IN THE SUPREME COURT OF IOWA

No. 16–1884

Filed January 12, 2018

Amended January 16, 2018

TINA ELIZABETH LEE,

Appellant,

vs.

THE STATE OF IOWA and **THE POLK COUNTY CLERK OF COURT,**

Appellees.

Appeal from the Iowa District Court for Polk County, James M. Richardson, Judge.

A plaintiff appeals an attorney fee and expense award. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Paige Fiedler and Brooke Timmer of Fiedler & Timmer, PLLC, for appellant.

Thomas J. Miller, Attorney General, Jeffrey S. Thompson, Solicitor General, David M. Ranscht and Jeffrey Peterzalek, Assistant Attorneys General, for appellee.

WIGGINS, Justice.

This case is before us for the fourth time on appeal. *See Lee v. State* (*Lee I*), 815 N.W.2d 731 (Iowa 2012); *Lee v. State* (*Lee II*), 844 N.W.2d 668 (Iowa 2014); *Lee v. State* (*Lee III*), 874 N.W.2d 631 (Iowa 2016). In this appeal, the plaintiff contests the most recent fee and expense award entered by the district court. In our review of the record, we find the district court did not abuse its discretion by using the plaintiff's attorneys' current hourly rates or by using the percentage reduction method to reduce the total requested fees and expenses. However, we find the district court abused its discretion in the manner it used the percentage reduction method. We also find the district court abused its discretion by not awarding the plaintiff any of the expenses she requested in her application for fees and expenses. We therefore reverse the latest order of the district court awarding plaintiff her attorney fees and expenses.

We exercise our discretion to decide this case on appeal rather than remand it to the district court for further proceedings regarding fees and expenses because of the protracted history of this case. For the reasons stated in this opinion, we set the fee award at $241,700.05 and the expense award at $5664.10. We remand the case to the district court for the sole purpose of entering judgment consistent with these awards.

I. Background Facts and Proceedings.

Tina Lee worked for the Polk County clerk of court beginning in 1981 until her termination in November 2004 after taking leave pursuant to the Family Medical Leave Act (FMLA) to treat her anxiety disorder. On January 3, 2006, Lee filed suit against the State of Iowa and the Polk

County clerk of court,[1] alleging violation of her statutory rights under 29 U.S.C § 2612(a)(1)(D) (2000),[2] the self-care provision of the FMLA. The State filed a motion for summary judgment alleging sovereign immunity. The district court denied the motion.

On September 13, 2007, the jury returned a verdict in favor of Lee and against the State on her wrongful discharge and retaliation claims. The jury found Lee suffered $165,122 in damages in lost past earnings. Additionally, the jury issued a special verdict recommending the Polk County clerk of court's office to receive FMLA training and additional training regarding awareness of mental health. On September 18, the district court entered judgment awarding $165,122 in backpay, plus interest at the legal rate.

The State filed a motion for judgment notwithstanding the verdict and, in the alternative, a motion for new trial. Lee filed a motion for reinstatement and other equitable relief, additional judgment for liquidated damages, and fees and expenses.

In October 2007, the district court entered judgment overruling the State's motions. The district court awarded Lee reinstatement; backpay damages as determined by the jury plus prejudgment interest for a total of $184,249.71; liquidated damages in an amount equal to the jury verdict and prejudgment interest for a total of $184,249.71; lost wages and benefits in the amount of $1146.47 per workweek from September 15, 2007, to the date of actual reinstatement; $68,109.75 in

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[1]Going forward, we refer to the State of Iowa and the Polk County clerk of court collectively as the State.

[2]The FMLA entitles "an eligible employee . . . to a total of 12 workweeks of leave during any 12-month period" for a number of reasons, one of them concerning "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D).

fees and $5734.46 in expenses for a total of $73,844.21; and postjudgment interest at the legal rate. The court used the 2007 hourly rates of Lee's attorneys when awarding the fees. For purposes of Iowa Public Employees Retirement System (IPERS) and FMLA benefits, the court ordered the State to credit Lee for years of employment as if the State had never terminated her.

In November, the State appealed the jury verdict and the district court's October 2007 order. Later that month, the State moved to stay all proceedings pending appeal without filing a supersedeas bond. In its motion to stay, the State promised to make Lee whole again by paying the judgment, plus any amounts owed to her during the time she should have been reinstated and when she is reinstated, on the condition that this court affirms the October 2007 order. Lee agreed to stay collection of the monetary judgment but requested the district court to compel her reinstatement. In January 2008, the district court denied the State's motion to stay the reinstatement and ordered the State to immediately reinstate Lee because delaying her return to work any further would cause significant harm to her in terms of receipt of salary and benefits.

On February 6, Lee filed a second supplemental motion for fees and expenses. Later that month, the State requested us to stay Lee's reinstatement pending its appeal. In March, the district court granted Lee's second supplemental motion, awarding Lee $8303.40 in fees and expenses incurred from October 2, 2007, through February 18, 2008.

