

1 Judge Ronald B. Leighton

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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10 MAJOR MARGARET WITT)

11 Plaintiff,)

No. C06-5195 RBL

12 v.)

**OPPOSITION TO PLAINTIFF'S
MOTION FOR COSTS**

13 UNITED STATES DEPARTMENT OF)
THE AIR FORCE, et al.)

14 Defendants.)

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INTRODUCTION

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20 Plaintiff has moved for taxation of costs pursuant to Local Rule 54(d) and Federal Rule
21 of Civil Procedure 54(d)(1) as the "prevailing party" in this action. Defendants respectfully
22 request the Court hold plaintiff's motion for costs in abeyance pending final resolution of this
23 matter. Defendants' time for noticing an appeal of the Court's September 24, 2010 decision does
24 not expire until November 23, 2010, and, accordingly, this matter has not been finally resolved
25 in plaintiff's favor. Should the Clerk decide plaintiff's motion for costs prior to the final
26 resolution of this case, the Clerk should reduce the amount of costs sought by plaintiff by
27 \$2,959.77 for the reasons stated below.

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2 **PROCEDURAL HISTORY**

3 Plaintiff filed her complaint in this case on April 12, 2006, alleging that defendants
4 violated her procedural due process, substantive due process, equal protection, and first
5 amendment rights. Compl. ¶¶ 32-33 (Docket No. 1). Plaintiff sought, *inter alia*, a preliminary
6 injunction preventing her discharge from the U.S. Air Force Reserve.

7 On July 26, 2006, this Court granted defendants' Motion to Dismiss this action in its
8 entirety. Order of July 26, 2006 (Docket No. 35). Plaintiff appealed that decision and, on May
9 21, 2008, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of
10 plaintiff's equal protection claim and vacated and remanded this Court's judgment with regard to
11 plaintiff's substantive and procedural due process claims.¹ *Witt v. Dep't of Air Force*, 527 F.3d
12 806, 822 (9th Cir. 2008).

13 On remand, following a full trial on the merits, this Court rejected plaintiff's procedural
14 due process claim and granted plaintiff's request for relief with respect to her substantive due
15 process claim. *See* Mem. Op. dated Sept. 24, 2010 (Docket No. 163). Defendants have 60 days
16 to appeal the Court's decision. *See* Fed. R. App. P. 4(a)(1)(B).

17 **ARGUMENT**

18 **I. The Court Should Hold Plaintiff's Motion for Costs in Abeyance Pending Final**
19 **Resolution of this Case.**

20 Federal Rule of Civil Procedure 54(d)(1) provides for the awarding of costs other than
21 attorney's fees to the "prevailing party." Typically, a prevailing party is one who has received
22 some relief from the court on the merits of one or more claim. *See Jordan v. U.S. Dep't of*
23 *Labor*, No. CV-07-5011-EFS, 2007 WL 2743482, at *4 (E.D. Wash. Sept. 17, 2007). Here,
24 defendants' time for noticing an appeal of the Court's September 24, 2010 decision has not yet
25 expired. Thus, although plaintiff received relief from the Court pursuant to her substantive due
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28 ¹ Plaintiff made no First Amendment argument before the Ninth Circuit, and thus abandoned that
claim. *See generally* Brief of Appellant, *Witt v. Dep't of Air Force*, No. 06-35644 (9th Cir. Oct. 16,
2006).

1 process claim, this matter has not been finally resolved in plaintiff’s favor. “[A] determination
2 of who is the prevailing party for purposes of awarding costs should not depend on the position
3 of the parties at each stage in the litigation but should be made when the controversy is finally
4 decided.” 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2667 (3d ed. 1998).
5 Accordingly, defendants request that plaintiff’s motion for costs be held in abeyance until this
6 action has been finally resolved

7 **II. Plaintiff Is Not Entitled to the Full Amount of Costs Sought.**

8 Federal Rule of Civil Procedure 54(d)(1) provides that “[u]nless a federal statute, these
9 rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to
10 the prevailing party. But costs against the United States, its officers, and its agencies may be
11 imposed only to the extent allowed by law.” Section 1920 of Title 28 of the United States Code
12 identifies allowable costs as follows:

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

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

24 28 U.S.C.A. § 1920.

25 Plaintiff is not entitled to the full amount of costs she seeks under subsections (2) and (4)
26 of section 1920. Defendants request the Clerk reduce the total taxable costs in the amount of
27 \$2,959.77.

