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NO. 69046-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KAREN JOHNSON,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Under both Washington and federal law, the acceptance of an offer of judgment forms an enforceable contract under civil rule 68. The plain terms of the contract that is formed are interpreted in accordance with the relevant case law. That case law also makes it clear that the plain terms of a civil rule 68 offer of judgment are enforceable in a civil rights case, a case under the Washington Law Against Discrimination (WLAD), or any other case in which a statute may include a fee shifting provision.

In this case the trial court, in a detailed and comprehensive order, properly exercised its discretion in awarding reasonable fees and costs pursuant to the CR 68 offer of judgment.

This Court should determine that the trial court's decision to segregate fees generated pursuing an unsuccessful claim, to deny fees documented by billing records the court found "wholly unreliable," and to decline to award expert witness costs to a medical provider never retained as an expert witness was not an abuse of discretion.

The Washington State Department of Transportation (DOT) requests that this court enforce the contract formed by the CR 68 offer of judgment in this case and affirm the trial court's discretionary award of attorney fees and costs.

II. COUNTERSTATEMENT OF THE ISSUES

(1) Whether this court should affirm the trial court's discretionary decision to deny fees and costs *after* Johnson's acceptance of the offer of judgment in accordance with the plain terms of the contract and interpreting case law?

(2) Whether this court should affirm the trial court's discretionary decision to deny fee recovery for Johnson's unsuccessful Personnel Resources Board administrative claim?

(3) Whether this court should affirm the trial court's discretionary decision to award fees only for contemporaneously documented time in a case where a multiplier of 1.3 was awarded and where the "reconstructed" fees were not claimed in the invoice filed with Johnson's acceptance of the offer of judgment?

(4) Whether this court should affirm the trial court's denial of cost recovery for "legal consultation" by Johnson's treating psychologist, Timothy Reisenauer, Ph.D., where the cost of Reisenauer's medical treatment for Johnson was included in the offer of judgment and where Reisenauer was not identified as an expert witness?

III. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

1. Background

Karen Johnson was the Assistant Regional Human Resources Manager for the Northwest Region of DOT in July 2007 when DOT hired Corey Moriyama as the Regional Human Resources Manager. CP at 2, 1444-46. Mr. Moriyama reported to Lorena Eng, the Regional Administrator. CP at 1445.

In April 2008, DOT conducted a "management inquiry" of an anonymous complaint regarding comments attributed to Mr. Moriyama. CP at 5, 28. In June 2008, Ms. Johnson filed a formal complaint with Brenda Nnambi in the DOT Office of Equal Opportunity. CP at 6, 29, 1450-55. Ms. Johnson's OEO complaint alleged that "'[Moriyama] has harassed [Johnson] (based on sex) and retaliated against her in addition to creating a hostile work environment'." CP at 6, 29, 1450-55. Ms. Johnson's discrimination complaint was closed by OEO in December 2008 because Ms. Johnson declined to participate. CP at 1446.

2. Medical Leave

Ms. Johnson states that she took "earned medical leave" from her DOT position beginning in September 2008. CP at 7. In the complaint she filed in this case, Ms. Johnson identifies Mr. Moriyama's language and actions in the workplace as the reason she requested medical leave. [1] CP at 7, 8-10.

In November 2008, Ms. Johnson's treating psychologist, Timothy M. Reisenauer, Ph.D., completed the Family Medical Leave Act (FMLA) Certification of Health Care Provider, testifying that Ms. Johnson had a serious health condition that prevented her from performing the

[1] In February 2009, an independent investigation confirmed many of the factual allegations included in Ms. Johnson's complaint. CP at 8-10 (without emphasis), 1446. Mr. Moriyama was disciplined as a result of the February 2009 investigation and left DOT. CP at 2157-58.

essential functions of her job. CP at 31; 714-20. Dr. Reisenauer certified: "Pt's condition continues to not allow her to return to work without it seriously jeopardizing her health. She is continuing to be at risk for serious exacerbation of her health conditions if she returns to work and is in need of ongoing treatment during her absence from work." CP at 13, 32. In May 2009, Dr. Reisenauer recommended that Ms. Johnson "remain off work until at least November 11, 2009 at which time her health status will be re-assessed." CP at 14.