We granted the State's motion to stay and transferred the case to our court of appeals. The court of appeals affirmed the judgment of the district court. We granted the State's application for further review but held the case in abeyance pending a decision by the United States Supreme Court in *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30,

132 S. Ct. 1327 (2012), on the issue of whether the self-care provision of the FMLA abrogated sovereign immunity.

We considered the State's appeal in *Lee I*, in which we held state employees alleging violations of the self-care provision of the FMLA could not sue the state for monetary relief because sovereign immunity cloaked the state from suit. *Lee I*, 815 N.W.2d at 743. However, we also held state employees could seek *Ex parte Young*[3] injunctive relief against the state official who wrongfully denied them self-care leave. *Id.* We concluded "the [October 2007] judgment entered by the district court was predicated on legal error" and "the noninjunctive relief granted in the judgment cannot stand." *Id.* As a result, we vacated the judgment of the court of appeals, reversed the judgment of the district court, and remanded the case "to determine what relief granted in [the district court's October 2007] judgment is still available to Lee within the framework of this lawsuit, findings of the jury at trial, and the cloak of immunity protecting the State." *Id.*

On remand, Lee filed a motion to enforce the October 2007 award of injunctive relief. She argued the State had waived sovereign immunity by promising it would pay her lost wages and benefits from the time the district court originally ordered her reinstatement on the condition that *Lee I* affirmed the reinstatement order. In resisting Lee's motion, the State contended Lee failed to name any state official in her original action, questioned whether lost wages and benefits constituted prospective relief, and argued it had not waived sovereign immunity.

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[3]In *Ex parte Young*, the United States Supreme Court held state sovereign immunity does not cloak state officials acting in their official capacities from suits in which parties seek prospective injunctive relief. *Ex parte Young*, 209 U.S. 123, 159–60, 28 S. Ct. 441, 454 (1908).

In October 2012, the district court granted Lee's motion. It ordered the State to not only immediately reinstate Lee but also pay her lost wages and benefits from October 26, 2007, to the date of actual reinstatement in the amount of $1146.67 per workweek; provide her IPERS and FMLA benefits credits as if the State had never terminated her; and pay postjudgment interest at the legal rate. The October 2012 order did not mention fees and expenses.

The State appealed once again. We considered the State's second appeal to this court in *Lee II*. In affirming the district court's October 2012 order, we held October 29, 2007,[4] is the date from which prospective relief is properly determined. *Lee II*, 844 N.W.2d at 684. We agreed with Lee the State waived its objection to paying lost wages and benefits from October 29, 2007, when it obtained a stay of Lee's reinstatement by assuring us it would make Lee whole if *Lee I* affirmed the district court's October 2007 order. *Id.* at 681. We reasoned the State was "technically correct that *Lee I* did not 'affirm' the district court's 2007 judgment." *Id.* However, we stated *Lee I* "specifically held only the 'noninjunctive relief granted in the judgment cannot stand.' " *Id.* Thus, the October 2012 order "correctly concluded the 2007 reinstatement order is relief granted . . . that is still available to Lee." *Id.* at 681–82.

When the State refused to pay any of the fees or expenses, Lee filed a third supplemental motion for attorney fees. Lee sought enforcement of the October 2007 and March 2008 orders by requesting the district

[4]The October 2012 order stated October 26, 2007, is the date from which lost wages and benefits should be calculated. However, while the district court entered its judgment on October 26, it did not file it until October 29. *See* Iowa R. Civ. P. 1.453 (stating orders are not effective until filed).

court to order the State to pay the fees and expenses specified in the orders: $73,844.21 plus interest from the October 2007 order and $8303.40 plus interest from the March 2008 order. Lee requested an additional $135,054.98 calculated at 2014 hourly rates for fees and expenses she incurred since February 18, 2008. Lee argued in the alternative that if the State did not agree with the enforceability of the prior judgments, then the district court should add those fees and expenses to the new judgment at current hourly rates.

The State resisted, arguing *Lee I* vacated the October 2007 and March 2008 orders and contending *Ex parte Young*, not the FMLA, allowed for an injunctive award. Lee filed a statement of additional fees and expenses, requesting $142,163.78 in fees and $4903.87 in expenses, for a total of $147,067.65 calculated at the 2014 hourly rates in addition to the October 2007 and March 2008 awards. We note Lee incorporated the previous request of $135,054.98 into the new figure of $147,067.65. Lee alternatively argued for a judgment against the State for all her fees and expenses incurred in the case calculated at current hourly rates.

On June 27,[5] the district entered judgment granting Lee's third supplemental motion for fees and expenses, awarding $141,038.78 in fees and $4903.87 in expenses incurred since February 18, 2008, for a total of $145,942.65. As for the October 2007 and March 2008 orders awarding fees and expenses, the court held they remain in force. The court did not raise the October 2007 and March 2008 awards to reflect the 2014 hourly rates of Lee's attorneys.

[5]The district court entered its judgment on June 27, 2014, but did not file it until July 17, 2014. Although we go by the filing date, we referred to this order as the June 2014 order in *Lee III*. For the sake of consistency, we will do the same here.