28 **A. Fees Sought Pursuant to 28 U.S.C. § 1920(2).**

Defendants should not be taxed the cost plaintiff incurred by obtaining a video-taped
copy of the deposition of Anthony Loverde. Subsection 1920(2) allows for the taxation of costs
only for transcripts “necessarily obtained” for use in the litigation. Plaintiff seeks to recover
costs associated with 14 depositions. *See* Kung Decl., Ex. C (Docket No. 177-1 at 7). With
respect to one of those depositions—the Loverde deposition—plaintiff seeks to be reimbursed for

1 the cost of both the original written transcript of the deposition as well as the video-taped
2 recording of the deposition. *Id.* at 20. Plaintiff's request is contrary to case law acknowledging
3 that video-recorded depositions are unnecessary where a deposition has already been
4 stenographically recorded. For instance, a court has held that "allowing recovery of the cost
5 incurred for both the court reporter's transcript and a separate videographic record of depositions
6 duplicates deposition costs without purpose." *Pullela v. Intel Corp.*, No. CV 08-1427-AC, 2010
7 WL 3361089, *3 (D. Or. Aug. 25, 2010).

8 Here, the Court specifically acknowledged that the video-tape of the Loverde deposition
9 was not necessary for the Court's consideration of the issues at trial. Rough Draft Transcript of
10 Proceedings² at 154:6-9 (Sept. 14, 2010) (stating that the playing of the video-tape "is not
11 necessary" and "[t]o be sure, you don't need to do this at all") (attached at Ex. A). Indeed, after
12 the opening portion of the video-tape had been played, the Court questioned plaintiff's counsel
13 as to whether playing the remaining portion of the video-tape was necessary, to which plaintiff's
14 counsel responded, "The video, I confidently [*sic*] say no we don't need to do that." Rough
15 Draft Transcript of Proceedings at 179:18-21 (Sept. 20, 2010) (attached as Ex. A). Accordingly,
16 defendants request that the amount plaintiff seeks pursuant to subsection 1920(2) be reduced by
17 \$622.00, the cost of video-taping the Loverde deposition. *See* Kung Decl., Ex. C (Docket No.
18 177-1 at 20).

19 **B. Fees Sought Pursuant to 28 U.S.C. § 1920(4).**

20 Defendants should not be taxed the costs plaintiff incurred by obtaining excess copies of
21 plaintiff's exhibit binders, nor should defendants be taxed the costs plaintiff incurred in enlarging
22 certain exhibits. Subsection 1920(4) allows for the taxation of costs for exemplification and
23 copying of only those materials that are "necessarily obtained" for use in the litigation. Because
24 six total sets of trial exhibits binders and enlargements of two separate photographs were

25 ² The court reporter has not completed the final certified copy of the trial proceedings at the time of
26 the filing of this document. Accordingly, defendants have cited to the Rough Draft Transcript where
27 necessary.
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1 unnecessary, plaintiff's request should be reduced.

2 With respect to the copying of exhibits, plaintiff admits that only 2 sets of her exhibit
3 binders—the Judge's own set and a court copy—were “absolutely necessary.” Pl.'s Mot. for Costs
4 at 7 (Docket No. 176). Plaintiff, however, attempts to tax defendants for the cost of six total sets
5 of exhibit binders, at a cost of \$579.69 per set. Plaintiff's recovery should be limited to the two
6 sets of exhibit binders that were necessary for the litigation. Accordingly, plaintiff's copying
7 fees should be reduced by \$2,318.76, the cost of the extraneous four sets of exhibit binders.

8 Plaintiff's enlargement of two photographs—one of plaintiff in uniform and another of a
9 picture plaintiff received at a co-worker's retirement party—was also unnecessary. These exhibits
10 were included in the exhibit binders available to the court, and nothing in the litigation required
11 that they be displayed in an enlarged format. Accordingly, the Clerk should further reduce the
12 amount of costs sought by \$19.01, the amount incurred by plaintiff in enlarging these exhibits.
13 *See King v. Kalama School Dist. No. 402*, No. C05-5675RBL, 2008 WL 110518, at *2 (W.D.
14 Wash. Jan. 7, 2008) (finding blow-up exhibits to be unnecessary).

15 CONCLUSION

16 For the forgoing reasons, the Clerk should hold plaintiff's motion for costs in abeyance
17 pending final resolution of this matter, or, in the alternative, should reduce plaintiff's request for
18 costs by \$2,959.77.

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Dated: October 25, 2010

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, I electronically filed the foregoing Defendants' Opposition to Plaintiff's Motion for Costs with the Clerk of the Court using the CM/ECF system which I understand will send notification of such filing to the following persons:

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