER

13 THIS MATTER comes before the Court on Plaintiff's Motion to Recover
14 Attorney Fees, docket no. 147 ("Plaintiff's Motion"), and Defendant Valve Corporation's
15 Motion for Award of Attorney's Fees, docket no. 151 ("Defendant's Motion"). Having
16 reviewed all papers filed in support of, and in opposition to, the motions, the Court enters
17 the following order.

18 **Background**

19 Plaintiff brought suit alleging eight claims: (1) wrongful termination in violation
20 of public policy; (2) discrimination; (3) failure to accommodate; (4) hostile work
21 environment; (5) retaliation; (6) unpaid wages under California Labor Code § 203;
22 (7) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code
23

1 § 17200, *et seq.*; and (8) misclassification under California Labor Code § 226.8. *See*
2 *generally* Complaint, docket no. 1-1.

3 On July 27, 2017, Defendant moved for partial summary judgment on all of
4 Plaintiff's claims, except for causes of action six and seven. *See* Defendant's Motion for
5 Partial Summary Judgment, docket no. 60, at 2. On September 20, 2017, the Court
6 granted Defendant summary judgment on Plaintiff's failure to accommodate, hostile
7 work environment, retaliation, and misclassification claims. Docket no. 89. The Court
8 denied Defendant's request for summary judgment on Plaintiff's wrongful termination
9 and discrimination claims. *Id.*

10 On September 25, 2017, Defendant tendered a check to Plaintiff "in the amount of
11 \$51,243.14, the exact amount Plaintiff claimed was owed to her in unpaid overtime
12 wages and associated interest" Declaration of Liam Lavery, docket no. 154
13 ("Lavery Decl."), at ¶ 4. "[Defendant] explained to Plaintiff that while it did not intend
14 to admit that she was an employee entitled to overtime wages, it intended to moot her
15 Labor Code and Unfair Competition Law claims by providing her with all of the relief to
16 which she would be entitled if she prevailed on those claims. To complete her recovery,
17 [Defendant] also agreed to pay Plaintiff's reasonable attorneys' fees solely in connection
18 with her unpaid wages claim in an amount to be determined by the Court." *Id.* at ¶ 6.
19 Plaintiff accepted and deposited the check, but maintained that her unpaid wages and
20 UCL claims were not moot. *Id.* at ¶¶ 8-9.

1 Trial commenced on November 1, 2017, and Defendant ultimately prevailed on
2 Plaintiff's remaining claims for wrongful termination, discrimination, unpaid wages, and
3 UCL claims. *See* Jury Verdict, docket no. 145.

4 Against this backdrop, Plaintiff asserts that she is entitled to reasonable attorney's
5 fees incurred in prosecuting her unpaid wages claim, but does not identify any legal basis
6 for the recovery of those fees. Defendant, in turn, seeks fees under FEHA and the
7 parties' "Independent Contractor Agreement" at issue in this lawsuit. Declaration of
8 Laurence A. Shapero in Support of Valve's Motion for Attorney's Fees, docket no. 152
9 ("Shapero Decl."), Exhibit E (the "Agreement"). Defendant specifically asserts that
10 "Plaintiff's wrongful termination, discrimination, failure to accommodate, and retaliation
11 [claims] all arise under or are underpinned by FEHA [collectively, the 'FEHA Claims'].
12 Plaintiff's remaining claims—unpaid wages § 203, violation of UCL, and
13 misclassification under § 226.8—all arise out of the parties' Agreement [collectively, the
14 'Non-FEHA Claims']." Defendant's Motion at 3.

15 **Discussion**

16 **1. Legal Standards**

17 Federal courts sitting in diversity apply state law in determining a party's right to
18 recover fees. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

19 **a. Fees Under FEHA**

20 "A district court has discretion to award attorney fees to a prevailing defendant in
21 a FEHA action 'upon a finding that the plaintiff's action was frivolous, unreasonable, or
22 without foundation [i.e., groundless].'" *Zaman v. Kelly Servs.*, No. 15-cv-04601-HRL,