3. Disability Separation

In early July 2009, Dr. Reisenauer provided the following information in response to a DOT disability medical questionnaire: "Ms. Johnson is capable of performing the essential functions of a WMS Band 2, H.R. Assistant H.R. Manager with the State of Washington but not within the Department of Transportation." CP at 17, 33, 716 (emphasis in original). Ms. Johnson's only requested accommodation was transfer to another state agency. CP at 17, 33, 716. Because her health care provider reported that Ms. Johnson was unable to return to DOT and because her medical provider's restriction was permanent, DOT disability separated Ms. Johnson effective July 29, 2009, at least nine months after

she began medical leave.[2] CP at 31, 34; 714-20; WAC 357-46-160, -165. The DOT officials who made the disability separation decision were at DOT headquarters; they were in a different office, in a different city than the DOT employees Ms. Johnson later charged with discriminating against her. CP at 1446.

4. Administrative Challenge to Disability Separation

In administrative proceedings before the Personnel Resources Board (PRB), Ms. Johnson challenged DOT's administrative decision to disability separate her and sought accommodation in another state agency[3]. CP at 714-20, 1478. Ms. Johnson's administrative challenge was unsuccessful. CP at 714-20, 1478. In awarding summary judgment to DOT, the PRB found that: "Under *Havalina* [sic] [*v. Washington State Department of Transportation*, 142 Wn. App. 510, 178 P.3d 354 (2007)], DOT had no duty to search for vacant positions in other agencies to accommodate [Ms. Johnson]."[4] CP at 720.

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[2] Under the FMLA, an eligible employee is permitted to take up to twelve weeks of leave during a calendar year for reasons that include "any serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's job." CP at 715. Ms. Johnson's initial FMLA leave was approved for September 18, 2008 to December 17, 2008. CP at 715. DOT approved additional FMLA leave until Ms. Johnson was disability separated effective July 29, 2009. CP at 715.

[3] Ms. Johnson's request for accommodation was based on Dr. Reisenauer's opinion that she could never return to DOT. CP at 17, 33, 716 (emphasis in original). Before the PRB, Johnson argued, as she did in this subsequent civil case, that DOT had a duty to accommodate her. CP at 17, 33, 716.

[4] When Judge Heller granted DOT's request for a protective order prohibiting discovery regarding transfers to other state agencies, he concurred that *Havlina*

Mann & Kytle represented Ms. Johnson in administrative proceedings from July 2008 through July 2010 when she filed this case alleging discrimination under RCW 49.60. CP at 535-40; 714-20. DOT was represented by Assistant Attorney General (AAG) Lawson Dumbeck, a program lawyer responsible for administrative hearings. The PRB dismissed Ms. Johnson's accommodation case against DOT in February 2010; Ms. Johnson filed this discrimination case in July 2010. CP at 537-40, 714-20. The trial court found that the hours Mann & Kytle spent on Ms. Johnson's administrative challenge of DOT headquarters' decision to disability separate her were not recoverable in this action because "they did not involve the same core of facts and related theories."[5] CP at 714-20, 1478.

B. Procedural Posture

1. Motions Practice

The complaint in this case was filed in July 2010 under RCW 49.60. CP at 1, 20. In her complaint, Ms. Johnson alleges that her manager, Corey Moriyama, maintained a hostile work environment for

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controlled: DOT had "no duty to accommodate transfers to another state agency." CP at 720.

[5] The parties produced a joint submission of stipulated hour calculations that served as the basis for the PRB hours excluded by the court. CP 1464-70. The joint submission separated hours related to the disability separation proceeding (segregable administrative time) from those related to the discrimination claim. CP at 1469. The trial court awarded Ms. Johnson attorneys' fees for all of the contemporaneously documented time related to the discrimination claim entered prior to the offer of judgment. CP at 1481.

female and disabled employees; that DOT was negligent in its hiring, supervision, and retention of Moriyama; and that Moriyama and DOT management retaliated against Ms. Johnson for opposing and reporting Moriyama's conduct. CP at 1-3. Ms. Johnson's complaint also makes similar allegations against Kermit Wooden, the then-Director of Human Resources for DOT. CP at 1-3.

During the course of this litigation, three significant motions were contested by the parties: (1) a motion for CR 35 examination filed by DOT in May 2011 (CP at 39) and decided in July 2011 (CP at 105-06); (2) a motion for protective order regarding the scope of discovery, filed by DOT in August 2011 (CP at 107), and decided on September 27, 2011 (CP at 748-51); and (3) a motion to quash the deposition notice for Secretary of Transportation Paula Hammond, filed by DOT in September 2011 (CP at 1755) and denied, in part,[6] by the trial court on October 7, 2011 (CP at 348-9), two days after the offer of judgment was made (CP at 2147-53). Ms. Johnson also requested substantial electronic discovery from DOT. CP at 702-04. That discovery was pending (complete, but not yet produced) at the time judgment was entered. CP at 728-38. DOT had

[6] The trial court allowed Ms. Johnson to ask Paula Hammond "whether, as Secretary, she was involved in any decisions or discussions related to plaintiff Johnson's complaint against Mr. Moriyama, whether to accommodate her, and the decision to separate her from employment." CP at 348. If Secretary Hammond answered in the negative, the trial court specified that "no further questions be asked regarding Karen Johnson." CP at 348.

identified 1,545,981 email responsive to Johnson's requests for production for those individuals identified in the trial court's protective order. CP 702-04.

