

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN WASHINGTON  
AT

MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
THE AIR FORCE; ET AL.,

Defendants.

No. 06-5195 RBL

**PLAINTIFF'S MOTION FOR  
COSTS**

NOTE ON MOTION CALENDAR:  
OCTOBER 29, 2010

**I. INTRODUCTION**

Pursuant to Local Civil Rule 54(d) and Federal Rule of Civil Procedure 54(d), Plaintiff respectfully moves for disbursement of taxable costs totaling \$17,294.02, as itemized in the attached bill of costs. (Exhibit A of Declaration of Sher Kung ("Kung Decl.") at 5). As a prevailing party under the Equal Access to Justice Act, Plaintiff submits this motion for costs pursuant to 28 U.S.C. § 2412(a)(1988).<sup>1</sup>

**II. PROCEDURAL HISTORY**

Plaintiff filed the complaint in this case on April 12, 2006. (Dkt. No. 1). This court dismissed the suit for failure to state a claim and Plaintiff subsequently appealed to the Ninth

<sup>1</sup> Plaintiff will later seek attorney fees and other expenses under the EAJA within the 30 day time limit prescribed by 28 U.S.C. §2412(d)(1)(B). See *Hoa Hong Van v. Barnhart*, 483 F.3d 600, 612 (9th Cir. 2007). Plaintiff brings her motion for costs out of caution now in order to comply with the time limit under Local Rule 54(d).

1 Circuit. On May 21, 2008, the Ninth Circuit affirmed the dismissal of Plaintiff's equal  
2 protection clause claim, but vacated the court's dismissal of both the substantive due process and  
3 procedural due process claims, and remanded for trial on those claims.

4 On September 2, 2009, this court issued a minute order setting trial and pre-trial dates.  
5 (Dkt. No. 54). Trial was held over six days in federal court of the Western District of  
6 Washington from September 13, 2010 to September 21, 2010. Judgment in favor of Plaintiff  
7 was entered on September 24, 2010. (Dkt. No. 166).

### 8 **III. ARGUMENT**

#### 9 **1. Legal Standard**

10 Federal Rule of Civil Procedure 54 provides that costs should be allowed to the  
11 prevailing party, but "costs against the United States, its officers, and its agencies may be  
12 imposed only to the extent allowed by law." Fed. R. Civ. P. 54(d)(1). Section 2412(a) of the  
13 Equal Access to Justice Act ("EAJA") provides the authority to award costs "as enumerated in  
14 section 1920 of this title, but not including the fees and expenses of attorneys" to the prevailing  
15 party in any civil action brought against the United States. 28 U.S.C. § 2412 (1998). Section  
16 1920 governs the taxation of costs as follows:

17 A judge or clerk of any court of the United States may tax as costs the following:

- 18 (1) Fees of the clerk and marshal;
- 19 (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in  
20 the case;
- 21 (3) Fees and disbursements for printing and witnesses;
- 22 (4) Fees for exemplification and the costs of making copies of any materials where the  
23 copies are necessarily obtained for use in the case;
- 24 (5) Docket fees under section 1923 of this title;
- 25 (6) Compensation of court appointed experts, compensation of interpreters, and salaries,  
26 fees, expenses, and costs of special interpretation services under section 1828 of this  
27 title.

28 28 U.S.C. § 1920 (2008).  
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1 The Supreme Court has held that section 1920 enumerates the items that a federal court  
2 may tax as a cost, thereby restricting the court’s discretion to tax costs. *See Crawford Fitting Co.*  
3 *v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987). However, even after *Crawford*, “the Ninth  
4 Circuit has specifically held that explicit enumeration in § 1920 is not a prerequisite to allowance  
5 of a cost, reasoning that “courts are free to interpret what constitutes taxable costs” under the  
6 statute.” *Lahrichi v. Lumera Corp.*, 2007 WL 1521222, \*8 (W.D. Wash. May 22, 2007), *citing*  
7 *Alflex Corp. v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 177 (9th Cir. 1990).