1 2017 WL 2335601, at * 3 (N.D. Cal. May 30, 2017) (alteration in original) (quoting
2 *Christianburg Garment Co. v. Equal Emp’t Opportunity Comm’n*, 434 U.S. 412, 42–22
3 (1978)). In determining whether a FEHA action is frivolous for purposes of a fee award,
4 the Court considers whether (1) the plaintiff established her prima facie case; (2)
5 defendant offered to settle; and (3) the court dismissed the case before it was tried on the
6 merits. *Portnoy v. Veolia Transp. Servs., Inc.*, No. 2:10–cv–02730–GEB–CKD, 2013
7 WL 4828122, at *1 (E.D. Cal. Sept. 9, 2013) (citing *Lial v. Cnty. of Stanislaus*, No. CV F
8 09–1039 LJO JLT, 2011 WL 92012, at *3 (C.D. Cal. Jan. 11, 2011)). If the Court
9 concludes that the FEHA claims were frivolous, it must then determine when plaintiff
10 should have known that they had become so. *Zaman*, 2017 WL 2335601, at *3.

11 **b. Fees Under the Agreement**

12 The Agreement allows the prevailing party in “any claim or cause of action . . .
13 arising out of or relating to this Agreement . . . to recover . . . all “reasonable attorney’s
14 fees incurred” Agreement at ¶ 14. The Agreement further requires Plaintiff to “bear
15 any and all expenses, including legal and other professional fees, . . . that [Defendant]
16 and/or [Plaintiff] may incur in connection with” any attack or recharacterization of
17 Plaintiff’s independent contractor status. *Id.* at ¶ 3(b).

18 The Agreement is governed by Washington Law. *Id.* at ¶ 14. Washington’s RCW
19 4.84.330 confirms that “[i]n any action on a contract . . . where such contract . . .
20 specifically provides that attorneys’ fees and costs, which are incurred to enforce the
21 provisions of such contract or lease, shall be awarded to one of the parties, the prevailing
22 party . . . shall be entitled to reasonable attorneys’ fees”
23

1 **c. Reasonableness**

2 The Court must ensure that any award is reasonable. *Sealy, Inc. v. Easy Living,*
3 *Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984). In determining the reasonableness of
4 attorney’s fees, courts employ the lodestar approach. *Ketchum v. Moses*, 24 Cal. 4th
5 1122, 1132 (2001). Under the lodestar approach, the Court multiplies the number of
6 hours reasonably spent by a reasonable hourly rate. *See id.* The Court may then adjust
7 this resulting figure up or down to account for the difficulty of the questions involved, the
8 skill displayed in presenting those questions, the extent to which the litigation precluded
9 other employment by the attorneys, and the contingent nature of the fee award. *Id.*

10 **2. Plaintiff’s Request for Fees**

11 Plaintiff argues she is the “prevailing party” on her unpaid wages claim. Although
12 Plaintiff does not identify any legal basis supporting her request for fees, California
13 Labor Code § 218.5 states that “[i]n any action brought for the nonpayment of wages . . .
14 the court shall award reasonable attorney’s fees and costs to the prevailing party”

15 The parties dispute whether Plaintiff was the “prevailing party” on this claim.
16 Defendant tendered the amount of money requested by Plaintiff in her unpaid wages
17 claim under the strategic assumption that it would moot her wages and UCL claims,
18 thereby removing additional issues to be decided by the jury. In doing so, Defendant
19 agreed to pay Plaintiff’s reasonable attorney’s fees in prosecuting her unpaid wages claim
20 in an amount to be determined by this Court. *See Lavery Decl.* at ¶¶ 6–9. Rather than
21 voluntarily dismiss her unpaid wages and UCL claims upon receipt of this payment,
22 Plaintiff pursued these claims at trial and the jury determined that Plaintiff was not
23

1 entitled to recovery. Jury Verdict, docket no. 145. The Court subsequently entered
2 judgment in favor of Defendant and dismissed Plaintiff's remaining claims with
3 prejudice. *See* Judgment in a Civil Case, docket no. 146. Thus, Plaintiff was not the
4 prevailing party on her unpaid wages or UCL claims and is not entitled to fees under
5 California Labor Code § 218.5. Having identified no other basis under which this Court
6 could find that Plaintiff should be awarded fees, Plaintiff's Motion is DENIED.