These three motions were strongly contested and supported by extensive briefing and numerous declarations (CP at 39-318, 1504, 1809). The case was assigned to King County Superior Court Judge Bruce Heller in March 2011; he heard and decided each contested motion. CP at 105-06, 319-20, 348-49, 748-51.

Trial in the case was rescheduled for April 9, 2012. A stipulated continuance, entered on September 27, 2011, allowed both parties to complete discovery. CP at 741-6.

2. Offer of Judgment and Acceptance

On October 5, 2011, DOT filed an offer of judgment (CP at 533-34). The offer of judgment stated (in full):

> Under Civil Rule 68, Defendant Department of Transportation, State of Washington offers to allow Plaintiff, Karen Johnson, to take judgment against the State of Washington in this matter pursuant to RCW Ch. 4.92, which judgment shall be Three Hundred and Fifty Thousand dollars ($350,000). *Additionally, Defendant State of Washington hereby offers to pay Karen Johnson's awardable costs and reasonable attorney's fees accrued in this lawsuit up to the date/time of this Offer, which sum shall be determined by the King County Superior Court in the event that counsel for the parties cannot agree within 10 days of Plaintiff's timely acceptance. Plaintiff's claimed costs and fees shall be*

> *substantiated by billing records attached to Plaintiff's acceptance of this Offer detailing the nature and date of the work performed and hours accrued.*
>
> This Offer is conditioned upon the dismissal of the Defendant with prejudice, and pursuant to the provisions of RCW 4.92 et seq., judgment may only be entered against and payment made by the State of Washington. This Offer is extended to settle and finally resolve all legal and equitable relief sought by Karen Johnson in this case against the Defendant State of Washington, as well as any other current or former employees or agents of the state, arising from the facts and causes of action described in her complaint.
>
> This Offer is made for the purposes of Civil Rule 68, and may not be construed as a waiver of any defenses or objections, an admission that any Defendant is liable, or that any claimed injuries or damages are the result of any action or inaction on the part of any Defendant.
>
> This Offer is made in an attempt to allow Plaintiff and Defendant to compromise their respective litigation positions, to eliminate the added costs of further trial preparation, and to avoid the risks and expenses of trial.

CP at 533-4 (emphasis added); Appendix A.

On Monday, October 17, 2011, Karen Johnson unconditionally accepted DOT's offer of judgment. CP at 528-53; Appendix B. Ms. Johnson's acceptance states:

> COMES NOW Plaintiff Karen Johnson, who hereby gives notice of acceptance of Defendant's October 5, 2011 Offer of Judgment attached hereto.

CP at 528-9; Appendix B.

3. Mann & Kytle's October 17, 2011 Invoice for Attorneys' Fees and Costs

Appended to Ms. Johnson's unconditional acceptance of DOT's offer of judgment was an invoice, submitted to Karen Johnson and dated October 17, 2011, from the firm of Mann & Kytle, PLLC. CP at 535-53.

In accordance with the condition stated in the offer of judgment, the invoice documents 341.78 hours of partner, associate, and paralegal time. CP at 551. The first documented time entry is Mary Ruth Mann's intake interview with Ms. Johnson on July 1, 2008.[7] CP at 535. The last documented time entry is Ms. Mann's conference with Ms. Johnson and related work regarding the offer of judgment on October 17, 2011. CP at 551. The total amount requested for professional services is $128,707.52, but Mann & Kytle then add a "1.5 Multiplier...based on the Risk of Contingent Litigation and other statutory factors." Mann & Kytle estimate the "multiplier" to be $65,000, for a total fee request of $193,707.52. CP at 551.

The invoice also includes an itemized request for costs of $12,706.97. CP at 553. The invoice notes that it does not include fees for

[7] This case was filed two years later in July 2010. CP at 1. Ms. Johnson began her medical leave in September 2008, approximately three months after her intake interview with Ms. Mann. CP at 7, 535.