## 8 **2. Plaintiff is Entitled to Statutory Costs as a Prevailing Party Against Defendants**

9 A prevailing party is “one who has been awarded some relief by the court.” *Buckhannon*  
10 *Bd. and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598  
11 (2001); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (finding plaintiffs to be  
12 prevailing parties “if they succeed on any significant issue in litigation which achieves some of  
13 the benefit the parties sought in bringing suit.”) Here, Plaintiff is a prevailing party under the  
14 EAJA because judgment in this case, regarding her primary substantive due process claim, was  
15 entered in her favor on September 24, 2010. Plaintiff thus moves for costs under section 2412(a)  
16 of the EAJA for costs incurred in litigating this case in district court.

### 17 a. Filing Fees

18 Pursuant to section 1920(1), Plaintiff seeks disbursement of \$350 for filing fees in this  
19 court. (Kung Decl. Ex. B at 7).

### 20 b. Deposition Transcripts

21 The cost of deposition transcripts as well as copies of depositions taken by the opposing  
22 party is encompassed by section 1920(2), so long as considered necessary. *See Alflex*, 914 F.2d  
23 at 177-78; *see also Independent Iron Works Inc. v. United States Steel Corp.*, 322 F.2d 656, 678-  
24 79 (9th Cir. 1963); *cert denied*, 375 U.S. 922 (1963).

25 Plaintiff seeks disbursement of costs totaling \$9,593.74, for 14 deposition transcripts,  
26 which consist of original transcripts and copies. (Kung Decl. Ex. C at 10). Handling and  
27 delivery charges are also included, as encompassed under section 1920(2). *See Lahrichi*, 2007  
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1 WL 1521222 at\*8; *Denton v. DaimlerChrysler Corp.*, 645 F. Supp. 2d 1215, 1227 (N.D. Ga.  
2 2009).

3 The deposition transcripts of testifying servicemembers, Captain Jill Robinson, Captain  
4 Edmond Hrivnak, and Master Sergeant Stacey Julian, were necessarily obtained in order to  
5 prepare Plaintiff's case and prepare the witnesses for testimony and cross-examination at trial.  
6 The transcripts of party defendants in their official capacity, both Colonel Mary Walker and  
7 Colonel Janette Moore-Harbert, were necessarily obtained to anticipate cross-examination of the  
8 witnesses. Colonel Moore-Harbert was later listed on Defendants' "may call" witness list, thus  
9 counsel actually used her transcript to prepare for cross-examination. Ultimately, excerpts from  
10 both depositions of Walker and Moore-Harbert were admitted into evidence as Plaintiff's  
11 exhibits. (Dkt. No. 167). Similarly, excerpts of the transcript of Major General Eric Crabtree  
12 were also admitted into evidence. (Dkt. No. 167).

13 General Charles E. Stenner was Defendants' key witness in this case, providing the only  
14 testimony to support the government's position. Plaintiff necessarily obtained his deposition  
15 transcript in order to prepare her case, to prepare a rebuttal expert, as well as to use as an  
16 impeachment tool.

17 Likewise, copies of transcripts of depositions noticed by Defendants were necessary in  
18 order to prepare Plaintiff's witnesses for testimony, cross-examination and to anticipate the  
19 scope of impeachment. *See Rashid v. Communications Workers of America*, 2007 WL 315355,  
20 \*6 (S.D. Ohio Jan. 30, 2007); *Board of Directors, Water's Edge v. Anden Group*, 135 F.R.D.  
21 129, 135 (E.D. Va. 1991) (holding that transcripts of prevailing party's own witnesses were  
22 reasonably necessary, therefore taxable, because counsel would use them to prepare the  
23 testimony of its witnesses and to limit their exposure to impeachment). Accordingly, Plaintiff  
24 seeks costs for copies of the transcripts of her own deposition, as well as those of Plaintiff's  
25 experts (Frank, Greenwald, Kier and Laich) who testified in the case and were subject to  
26 extensive cross-examination.