7 **3. Defendant's Request for Fees**

8 **a. Apportionment**

9 Defendant states it spent 80% of its time defending Plaintiff's FEHA Claims, and
10 20% of its time defending Plaintiff's remaining Non-FEHA Claims. *See id.* at 4 (citing
11 Shapero Decl. at ¶ 13, Exs. A–C). Applying these percentages, Defendant asserts that it
12 is owed \$192,900.42 under FEHA and \$133,882.57 under the Agreement. Defendant
13 Valve Corporation's Reply in Support of Motion for Attorney's Fees, docket no. 163, at
14 1. Thus, Defendant asserts that it is owed a total fee award of \$326,782.99.¹ Plaintiff
15 does not dispute Defendant's apportionment and the Court agrees that these allocations
16 are reasonable for determining what attorney's fees, if any, Defendant is owed.

17 **b. FEHA Claims**

18 Plaintiff's hostile work environment, retaliation, and failure to accommodate
19 claims were not frivolous.² Plaintiff premised her hostile work environment claim on the
20 theory that Defendant's conduct amounted to on-going harassment for purposes of tolling

21 ¹The total of \$192,900.42 and \$133,882.57 is \$326,782.99.

22 ² Defendant's argument to the contrary is troubling. Defendant has not meaningfully reconciled its
23 current position that this case was largely frivolous with the nearly 2,000 hours it spent on this matter.

1 the applicable statute of limitations period and sustaining liability. *See* Plaintiff's
2 Opposition to Defendants' Motion for Partial Summary Judgment, docket no. 71
3 ("Plaintiff's Opposition"), at 16–17. Likewise, Plaintiff asserted her retaliation claim
4 under the theory that Defendant terminated her after reporting allegedly unlawful
5 employment activities (including a purported violation of California's minimum wage
6 law). *See id.* at 6–11. Finally, Plaintiff did not premise her failure to accommodate claim
7 on any of the accommodations she requested while at the company. Instead, she posited
8 that Defendant's refusal to grant her request to return to work in Defendant's Washington
9 offices was a failure to engage in the interactive process. The Court's conclusion that the
10 facts underpinning these claims were insufficient to create genuine issues of material fact
11 does not render these claims frivolous for purposes of awarding fees under FEHA. *See*
12 *Warren v. City of Carlsbad*, 58 F.3d 439, 444 (9th Cir. 1995). It is sufficient that
13 Plaintiff had some evidence to support her position, *see id.*, even though that evidence
14 was ultimately insufficient to establish a prima facie claim. Likewise, Defendant's
15 attempts to settle these claims do not render them frivolous. Plaintiff had a colorable
16 basis to pursue these claims through summary judgment and Defendant's request for
17 attorney's fees in defending them is DENIED.³

22 ³ Defendant apparently concedes that the Agreement does not entitle Defendant to collect the fees it
23 incurred in defending these claims. *See* Motion at 3.

1 **c. Non-FEHA Claims**

2 The Agreement allows Defendant, as the prevailing party, to recover its attorney's
3 fees in defending Plaintiff's remaining claims.⁴ *See also* RCW 4.84.330. As Defendant
4 correctly observes, one of the central issues in these remaining claims was whether
5 Plaintiff was an independent contractor. *See, e.g.,* Verdict, docket no. 145.

6 **i. Lodestar Amount and Hourly Rates**

7 Defendant asks for \$133,882.57 in fees under the Agreement. On pages 10 and 11
8 of Defendant's Motion, Defendant provides the hourly rate charged by each professional
9 who billed time to this matter. *See also* Shapero Decl. at ¶ 25. The Court finds that these
10 rates are reasonable in light of each respective attorney's experience and expertise, and
11 the prevailing market rates. *See id.* at ¶¶ 26–41.

12 **ii. Hours Spent**

13 Defendant presents evidence that the professionals who worked on this case billed
14 a total of 1998 hours over a 19 month period. *Id.* at ¶ 13, Ex. C. Plaintiff's only real
15 dispute with this amount is that certain invoices submitted by Defendant for work billed
16 by K&L Gates have been redacted. *See* Plaintiff's Opposition at 1 n.1, 8. This argument
17 does not bear on Defendant's fee request, as the redacted portions of the K&L Gates
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20 ⁴ Plaintiff's reliance on *Drybread v. Chipain Chiropractic Corp.*, 151 Cal. App. 4th 1063, 1075 (2007) is
21 misplaced. In that case, the plaintiff sublessors dismissed without prejudice a statutory unlawful detainer
22 action and defendant sublessee moved for fees under the sublease. In resolving the defendant's request
23 for fees, the court considered whether California Civil Code § 1717 barred recovery because the unlawful
detainer action was "an action on contract." *Id.* at 1071–72. Here, the issue is not whether some statute
bars Defendant's request for fees (neither party has identified any such statute), but instead whether the
Agreement applies to Plaintiff's claims that proceeded to trial.