The State appealed for the third time. In *Lee III*, we decided Lee was entitled to an award of fees and expenses that she had incurred in seeking prospective relief, but not retroactive relief, against the State for violations of the self-care provision of the FMLA. *Lee III*, 874 N.W.2d at 648–50. Thus, we held the district court erred in awarding all of her fees and expenses because Lee incurred some of them in relation to her unsuccessful pursuit of retroactive relief. *Id.* We remanded the case with instructions to grant an award consistent with prior caselaw but excluding "fees and costs Lee incurred in proving aspects of her claims for retroactive relief that were wholly unrelated to the common core of facts or legal theories establishing her entitlement to prospective relief." *Id.* at 650. We also instructed the district court to enter an award "in accordance with the principles [governing fee awards] set forth in this opinion." *Id.*

On July 12, 2016, Lee filed an application for fees and expenses as well as a brief in support of her application. This application requested fees at present hourly rates for all the work Lee's attorneys had done in this case dating back to March 2005. Lee included a fee report that broke down the unbilled 7.1 hours for time spent on retroactive relief and the billed 967.28 hours for time expended on prospective relief as well as the applicable unbilled amount ($4963.75) and billed amount ($356,063.25). Lee alternatively argued if the district court cuts the fees by a particular percentage, it should reduce only by one percent from the amount of $361,027, which includes both the billed and unbilled amounts. As for the expenses, Lee requested the court to order the State to reimburse her for all of the expenses, totaling $13,707.72.

In its August 22 resistance, the State proposed a forty-percent reduction in fees to account for partial success. The State also objected

to Lee's expense report, arguing Lee should not recover costs related to the first and third appeals, and the Westlaw charges. Lee filed a reply to the State's resistance. On October 3, Lee filed a supplemental application for fees and expenses, requesting an additional $7032.50 in fees and $143.18 in expenses for amounts incurred after the filing of her July 12 application. Relevant to this appeal, the parties have agreed that this additional total amount stated in Lee's supplemental application is not subject to any reduction because the attorneys did not incur these charges in pursuing retrospective relief.

On October 3, the district court held a hearing to hear the dispute over the amount spent on seeking prospective relief. On October 10, the district court found the work that Lee's attorneys had performed largely centered on a common core of work directed toward obtaining both prospective and retroactive relief. Thus, because "Lee's claims for monetary relief and reinstatement are so intertwined as to make them inseparable," the court stated $361,027 was appropriate as an award of attorney fees.

However, the court concluded *Lee III* required it to reduce a fee award "based on the ultimate result or partial success of a case." In its analysis, the district court divided Lee's claims into five subparts: "(1) sovereign immunity [monetary damages for wrongful discharge]; (2) reinstatement of her employment; (3) reinstatement of employee benefits [IPERS, etc.]; (4) an award of attorney fees and costs; and (5) the amount of attorney fees and costs." The court stated the State succeeded in the first and last areas—the last area constituting the very issue presented before the district court for a resolution—and Lee succeeded in the remaining three areas. Thus, the district court

reasoned, Lee was successful in sixty percent of her claims. The court therefore reduced Lee's requested amount by two-fifths or forty percent.

Applying a forty percent reduction, the court awarded (1) $216,616.20 (i.e., sixty percent of $361,027),[6] (2) the additional requested $7032.50 in fees, and (3) additional requested $143.18 in expenses. Thus, the court awarded a total sum of $223,791.88. The district court wholly omitted consideration of the $13,707.72 of expenses that Lee had requested in her July 12, 2016 application. We note $5134 of the $13,707.72 of expenses was attributable to Westlaw charges.

Lee appeals.

II. Issue.

The only issue we must decide is whether the district court was correct when it awarded Lee's fees and expenses.

III. Scope of Review.

We review challenges to the amount of an attorney fee award for abuse of discretion. *Equity Control Assocs., Ltd. v. Root*, 638 N.W.2d 664, 674 (Iowa 2001). "A court abuses its discretion when the grounds or reasons for the court's decision are 'clearly untenable' or when the court has exercised its discretion to an extent that is 'clearly unreasonable.' " *Id.* (quoting *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Id.* We will presume the district court's discretionary decisions are correct

[6]We recognize Lee requested $356,063.25 in fees in her July 12, 2016 application. This figure does not include the purported 7.1 hours of time spent on pursuing exclusively retroactive relief. However, Lee alternatively argued in her application that a one percent reduction from $361,027 (i.e., $357,416.73) would also be appropriate. The district court used $361,027 as the starting point in calculating the fees.

until the complaining party shows the contrary. *Bremicker v. MCI Telecomm. Corp.*, 420 N.W.2d 427, 428–29 (Iowa 1988).