27 Finally, the deposition transcripts of both Lieutenant Colonel Thomas Hansen and  
28 Anthony Loverde, as well as the video recording of Loverde's deposition, were necessarily  
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1 obtained to preserve their testimony, because both individuals were overseas in Afghanistan and  
2 Iraq at the time of trial. Hansen’s deposition was read into the record and subsequently published  
3 (Dkt. No. 153 and 157) and Loverde’s video deposition was played in court (Dkt. No. 154).

4 c. Witnesses

5 Pursuant to section 1920(3) and Local Rule 54(d), Plaintiff seeks disbursement in the  
6 amount of \$3,607.50 for witness transportation and subsistence during trial. The local rules  
7 provide that “attendance, travel, and subsistence fees of witnesses, for actual and proper  
8 attendance, shall be allowed in accordance with 28 U.S.C. § 1821, whether such attendance was  
9 procured by subpoena or was voluntary.” Loc. R. Civ. P. 54(d)(3)(A). Section 1821 restricts per  
10 diem, mileage and subsistence allowances for witnesses, without differentiating between lay and  
11 expert witnesses. 28 U.S.C. § 1821 (1996); *Fowler v. Acosta*, 2008 WL 5213917, \*2 (S.D. Cal.  
12 Dec. 12, 2008).

13 Plaintiff’s bill of costs for witness expenses is itemized by witness. (Kung Decl. Ex. D  
14 at 26). Pursuant to section 1821(c), which allows for disbursement of airfare and transportation  
15 between the airport and hotel, Plaintiff seeks travel costs, and submits receipts of actual costs  
16 incurred by traveling witnesses (Manzella, Kopfstein, Oda<sup>2</sup>, Frank and Laich).

17 Section 1821(d) provides for a subsistence allowance when the court is so far removed  
18 from the witness’ residence as to prohibit day to day return. The subsistence allowance shall  
19 “not exceed the maximum per diem allowance prescribed by the Administrator of General  
20 Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by  
21 employees of the Federal Government.” 28 U.S.C. § 1821(d)(2). According to the U.S. General  
22 Services Administration website, the per diem rates for Tacoma, Washington in the month of  
23 September, 2010, were \$113 for lodging and \$61 for meals and incidental expenses. *See U.S.*  
24 *General Services Admin. Perdiem Rates Overview*, available at  
25 <http://www.gsa.gov/portal/category/21287> (last visited Oct. 13, 2010). The per diem rate does  
26 not include hotel taxes. *Belk, Inc. v. Meyer Corp., U.S.*, 2010 WL 3474918, \*11 (W.D.N.C.  
27 Aug. 31, 2010).

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29 <sup>2</sup> LTC Oda was on weekend duty at McChord AFB immediately prior to trial, thus Plaintiff only submits a one-way  
plane ticket for his return to Utah.

1 Five of Plaintiff's traveling witnesses reside outside of Washington state, thereby making  
2 it impracticable to commute and testify in court without staying overnight in Tacoma. Kopfstein  
3 and Oda traveled from Southern California and Utah respectively. Each testified on September  
4 13 (Dkt. No. 152), thus Plaintiff seeks subsistence for one night of hotel lodging for both  
5 Kopfstein and Oda.<sup>3</sup> Manzella traveled from New York and testified over the course of two  
6 days, September 13 and 14 (Dkt. Nos. 152 and 152). Accordingly, Plaintiff reduces subsistence  
7 costs for Manzella to cover only two nights of hotel stay. Schaffer was Plaintiff's lead witness  
8 on the first day of trial (Dkt. No. 152), thus making it reasonable for him to commute from his  
9 home in Spokane to Tacoma one day prior. Plaintiff seeks one night of hotel expenses for  
10 Schaffer. Frank traveled from New York and testified for nearly the entire day of September 16,  
11 close to five hours (Dkt. No. 155). Given the infrequency of transcontinental flights, and the  
12 length of Frank's testimony, Plaintiff seeks costs for two nights of subsistence in Tacoma for  
13 Frank. Laich traveled from Ohio and testified on September 21 (Dkt. No. 158) as Plaintiff's  
14 rebuttal witness. It was reasonably expected that his testimony may continue into September 22,  
15 given that Plaintiff did not know how many witnesses Defendants were going to call when  
16 putting on their case. Plaintiff thus seeks costs for two nights of subsistence for General Laich.