"legal consultation" with Timothy M. Reisenauer, Ph.D., Ms. Johnson's treating psychologist.[8] CP at 67-76, 553.

Johnson's October 17, 2011 invoice may be summarized as follows:

Professional Time (Partner, Associate, and Paralegal hours)	341.78 hours	$128,707.52
Requested Multiplier (based on contingent litigation and other statutory factors)	1.5	$65,000
Total fees		$193,707.52
Itemized costs		$12,706.97
Total		$206,414.49

CP at 535-553.

4. Mann & Kytle's January 9, 2012 Invoice and Petition for Fees and Cost

On February 12, 2012, Ms. Johnson filed a revised petition for fees (CP 450-63)[9] accompanied by a lengthy declaration from attorney Mary Ruth Mann (CP at 464-679). The request was based upon a January 9, 2012 invoice from Mann & Kytle. CP at 485-515.

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[8] Dr. Reisenauer is not identified in the invoice as an expert witness, although Robert Moss, Ms. Johnson's economist, is identified as an expert witness. CP at 553.

[9] On January 20, 2012, Ms. Johnson filed a petition for attorneys' fees and costs with the trial court. CP 350-71. The January 20, 2012 motion was stricken by stipulation after DOT objected to the length of the petition and the short time period allowed for response. CP at 372-81. Ms. Johnson received (and submitted to DOT) one interim invoice on October 21, 2012, that included the $43,718.56 bill for Dr. Reisenauer.

Johnson's January 9, 2012 invoice may be summarized as follows:

Professional Time (Partner, Associate, and Paralegal hours)	443.26 hours	$172,623.13
Multiplier (based on contingent litigation and other statutory factors)	1.5	$85,694.00
Total fees		$258,597.13
Itemized costs		$64,444.48
Total		$322,927.31

CP at 485-515.

The fee and cost differences between the October 17, 2011 invoice (submitted with acceptance of the offer of judgment) and the January 9, 2012 invoice (submitted with the revised petition for fees) include:

October 17, 2011 Professional Staff Hours	341.78 hours
January 9, 2012 Professional Staff Hours	443.26 hours
Difference	**+101.48 hours**
October 17, 2011 Fee Request	$193,707.52
January 9, 2012 Fee Request	$258,597.13
Difference	**+$64,889.61**
October 17, 2011 Costs	$12,706.97
January 9, 2012 Costs	$64,444.48
Difference	**+$51,737.51**
Total difference	**+$116,627.12**

The fee and cost differences between the two invoices (CP at 485-515, 535-53) are the result of three changes by Mann & Kytle: the addition of attorneys' fees for "reconstructed time"[10] (CP at 1475-82), the addition of attorney's fees and costs for preparing the fee petition, and a request for reimbursement for a cost bill for "legal consultation" with Timothy Reisenauer, Ph.D., ($43,718.56) during the period Dr. Reisenauer served as Johnson's treating psychologist. CP at 67-76, 515, 553, 1099-1102. Reisenauer was not identified as an expert by Johnson at the time these charges were incurred; Reisenauer testified in his deposition that his treatment records and bills included "a hundred percent of my treatment with her."[11] CP at 792-93.

In her petition for fees, Ms. Mann requested that her fees and those of her partner James W. Kytle be approved at $450 per hour. CP at 476. She requested a multiplier of 1.5. CP at 477. Exhibits to Ms. Mann's

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[10] The trial court finding's state: "Plaintiff's counsel represented that the new additional hours were for time expended that did not get billed at the time. Plaintiff's counsel reconstructed the amount of time by reviewing correspondence and other documents in the file and then assigning a time estimate. It does not appear that Plaintiff's counsel kept informal time records to assist this process." CP at 1479-80.

[11] The January 9, 2012 invoice describes this cost bill, dated October 20, 2011 as: "Timothy Reisenauer—Special Services Billing Statement related to legal case: Service Description of Non-clinical, legal related, non-insurance billable services." CP at 515, 1099-1102. Dr. Reisenauer's bill was included in a revised October 21, 2011 invoice sent to DOT four days after Johnson accepted the offer of judgment. CP at 373, 706, 800-04, 2150. Johnson identified legal consultation with Dr. Reisenauer as an outstanding cost in her original October 17, 2011 invoice. CP at 553.

declaration include declarations from attorneys Judith Lonnquist (CP at 631-39), Jack Sheridan (CP at 642-45), and Scott Blankenship (CP at 647-69). All of the declarations support the Mann & Kytle request for a partner hourly rate of $450 hour and the use of a 1.5 multiplier.[12] CP at 631-69.