IV. Whether to Decide the Issue of Fees and Expenses on Appeal or to Remand for Determination.

At oral argument, we asked both parties whether they wanted us to remand to the district court or decide the issue on appeal if we found legal error on the part of the district court. Both parties indicated they did not want us to remand the case if we found the district court erred and requested us to decide the merits on appeal. We agree with the parties' request because of the long history of this case. Thus, we exercise our very narrow discretion to adjust the award at the appellate level. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941 (1983); *see Mims v. Shapp*, 744 F.2d 946, 955 (3d Cir. 1984) ("[W]e find here an overarching consideration—the conservation of judicial resources—that compels us to invoke the narrowest of exceptions to our normal procedures" because "[t]his case has persisted for over ten years in the court system, commanding the attention of three separate district judges, three separate panels of this court, and in one instance, the court *in banc*."). Accordingly, we will decide the merits on appeal rather than remand the case to the district court.

V. Analysis.

Our first task is to decide which expenses claimed by Lee's attorneys are recoverable. After doing so, we will then determine whether the court abused its discretion in awarding Lee her fees.

A. Expenses Claimed. Regarding Lee's expense claim, we find two issues. First, we must decide whether we should reimburse the Westlaw charges claimed in the July 12, 2016 application. Next, we

must address whether we should reimburse the lone Westlaw charge claimed in the October 3, 2016 supplemental application.

1. *Westlaw charges claimed in Lee's application for fees and expenses filed on July 12, 2016.* We are unaware of controlling caselaw in the State of Iowa that discusses computerized legal research charges. In 2006, the Ninth Circuit Court of Appeals summarized the state of the law at that time. There they said,

> We note that there is a circuit split concerning whether expenses for computer-based legal research are compensable as "reasonable attorney's fees." The Eighth Circuit has held that "computer-based legal research must be factored into the attorneys' hourly rate, hence the cost of the computer time may not be added to the fee award." No other circuit has endorsed this view, and many have expressly held that computerized research costs can, in appropriate circumstances, be recovered in addition to the hourly rates of attorneys.
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> We believe that the growing circuit consensus reflects the Supreme Court's treatment of litigation expenses under attorney's fee statutes. Neither tradition nor statutory usage distinguishes computer-based legal research costs from attorney's fees. We therefore hold that reasonable charges for computerized research may be recovered as "attorney's fees" . . . if separate billing for such expenses is "the prevailing practice in the local community."

Trs. of Constr. Indus. & Laborers Health & Welfare Tr. v. Redland Ins., 460 F.3d 1253, 1258–59 (9th Cir. 2006) (citations omitted) (first quoting *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 325 (8th Cir. 1993); then quoting *Missouri v. Jenkins*, 419 U.S. 274, 288 n.9 109 S. Ct. 2463, 2471 n.9 (1989)); *see also* Kurtis A. Kemper, Annotation, *Recovery of Computer-Assisted Research Costs as Part of or in Addition to Attorney's Fees Under Federal Fee-Shifting Statutes*, 28 A.L.R. Fed. 2d 397, 415–16 (2008).

Today, the Eighth Circuit has shifted directions and permits the recovery of computerized legal research as long as "the prevailing party demonstrates that separately billing for [computerized legal research] is the 'prevailing practice in a given community' and that such fees are reasonable." *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 432 (8th Cir. 2017) (quoting *Hernandez v. Bridgestone Ams. Tire Operations, LLC*, 831 F.3d 940, 950 (8th Cir. 2016)). We believe the recovery of computer-assisted legal research is allowable if the requestor's application meets the following two requirements.

First, the party must show that the computer-assisted legal research reasonably relates to the issue at hand. This will require the party to present sufficient information to the court to permit the court to determine the basis for the charge and its relation to the issue or issues in the case. As the party requesting fees and expenses, Lee bears the burden "to prove both that the services were reasonably necessary and that the charges were reasonable in amount." *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). "[T]o ensure that all necessary data is before the court, attorneys are generally required to submit detailed affidavits which itemize their fee claims." *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009) (per curiam) (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975)); *accord Lusk v. Va. Panel Corp.*, 96 F. Supp. 3d 573, 581 (W.D. Va. 2015).

The United States Supreme Court has stated, "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939. While a party does not need to "record in great detail how each minute of his time was expended," he must provide at a minimum sufficient

documentation to "identify the general subject matter of his time expenditures." *Id.* at 437 n.12, 103 S. Ct. at 1941 n.12.

Thus, failure to identify the reasonable relation between the computer-assisted legal research charges and the concomitant issue in the case are grounds to deny such charges. *See Dusseldorp v. Ho*, 4 F. Supp. 3d 1069, 1072–73 (S.D. Iowa 2014) (discussing the necessity of providing sufficient detail to give the court the means to determine the nature of the legal work involved and how it relates to the charges and holding the plaintiffs did not specify the relation between the Westlaw charges and the legal work).

Second, the party must also show that the charges for computer-assisted legal research are the type of costs normally billed to a paying client in the relevant market. *Redland Ins.*, 460 F.3d at 1259. Thus, the party seeking reimbursement for computer-assisted legal research charges must present the court with proof such that the court can determine that attorneys in the relevant market normally bill these charges to paying clients.