17 Finally, pursuant to 28 U.S.C. § 1821(a)(1), Plaintiff seeks disbursement of an attendance  
18 fee of \$40 that was paid to Colonel Mary Walker at her deposition.

19 d. Exemplification and Copies

20 The costs of creating exemplifications and copies "necessarily obtained for use in the  
21 case" are taxable under 28 U.S.C. § 1920(4). This subsection includes all types of demonstrative  
22 evidence, such as photographs and graphic aids. *See Maxwell v. Hapag-Lloyd*  
23 *Aktiengesellschaft*, 862 F.2d 767 (9th Cir. 1988).

24 Plaintiff's bill of costs reflecting \$3,742.78 in copying expenditures is attached. (Kung  
25 Decl. Ex. E at 48). These copy costs exclude photocopies made in house. Rather, they include  
26 costs incurred during Plaintiff's document production in discovery, costs of creating exhibit  
27 binders for use at trial and costs of creating exhibit displays for trial.

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29 <sup>3</sup> Plaintiff has reduced the bill of costs to reflect the statutory per diem limitation on hotel charges, thus seeking \$113 per night instead of \$189, the actual rate charged by the hotel.

1 Copying costs that a party incurs during the course of discovery can be properly claimed  
2 under section 1920(4). See *Marbled Murrelet v. Babbitt*, 1999 WL 193387, \*7 (N.D. Cal. Apr.  
3 5, 1999) (awarding \$8,102.78 under section 1920(4) in copying costs attributable to responding  
4 to discovery requests). During the course of discovery, counsel traveled to Plaintiff's residence  
5 in Spokane, Washington, to search for and gather documents responsive to Defendants'  
6 numerous requests for document production. To review the hard copy documents for  
7 responsiveness and to make appropriate redactions, it was necessary for counsel to make copies  
8 of Plaintiff's original documents in Spokane.

9 The second category of copy costs covers eight sets of Plaintiff's trial exhibits ordered  
10 from an outside vendor. Duplication of trial exhibits is taxable under section 1920(4) depending  
11 upon the use of the copies. See *Endress & Hauser, Inc. v. Hawk Measurement Systems Pty. Ltd.*,  
12 922 F. Supp. 158, 163 (S.D. Ind. 1996). The judge's own set, as well as the court copy, were  
13 absolutely necessary. Three additional full sets were necessary for counsel, each of whom  
14 examined witnesses and argued the admissibility of exhibits at trial. Counsel's legal assistant  
15 was also required to have her own set of exhibits in order to effectively put exhibits on the Elmo  
16 during witness testimony. Recognizing that the two additional copies ordered were not  
17 necessary for use in the case, Plaintiff has reduced the bill of costs by 2/8, seeking costs for only  
18 six copies of exhibits.

19 Finally, Plaintiff seeks taxation of the cost in creating two enlargements of exhibits used  
20 at trial. These enlargements were displayed during the first day of trial, and were referenced by  
21 Plaintiff's counsel in her opening statement. One image portrayed Plaintiff in uniform—a  
22 depiction to capture her service in the military. The other enlargement was a life-size duplication  
23 that depicted two aircrafts used in Aeromedical Evacuation—showing the numerous signatures  
24 of fellow servicemembers in actual size. This exhibit was referenced by counsel as well as  
25 SMSgt Schaffer during his testimony, significantly illustrating the squadron's informal  
26 recognition of Plaintiff and her value to the unit, despite her discharge.  
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**IV. CONCLUSION**

For the reasons stated above, the court should tax Plaintiff's submitted bill of costs, which Plaintiff has reduced from the actual costs incurred, and order disbursement of costs.

DATED this 14th day of October, 2010.

Respectfully submitted,  
ACLU OF WASHINGTON FOUNDATION

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2010, I electronically filed *Plaintiff's Motion for Costs* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 14th day of October, 2010.

AMERICAN CIVIL LIBERTIES UNION OF  
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