5. DOT's Opposition to Johnson's Fee Petition

DOT's response to the petition for fees was supported by declarations from AAG Tad Robinson O'Neill (CP at 701-804), private counsel D. Michael Reilly of Lane Powell (CP at 805-836), and Attorney General's Office Legal Assistant Courtney Amidon (CP at 837-91).[13] Mr. Reilly's declaration—which addressed the "reasonable" rate of compensation for attorneys Mann and Kytle—is responsive to those of Ms. Lonnquist, Mr. Sheridan, and Mr. Blankenship. CP at 805-36.

DOT identified four issues for the trial court's consideration on review of the fee petition:

> (1) whether the Mann & Kytle partners should be compensated at $350 per hour (where objective evidence showed the average compensation for WSTLA attorneys who had completed the Gerry Spence program in Wyoming to average $343 per hour in 2011);

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[12] These issues are not contested on appeal, except insofar as Mann & Kytle request that their appellate fees include award of a 1.5 multiplier.

[13] Ms. Amidon prepared Excel spreadsheets identifying the "reconstructed" time in the Mann & Kytle records. CP at 873-89. Ms. Amidon also arranged for payment of Dr. Reisenauer's "editorial review" of Ms. Johnson's records for DOT. CP at 891.

(2) whether the trial court should deny recovery for the unsuccessful PRB administrative claim, for "reconstructed" time that did not appear in the October 17, 2011 invoice filed with Ms. Johnson's acceptance of the offer of judgment, and for all time expended on the fee petition *after* acceptance of the offer of judgment in accordance with the plain terms of the contract and interpreting case law;

(3) whether the court should decline to award the exceptional remedy of a multiplier in this unexceptional case; and

(4) whether the trial court should deny recovery for costs that were not properly documented (including the double recovery from Dr. Reisenauer, whose psychological treatment of Ms. Johnson was necessarily included in the offer of judgment but who now requested fees for "legal consultation" during the several years *before* he was identified as an expert witness).

CP 683-4, 690-91, 786-804, 807-13.

6. Johnson's February 16, 2012 Reply Brief and Supplemental Mann Declaration Introducing the *Burklow* Findings and Conclusions

In her reply brief and supplemental declarations (CP at 900-1082), Ms. Johnson requested additional fees and costs for preparation of the reply in support of the fee petition.[14] CP at 901, 954-5.

As an appendix to the supplemental declaration she filed in support of Johnson's reply brief (February 16, 2012), counsel Mary Ruth Mann included the findings of fact and conclusions of law entered by Judge

[14] The reply requested an additional $9,439.75 for 25.91 hours of professional time and $1,433.50 in costs related to the reply brief. CP at 901.

George Bowden regarding the contested attorneys' fees in *Burklow v. Everett Community College*, Snohomish County Cause No. 10-2-03347-3.[15] CP at 969-80. Ms. Mann also appended the transcript of the contested fee hearing. CP at 981-1038.

In her supplemental declaration, Ms. Mann discusses the *Burklow* case as the basis for her request for a higher fee (the hourly rate she was awarded in *Burklow* was $400 per hour) and for a multiplier (Judge Bowden awarded a 1.5 multiplier in *Burklow*). CP at 946-48. Mann also describes *Burklow* as persuasive because Judge Bowden considered and dismissed the testimony and survey of Mike Caryl in support of Everett Community College's objections to Burklow's fee petition.[16] CP at 947. Ms. Mann describes *Burklow* as an example of a case "where the State is a significant part of the undesirability of Plaintiff's case."[17] CP at 947.

In ¶10 of her declaration, Ms. Mann states that "she had multiple conversations with Mr. Robinson O'Neill to avoid the contested petition

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[15] The *Burklow* findings of fact and conclusions of law Mann appends to her supplemental reply declaration were entered on October 27, 2011, ten days after Johnson accepted the offer of judgment in this case. CP at 2150.

[16] The declaration of Michael Reilly, filed by DOT in opposition to Ms. Johnson's fee petition referred to and relied upon the Caryl study. CP at 809.

[17] *Burklow* was an employment case filed against Everett Community College in Snohomish County and defended by AAG Susan Edison. Ms. Johnson's case was filed against DOT in King County and defended by AAG Tad Robinson O'Neill. Ms. Mann's declaration appears to suggest that a multiplier should be awarded in any employment case against "the State." CP at 947. Cathy Burklow was represented by Mann & Kytle, who associated Philip Talmadge to make the attorneys' fee argument before Judge Bowden in Snohomish County. CP at 983.

by adopting Judge Bowden's outcome in the *Burklow* case ($400 per hour plus a 1.5 multiplier) and other methods to avoid further litigation." CP at 948.