Applying these two requirements to the expense report contained in Lee's July 12, 2016 application, we find the documentation of the claimed Westlaw charges to be insufficient. Lee's attorneys presented to the court an expense report that describes the charges as "research charges" or "Westlaw research charges," sometimes followed by the amount of time, represented in minutes, spent on Westlaw. Such documentation is insufficient to allow us to determine if the Westlaw charges relate to any of the issues in this case. Additionally, Lee's attorneys did not provide any proof that the Westlaw charges are the type of costs normally billed to a paying client in the relevant market or local community. For these reasons, we find the gross amount of

compensable expenses claimed in the July 12, 2016 application to be $8573.72.[7]

2. *Westlaw charges claimed in Lee's supplemental application for fees and expenses filed on October 3, 2016.* The expense claim in the October 3, 2016 supplemental application requested $143.18 for expenses incurred since July 12, 2016. We deduct the $52 Westlaw charge from the total requested amount. Lee's attorneys have not specified the relation between the charge and the legal work they have performed nor have they proved that the Westlaw charges are the type of costs normally billed to a paying client in the relevant market or local community. Accordingly, we find the gross amount of compensable expenses claimed in the October 3, 2016 supplemental application to be $91.18. Moreover, because the State stipulated Lee's attorneys incurred these expenses for prospective relief, we will award this amount of costs in our final judgment.

B. Fees Claimed. We next address the contested amount of fees the district court awarded to Lee. In her October 3, 2016 supplemental application, Lee requested $7032.50 in fees. The State stipulated that these fees were for prospective relief. Therefore, we will award this amount of attorney fees in our final judgment. The fighting issue regarding fees in this appeal is whether the district court abused its discretion in reducing the $361,027 fees claimed in plaintiff's July 12, 2016 application by forty percent.

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[7]We arrived at this number by taking the difference between $13,707.72 and $5134. As noted before, $13,707.72 is the total expenses Lee claimed in her July 2016 application. $5134 is the total amount of the "research charges" or "Westlaw research charges" we tallied from the expense report contained in her July 2016 application.

1. *Law regarding fee awards.* We begin with the general principles governing fee awards. Absent express statutory authorization, each party to a lawsuit ordinarily bears its own attorney fees. *Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620, 623 (Iowa 2016) (per curiam); *see also Lara v. Thomas*, 512 N.W.2d 777, 786 (Iowa 1994). The FMLA requires employers to pay reasonable fees and expenses to successful plaintiffs. 29 U.S.C. § 2617(a)(3) ("The court in such an action *shall*, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant." (Emphasis added.)). Because of the mandatory language of the statute, the district court has no discretion in deciding whether to award attorney fees. *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 22 (Iowa 2001). However, the court has broad—but not limitless—discretion to determine the *amount* awarded to the prevailing party. *Id.*

The court may make reductions for "partial success, duplicative hours, or hours not reasonably expended." *Boyle*, 773 N.W.2d at 834 (quoting *Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 881 (N.D. Iowa 2004)). Additionally, we stated, "The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case." *Landals*, 454 N.W.2d at 897; *accord Lynch v. City of Des Moines*, 464 N.W.2d 236, 239 (Iowa 1990) (stating the court may consider proportionality as a factor, but it may not "place undue emphasis on the size of the judgment" and therefore fail to "look at the whole picture").

"There is no precise rule or formula for making these determinations." *Boyle*, 773 N.W.2d at 833. Nevertheless, "[d]etailed findings of fact with regard to the factors considered must accompany

the attorney fee award." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897 (Iowa 1996).

In *Lee III*, we mandated the district court to "reduce its initial award" such that it excludes fees and costs incurred in pursuing retroactive relief "wholly unrelated to the common core of facts or legal theories establishing her entitlement to prospective relief." *Lee III*, 874 N.W.2d at 650. Furthermore, we instructed the district court to enter an award "in accordance with the principles [governing fee awards] set forth in this opinion." *Id.*

With these general principles and the mandate of *Lee III* in mind, we now consider whether the district court abused its discretion in awarding Lee $216,616.20 (i.e., sixty percent of $361,027).

2. *Did the district court abuse its discretion by using current rates as the lodestar?*[8] In its August 22, 2016 resistance to Lee's July 12, 2016 application for fees and expenses, the State objected to the increased hourly rates of Lee's attorneys since the October 2007 and March 2008 orders, arguing that the rates exceeded the current and appropriate market rate of similarly experienced attorneys. However, we are unaware of any evidence the State submitted to the district court to

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[8]The starting point in determining attorney fees is generally the lodestar. *See Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939. Courts calculate the lodestar by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Landals*, 454 N.W.2d at 897–98. In calculating a reasonable lodestar, the district court normally considers the following nonexhaustive factors:

> [T]he time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.

Id. at 897; *cf. Johnson v. Ga. Highway Express*, 488 F.2d 714, 717–19 (5th Cir. 1974) (laying out a twelve-factor test to determine the lodestar).

corroborate its argument that the current hourly rates of Lee's attorneys exceeded the market rate. *Boyle*, 773 N.W.2d at 832 ("[T]he party opposing the fee award . . . has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." (quoting *Sherman*, 314 F. Supp. 2d at 881–82)).