invoices appear to be for fees that Defendant is not seeking to recover.⁵ Defendant seeks repayment of the fees incurred by the following K&L Gates attorneys: 1) Martha Dawson; 2) Lori Steidl; 3) Sean Selin; and 4) Matt Collins. *See* Shapero Decl. at ¶¶ 25, 36–39.⁶ Each of these attorney’s time appears on the face of the K&L Gates invoices submitted, along with a description of the work performed and the total amount billed. *See generally* Shapero Decl., Ex. B. If anything, the \$95,743.36 in fees incurred by K&L Gates and sought by Defendant (*see id.* at ¶ 9) is less than the total amount reflected in the unredacted portions of the submitted invoices, which can be broken down as follows:

Invoice No.	M. Dawson	L. Steidl	S. Selin	M. Collins
3328699	\$390.96			
3339979	\$651.60	\$2,001.88		
3351565	\$1,004.55	\$12,797.77	\$814.51	
3360331	\$3,750.32	\$19,268.18		
3375119	\$669.70	\$8,365.00		
3384872	\$133.94	\$571.96		\$250.24
3399739	\$1,808.19	\$6,327.41		
3409856	\$2,544.86	\$9,937.95		
3419783	\$200.91	\$9,258.72		
3431336	\$133.94	\$1,787.42		\$2,001.88
3439486		\$8,937.00		
3448291		\$2,609.60		
Totals:	\$11,288.97	\$81,862.89	\$814.51	\$2,252.12
			Grand Total:	\$96,218.49

⁵ Defendant confirms that it has “excluded 86.2 hours of time entries worth \$25,263.50 recorded by non-attorneys” at K&L Gates. *Id.* at ¶ 21.

⁶ Defendant also seeks repayment of the fees incurred by professionals at Paul Plevin and Fox Rothschild, who incurred \$9,881.00 and \$563,789.50, respectively. Shapero Decl. at ¶¶ 7, 12; *see also id.* at ¶ 13 (“In total, professionals at Paul Plevin, K&L Gates, and Fox Rothschild spent 1,998 hours on this matter and billed \$669,413.86.”) Plaintiff does not appear to challenge the amounts incurred by Paul Plevin or Fox Rothschild professionals. *See* Plaintiff’s Opposition at 8. Applying the apportionment discussed in Section 3a above, 20% of \$669,413.86 is approximately \$133,882.57.

1 *See generally id.*, Ex. B. Whether the redacted portions of these invoices reflect billed
2 time by other timekeepers that was duplicative of other work makes no difference, as
3 Defendant is not seeking to recover those amounts. The Court is satisfied that the
4 discernable portions of the K&L Gates invoices reflect time that was reasonably spent on
5 this litigation and, coupled with the other reductions and apportionments discussed
6 herein, finds that these fees are reasonable.

7 **iii. Lodestar Adjustment**

8 Neither party requests that the \$133,882.57 lodestar amount be adjusted for the
9 “results obtained.” While Defendant skillfully prevailed on each of Plaintiff’s claims, it
10 was faced with relatively routine issues of employment law. Because of these competing
11 considerations, the Court declines to apply any adjustment.

12 **Conclusion**

13 For the foregoing reasons, the Court ORDERS:

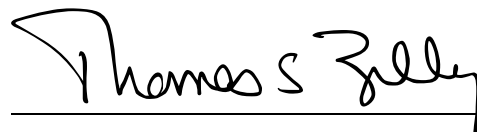
14 (1) Plaintiff’s Motion is DENIED.

15 (2) Defendant’s Motion is GRANTED in part and DENIED in part. The Court
16 awards a total of \$133,882.57 in attorney’s fees to Defendant and against Plaintiff.

17 (3) The Clerk is directed to send a copy of this Order to all counsel of record.

18 IT IS SO ORDERED.

19 Dated this 2nd day of February, 2018.

20 
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22 Thomas S. Zilly
23 United States District Judge