Significantly, Ms. Mann's declaration does not contain the factual basis for the arguments Ms. Johnson makes on appeal. She does not describe the *Burklow* decision as a *rule* that led her to expect that different AAGs representing different clients in different courts would all accept that post-offer of judgment fees would be uncontested in cases under RCW 49.60; nor does she state that she was led by "the State's" course of conduct in a prior case (*Burklow*) to believe that DOT would not contest her fees after the date of the offer of judgment. App. Opening Br. at 13-19. She does not state there was an unrevealed "scheme" to deny Ms. Johnson fees after she accepted the offer of judgment. CP at 946-48.

7. Trial Court's Letter Decision

The telephonic fees' hearing in this case was held on March 23, 2012. CP at 1103. The trial court emailed a letter decision, dated March 26, 2012, to the parties. The letter decision determined the matters at issue in the fee petition[18] (CP at 1135-36; Appendix C):

> The Court concludes as follows with respect to plaintiff's fee and cost petition:

[18] The trial court's decision letter was filed on March 28, 2012. CP at 1135.

1) The reasonable hourly rate for Ms. Mann and Mr. Kytle is $425.00; for Mr. Rose $225; for their paralegal $125.00;
2) Plaintiff is not entitled to fees for hours expended after October 5, 2011 pursuant to the terms of the offer of judgment. *Guerrero v. Cummings*, 70 F.3rd 1111, 1113 (9th Cir. 1995);
3) Plaintiff is only entitled fees based on hours that were contemporaneously billed. *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998).
4) Plaintiff is entitled to fees for all hours expended on this case through October 5, 2011, with the exception of time spent on her administrative challenge to her transfer to another state agency.
5) Plaintiff is entitled to a multiplier of 1.3.
6) Plaintiff is entitled to reimbursement for all costs, with the exception of Dr. Reisenauer's bills for work performed before June 17, 2011 as her treating physician. Dr. Reisenauer did not submit a cost bill that segregated the costs incurred as an expert witness rather than as a treating physician. His costs are therefore not recoverable.

CP at 1135.

The trial court concluded by requesting:

> [T]he parties attempt to agree on stipulated Findings of Fact and Conclusions of Law consistent with the above findings, including the number of attorney hours and costs that are reimbursable. If outstanding issues remain, the court will resolve them.

CP at 1136.

8. Mann's March 26, 2012 Supplemental Declaration[19]

On March 26, 2012, three days after Judge Heller heard her fee petition, Johnson attempted to place the *Burklow* offer of judgment (and portions of various email between Ms. Mann and Mr. Robinson O'Neill) into the record CP at 1123-24. March 26, 2012, was the same day the trial court's letter decision was sent to counsel by email. CP 1123-34.

9. Johnson's Motion for Reconsideration and Supplemental Declarations

Ms. Johnson requested reconsideration on April 5, 2012. CP at 1137-1326. The issues Ms. Johnson requested that the trial court reconsider are the same four issues[20] she identifies on appeal:

> (1) denial of fees after the date of the offer of judgment (October 5, 2011) for preparation of the fee petition;
>
> (2) denial of fees for non-contemporaneous "reconstructed" billings;
>
> (3) denial of fees for Ms. Johnson's administrative challenge of her disability separation before the Personnel

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[19] Although DOT discusses Mann's Supplemental Declaration in Support of Plaintiff's Supplemental Authorities in this statement of the procedural posture of this case, DOT is aware of no civil or local rule (or case law interpretation of "supplemental authorities") that would have authorized this filing. In describing the declaration here, DOT does not accede to its admissibility. The Supplemental Authority the declaration states that it supports is *Lasswell v. City of Johnston*, 436 F. Supp. 2d 974, 980-82 (S.D. Ill. 2006) (this case interprets the phrase "costs accrued to date" in an offer of judgment and is discussed below). CP at 1103-22.

[20] Johnson's extensive argument on "the State's" course of conduct regarding payment of post-offer of judgment fees is not identified as an *issue*, either on reconsideration or on appeal. *Contrast* RAP 10.3(a)(4).

> Resources Board and the subsequent administrative appeal; and
>
> (4) denial of reimbursement for Dr. Reisenauer's bill for work performed because he did not segregate the costs he incurred as an expert witness from those he incurred (prior to June 17, 2011) as Ms. Johnson's treating psychologist.

CP at 1196-97.