Furthermore, despite the State's initial objection in its August 2016 resistance to Lee's attorneys' current hourly rates, at the district court hearing the State stated its position was reducing $361,027—an amount calculated using current hourly rates—by forty percent. Accordingly, the State waived any argument to the contrary on appeal.

Even if the State did not waive its argument that the district court erred in using current hourly rates, the district court did not abuse it discretion in doing so. In its October 2016 order, the district court concluded "current hourly attorney rates . . . offsets any delay in payment of same." In *Landals*, we approved the district court's consideration of delay in payment in determining a reasonable hourly rate. *Landals*, 454 N.W.2d at 898. Moreover, the United States Supreme Court carefully explained,

> When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later . . . . Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. . . . We do not suggest . . . that adjustments for delay are inconsistent with the typical fee-shifting statute.

Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 716, 107 S. Ct. 3078, 3081–82 (1987) (citations omitted); *accord Jenkins*, 491 U.S. at 283, 109 S. Ct. at 2469 (holding delay in payment is an

appropriate factor under § 1988 because "compensation received several years after the services were rendered . . . is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings").

We believe the same reasoning in incorporating the delay factor into an attorney fee award applies to a fee-shifting statute such as the FMLA. Lee's lawyers have been working on this case for well over a decade. Twelve to thirteen years is a long enough delay. *See Anderson v. Director*, 91 F.3d 1322, 1325 (9th Cir. 1996) (holding the office of workers' compensation programs abused its discretion when it failed to award a delay enhancement to account for the fourteen-year delay in payment for the lawyer's services); *cf. West v. Potter*, 717 F.3d 1030, 1034 (D.C. Cir. 2013) (holding compensation for delay is not always necessary in Title VII cases as in a scenario in which "a brief delay in payment might not warrant any adjustment for the lost value of money"). Accordingly, the district court did not abuse its discretion in adjusting the hourly rates to account for delay in payment.

3. *Did the district court abuse its discretion by cutting Lee's requested fee by forty percent?* The district court did not abuse its discretion by adopting the percentage method as opposed to another method. *See Smith*, 885 N.W.2d at 627 (allowing the use of the percentage method); *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 541 (Iowa 1996) ("The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." (quoting *Hensley*, 461 U.S. at 436–37, 103 S. Ct. at 1941). However, we find the district court abused its discretion in cutting the requested amount of $361,027 by forty percent.

As a refresher, the district court divided Lee's claims into five subparts: "(1) sovereign immunity [monetary damages for wrongful discharge]; (2) reinstatement of her employment; (3) reinstatement of employee benefits [IPERS etc.]; (4) an award of attorney fees and costs; and (5) the amount of attorney fees and costs." The district court stated the State succeeded in the first and last areas, and Lee succeeded in the remaining three areas. Thus, the district court reasoned, Lee was successful in sixty percent of her claims. The district court therefore reduced Lee's requested amount by two-fifths or forty percent.

First, the district court's circular reasoning that the State succeeded in the last area—the amount of attorney fees and costs—is untenable. The success of the last issue depended on the outcome of the district court's order, yet the district court prematurely stated the State was successful on the very issue that was currently under review. The court used its conclusion to bolster its reasoning. We note the district court was referring to *Lee III* when it stated the State succeeded in the last area. However, in *Lee III*, Lee won the issue of whether she was entitled to an award of fees and costs. *See Lee III*, 874 N.W.2d at 643. Yet the issue of determining the *amount* of fees and costs has been ongoing.

Second, in *Hensley*, the United States Supreme Court laid out a mandatory two-part test in circumstances in which the plaintiff succeeded on some—but not all—of his or her claims for relief. *Hensley*, 461 U.S. at 434, 103 S. Ct. at 1940. The Court stated,

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Id.

In *Lee III*, we incorporated the two-part test set forth in *Hensley*. In regards to the first step, we stated, "[T]o the extent Lee's unsuccessful claims for retroactive relief were unrelated to her successful claims for prospective relief, the court may not award [attorney] fees or [litigation] costs she obviously incurred in pursuing only the unsuccessful claims." *Lee III*, 874 N.W.2d at 649.

In its October 2016 order, the district court stated, "Lee's claims for monetary relief and reinstatement are so intertwined as to make them inseparable." The court further stated, "[T]he sum of $361,027[, which includes hours spent on pursuing retroactive relief,] is appropriate as an award of attorney fees." Yet in *Lee III*, we explicitly stated, "The documentation Lee submitted to the district court reveals a portion of the attorney fees the court awarded Lee was specific to her claims for retroactive monetary relief." *Id.* at 648. We further noted, "For example, Lee requested attorney fees her counsel charged for calculating her lost wages and bringing her claim for liquidated damages." *Id.* Despite its flawed analysis, the court did exclude the purported amount spent on pursuing retroactive relief because the forty percent reduction subsumed this amount.