In support of reconsideration Ms. Johnson filed declarations from both James W. Kytle (CP at 1137-95, 1270-1326) and Mary Ruth Mann (CP 1209-69). Mr. Kytle's declaration includes the *Burklow* judgment as an appendix (CP 1153-54). It also reintroduces the Mann supplemental declaration of March 26, 2012 and its appendices (the *Burklow* judgment, and various email between Ms. Mann and Mr. Robinson O'Neill). CP 1184-94.

On reconsideration Ms. Johnson argued, for the first time, that "the State" is bound by its "course of conduct" in the *Burklow* case and that DOT "intended to mislead" Ms. Johnson by making an offer of judgment that used the same legal form as that offered by Everett Community College to Ms. Burklow. CP 1199-1203; *see also* App. Opening Br. at 13-19. Johnson's new argument on reconsideration is the primary argument she relies upon in this appeal: "Any intent by the State to cut off these fees was affirmatively hidden from Johnson until after the acceptance in

the face of Johnson's clear assertion they were recoverable, and the contemporaneous course of dealing where they were sought and paid without objection."[21] CP at 1202.

Ms. Johnson also argued, for the first time on reconsideration, that the time she spent on her unsuccessful PRB litigation was non-segregable. CP at 1203-04. App. Opening Br. at 19-21.

10. DOT's Response on Reconsideration

In its response to Ms. Johnson's motion for reconsideration, DOT noted that under CR 59 parties are not allowed to present new theories that could have been raised before the entry of an adverse decision. CP 1335.

As part of his supplemental declaration in opposition to reconsideration, Mr. Robinson O'Neill provided the full record of his discussion of post-judgment fees with Ms. Mann, as well as their discussion of the *Burklow* case. CP at 1352, 1361-75. Mr. Robinson O'Neill's memory of the conversation (which his email confirms as occurring on October 24, 2011, a week after Ms. Johnson approved the

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[21] This statement is contradicted by Ms. Mann's (February 16, 2012) declaration in support of Johnson's reply which describes Burklow as a "contested" fee petition and criticizes "the State" for relying upon Mike Caryl's survey of attorneys' fees in both *Burklow* and *Johnson*: "The State of Washington in the *Burklow* contested fee petition relied heavily on the testimony and survey of Attorney Mike Caryl and the Court in multiple respects found Mr. Caryl's testimony and assertions erroneous or unpersuasive." CP at 946-47, 948. As the record Johnson introduces in support of her reply in this case demonstrates, Everett Community College (and AAG Susan Edison) strongly opposed the award of attorneys' fees and costs subsequent to acceptance of the offer of judgment in *Burklow*. CP at 983-1037. Everett Community College did not appeal the discretionary fee decision in *Burklow*.

offer of judgment) accords fully with Ms. Mann's *original* description of the discussion in the supplemental declaration (February 16, 2012) she filed in support of her reply brief (CP 948). *Compare* CP at 948-51, with CP 1352, 1375. Insofar as there was a *Burklow* "rule" or "formula," it was correctly described by Ms. Mann in her supplemental declaration in support of her reply (CP at 948) as being purely financial: $400 per hour plus a 1.5 multiplier.

Mr. Robinson O'Neill's declaration confirms that the hourly rate and the 1.5 multiplier were the only elements of *Burklow* discussed by counsel; counsel did not discuss whether any time spent litigating the fee award would be barred by the plain language of the offer, or whether the *Burklow* decision supported the broad interpretation Mann had proposed on October 17, 2011. CP 1352, 1368, 1375. His email of October 24, 2011, used that financial "formula" as the basis for counsels' continuing discussion of settling the costs and attorneys' fees in this case. CP at 1375.

Mr. Robinson O'Neill's complete email also makes it clear that neither he nor DOT ever waivered from the plain terms of the offer of judgment on the issue of post-judgment attorneys' fees. CP at 1352, 1368-69. And although Ms. Mann stated that she believed the "rule" was "costs and fees incurred in 'seeking reasonable attorney fees and costs' under

RCW 49.60" were recoverable (CP at 1368), Mr. Robinson O'Neill did not concur in her view of the law.[22] His final statement to Ms. Mann at 11:47 a.m. on October 17, 2011 (her acceptance of the offer of judgment was required by noon) was: "The best that I can do at this time is rest on the plain language of the settlement offer and the offer of judgment."[23] CP at 1368.