As to the second step of *Hensley*, if the plaintiff only obtained partial or limited success, "the court ultimately *must consider* the reasonableness of the hours expended on the litigation as a whole in light of the degree of success actually obtained." *Id.* (emphasis added) (citing *Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941). When a plaintiff achieves only limited success, a lodestar calculation may lead to an excessive amount. *Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941. "A reduced fee award is appropriate if the relief, however significant, is

limited in comparison to the scope of the litigation as a whole." *Id.* at 440, 103 S. Ct. at 1943. "The court may properly award any fees incurred in the litigation involving 'a common core of facts' or 'based on related legal theories.' " *Lee III*, 874 N.W.2d at 649 (quoting *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940).

In applying the second step of *Hensley*, the district court used a division process that went awry by engaging in an arbitrary numbers game. In *Hensley*, the Supreme Court rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Hensley*, 461 U.S. at 435 n.11, 103 S. Ct. at 1940 n.11. The Court stated, "Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested." *Id.* The Court provided an example that resembles the facts of Lee's case: "a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Id.*

In *Lash v. Hollis*, the United States Court of Appeals for the Eighth Circuit examined whether the district court abused its discretion in reducing the prevailing plaintiff's requested attorney fee of $250,000 to $10,000. *Lash*, 525 F.3d 636, 641–43 (8th Cir. 2008). The Eighth Circuit held the district court properly exercised its discretion in reducing the fee award from $250,000 to $80,000 based on its knowledge of what hourly rates were appropriate and what services were reasonably necessary. *Id.* at 641. However, the Eighth Circuit held the further reduction from $80,000 to $10,000 amounted to an abuse of discretion. *Id.* at 641–42.

The district court cut the $80,000 in half to $40,000 because only one of the two plaintiffs prevailed. *Id.* at 641. Furthermore, the district court divided $40,000 by four to $10,000 because the single prevailing plaintiff prevailed against one of the four defendants at trial. *Id.* The Eighth Circuit stated the district court had made the "cuts on a characterization of [the plaintiff's] degree of success . . . that involved sequential reductions of 50% and 75% based solely on the number of successful and unsuccessful claims." *Id.* It reasoned "[s]uch a method is, in general, not appropriate."[9] *Id.* at 641–42 (citing *Hensley*, 461 U.S. at 435 n.11, 103 S. Ct. at 1940 n.11).

The Eighth Circuit ultimately stated it could not determine from the record whether the district court had considered other factors, such as whether "common questions of law and fact existed among the claims by the two plaintiffs against the four defendants." *Id.* at 642. It remanded the case and instructed the district court to "consider the relationship between the successful and unsuccessful claims and also the overall degree of success obtained by the [prevailing plaintiff]." *Id.* at 643.

Here, the district court did exactly what the Court in *Hensley* and the Eighth Circuit rejected and wholly misapplied step two of the *Hensley* test. *See Yellow Pages Photos, Inc. v. Ziplocal, LP*, 846 F.3d 1159, 1164–65 (11th Cir. 2017) (per curiam) (disapproving of a "cash register approach" and holding the district court abused its discretion when it reasoned the damages awarded by the jury was five percent of the

[9]As a caveat, the Eighth Circuit noted, "Had each plaintiff's claim against each defendant involved entirely separate legal questions or depended on separate issues of fact, such a method for assessing the reasonableness of fees might have been permissible." *Lash*, 525 F.3d at 642; *accord Lee III*, 874 N.W.2d at 649.

maximum amount sought and ten percent of the minimum amount sought and then concluded the midpoint of the two percentages represented the lodestar figure); *cf. Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006) ("Fee awards comport with that reality by giving full credit to a meaningful successful plaintiff, rather than making a mechanical per-losing-claim deduction from an attorney's fee award.").

Based on the foregoing, we hold the district court's erroneous application of the two-part *Hensley* test amounts to an abuse of discretion. Accordingly, the court abused its discretion by reducing Lee's fee award by forty percent.

4. *Application of legal principles to Lee's July 12, 2016 application.* We now adjust Lee's fee award. In doing so, we do not disturb the district court's conclusion that the current hourly rates of Lee's attorneys offset the delay in payment.

In the context of a remedial statute like the FMLA, we consider how Lee's case advanced the goals of the FMLA. In *Lee III*, we instructed that "[o]n remand, the district court may consider not only the significance of the success obtained to Lee personally, but also the degree to which her core claim served to vindicate the public interest." *Lee III*, 874 N.W.2d at 649. There are different ways to measure the gradations of a party's success. *See Lash*, 525 F.3d at 642 (noting monetary success makes up only part of a plaintiff's success). One of the ways to undertake this task is to consider whether the party's success is "material" because it produces "some public goal other than occupying the time and energy of counsel, court, and client." *Farrar v. Hobby*, 506 U.S. 103, 121–22, 113 S. Ct. 566, 578 (O'Connor, J., concurring); *accord Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 773 (8th Cir. 2000).

Lee undoubtedly advanced the public interest. The statutory right of state employees to take a leave of absence to seek medical treatment for and recover from a serious health condition, such as Lee's anxiety disorder that impeded her ability to perform her job duties, existed in theory but not in practice. Lee's case admonishes the State that employees with actionable FMLA claims have access to enforceable equitable remedies. We acknowledge the social benefits that Lee's attorneys achieved by litigating this case and the public interest scheme underlying the FMLA.[10] *See Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 344 (Iowa 2000) (holding the district court "place[d] undue emphasis on the size of the judgment, to the exclusion of all other pertinent factors, thereby disregard[ing] the public interest underlying [the] remedial [wage collection] statute"); *see also Barton*, 223 F.3d at 773 (holding the district court did not abuse its discretion in declining to further reduce fee and

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[10]The purpose of the FMLA is

> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
>
> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
>
> (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
>
> (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
>
> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2601(b).

expense award because the plaintiff "was successful on the [Title VII sexual harassment] claim 'at the heart of her case,' " which served to vindicate public interest in creating a fair workplace).

Additionally, we recognize Lee was the prevailing party in this case, with the jury returning a verdict for Lee on her wrongful discharge and retaliation claims, and the district court awarding a judgment in her favor. *Lee III*, 874 N.W.2d at 646–47. However, the prevailing-party standard "is a generous formulation that brings the plaintiff only across the statutory threshold," and "[i]t remains for the . . . court in the exercise of its discretion to determine the fee." *Zook v. Brown*, 865 F.2d 887, 895 (7th Cir. 1989) (first quoting *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939). "[W]hen a plaintiff achieves only 'partial or limited success' on the claim for which attorney fees are recoverable, a reduction in the fee award may be appropriate even if the entire lawsuit flows from a common core of facts." *Smith*, 885 N.W.2d at 624 (quoting *Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941).

We find Lee has attained partial success in this case. Admittedly, Lee won on the merits of her claims. However, remedies also comprise the bigger picture. Lee obtained injunctive relief, although she did not obtain monetary damages because of the State's sovereign immunity.

After considering Lee's public interest achievement and the level of success on her claims, we conclude a thirty-five percent reduction is appropriate.[11] Accordingly, we award Lee $234,667.55 for her attorney

[11]*See Root*, 638 N.W.2d at 674 (holding the district court did not abuse its discretion in applying almost a thirty percent reduction and thus awarding approximately seventy percent of the defendant's requested attorney fees in a case involving the Iowa Loan Brokers Act); *Lynch*, 464 N.W.2d at 238–40 (holding the district court did not abuse its discretion in applying over a forty percent reduction to the plaintiff's fee and expense award, although the plaintiff brought claim pursuant to Iowa Civil Rights Act and ultimately won $10,000 in damages and enforcement of sexual

fees as requested in her July 12, 2016 application. We apply the same thirty-five percent reduction to the allowable expenses of $8573.72 in her July 12, 2016 application for a total of $5572.92.

VI. Summary.

We vacate all prior fee and expense awards. To summarize, we make the following award of fees and expenses:

Fees on the July 12, 2016 application	$234,667.55
Fees on the October 3, 2016 supplemental application	$ 7032.50
TOTAL FEES	$241,700.05
Expenses on the July 12, 2016 application	$ 5572.92
Expenses on the October 3, 2016 supplemental application	$ 91.18
TOTAL EXPENSES	$ 5664.10
TOTAL AWARD	$247,364.15

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harassment training at the police department); *see also Hernandez*, 831 F.3d at 944, 948–49 & n.4 (holding the district court did not abuse its discretion in reducing the requested fee and expense award by thirty percent when the plaintiff won summary judgment on his FMLA interference claim but lost summary judgment on his other three FMLA-related claims that shared core facts); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 292, 303–04 (4th Cir. 2009) (holding the district court did not abuse its discretion when it awarded the plaintiff approximately thirty-two percent less than what he had requested in attorney fees because he failed to recover frontpay although the jury awarded him $1876 on his FMLA interference claim and $331,429.25 on his FMLA retaliation claim, and the district court awarded him $333,305.25 in liquidated damages). *Compare Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 962, 965–66 (8th Cir. 2012) (holding district court properly reduced the requested fees by fifty percent when the plaintiff won her FMLA retaliation claim and attained $206,500 in monetary damages and $206,500 in liquidated damages, but lost on her other four underlying claims and did not win punitive or emotional distress damages she sought), *with Lewis v. Heartland Inns of Am., LLC*, 764 F. Supp. 2d 1037, 1046 (S.D. Iowa 2011) (granting full compensatory award because plaintiff's discrimination and retaliation claims "were clearly related and the evidentiary bases for these claims were inextricably intertwined"); *Hite v. Vermeer Mfg. Co.*, 361 F. Supp. 2d 935, 955 (S.D. Iowa 2005) (declining to reduce fee award because "[pl]aintiff's FMLA and ADA claims arose from precisely the same alleged conduct, not just from a similar set of core facts" and thus, even though plaintiff lost her ADA claim, her attorneys' work on the litigation as a whole warranted a full compensatory fee award).

VII. Disposition.

We reverse the October 2016 order of the district court. On remand, the district court must enter a fee award of $241,700.05 and an expense award of $5664.10. We remand the case to the district court to enter judgment consistent with this opinion. Costs of this appeal are assessed one-half to each party.

REVERSED AND REMANDED WITH INSTRUCTIONS.