11. Joint Submission of Stipulated Calculations

The parties filed a joint submission of stipulated calculations that served as the basis for the trial court's decision on Ms. Johnson's motion for reconsideration on April 24, 2012. CP at 1464-70. The stipulated calculations identified "the effect of each remaining issue before the Court which would potentially effect [sic] the total." CP at 1464. Most significantly, the joint submission agreed "the following are the correct attorney fee hours to be presented to the Court as the basis for its Order." CP at 1465. The joint submission identified the remaining contested costs, and stated the parties' respective positions regarding costs incurred after October 5, 2011. CP at 147.

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[22] His responsive email message stated: "I am not willing to agree on behalf of my client to a 'rule' in this settlement offer, or in the offer of judgment, at this time." CP 1368.

[23] At 11:02 a.m. on October 17, 2011, Mr. Robinson O'Neill wrote: "Assuming there is such a dispute ("over the amount of costs and fees accrued as of the October 5, 2011 offer of judgment"), my position would be that, as in other litigation contexts, the American rule would apply and the parties would bear their own costs." CP at 1368. This was the statement relied upon by the trial court in its findings of fact. CP at 1479.

On June 6, 2011, the court heard oral argument on whether Dr. Reisenauer's cost bill should be part of the medical damages awarded to Ms. Johnson as part of the offer of judgment or whether that bill should be categorized as a legal cost. CP at 1464.

12. Partial Judgment

On the basis of the offer of judgment and the acceptance (CP at 528-53), the trial court entered partial judgment for Ms. Johnson for $350,000 against DOT on May 15, 2012. CP at 1471-73. This judgment has been paid by DOT and is not contested on appeal. App. Opening Br. at 3.

13. Findings of Fact and Conclusions of Law

On June 18, 2012, after five months of briefing and argument, the trial court entered findings of fact and conclusions of law. CP at 1475-82; Appendix D. The trial court found that Mann & Kytle was entitled to an award of reasonable attorneys' fees and costs under RCW 49.60. CP at 1475, 1482. It determined the partner fee rate to be $425 (CP at 1477) and awarded a multiplier of 1.3 (CP at 1480) on those hours for which there was contemporaneous documentation (CP at 1479). It segregated and did not award the hours directly spent on Ms. Johnson's unsuccessful administrative claim (CP at 1478) and did not award fees and costs after the date of the offer of judgment (CP at 1478). *See* Appendix D.

14. Final Judgment

The trial court entered final judgment as to reasonable attorney fees ($119,448.20) and costs ($12,034.38) on June 22, 2012. CP at 1483-86. This judgment has been paid by DOT and is not contested on appeal. App. Opening Br. at 3. The fees and costs the trial court excluded as "unreasonable" are the sole issue in this case. App. Opening Br. at 3-4.

15. Appeal and Remedy

Ms. Johnson appeals the trial court's letter ruling of March 26, 2012 (CP at 1135-36), its findings of fact and conclusions of law (CP at 1475), and its final judgment (CP at 1483-86).

Rather than requesting remand, Ms. Johnson's opening brief requests that this court award "a supplemental judgment for the additional attorney fees and costs for litigating Johnson's Petition for 'reasonable attorneys fees and costs', for non-segregable time in the State disability termination appeal procedures, for attorney time documented and detailed during review and correction of time and billing records, and the costs for law-related, non-treatment time for Johnson's treating counselor, Dr. Reisenauer." App. Opening Br. at 3-4. In addition, Ms. Johnson requests that fees be awarded on appeal (with the 1.5 multiplier considered but not used by the trial court) for the "protracted litigation required to

cover fees under the 'scheme' advanced in this case by the State." App. Opening Br. at 4.

IV. ARGUMENT

A. Standard Of Review

The standard of appellate review for an award of fees and costs involves a two-step process. First, this Court reviews de novo whether a statute, contract, or equitable theory authorizes the award.[24] Second, if such authority exists, this court reviews the amount of the award for abuse of discretion.[25]

In this case, after examining the contract formed by the offer of judgment and acceptance, the trial court determined that "reasonable" attorney fees and costs were authorized by RCW 49.60. CP at 1482.

The trial court's award of reasonable attorney fees and costs was supported by a stipulated joint calculation of all of the areas where fees and costs were disputed (CP at 1464-70); thirty-one written findings of fact and six written conclusions of law articulated its final order. CP at

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[24] *Estep v. Hamilton*, 148 Wn. App. 246, 259, 201 P.3d 331 (2008) (internal citations omitted); *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 284 P.3d 749 (2012).

[25] *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). The manifest abuse of discretion standard applies to all attorney fee awards, including those interpreting the award of reasonable attorneys' fees under RCW 49.60.030(2) (WLAD). It also applies to a trial court's decision not to consider new theories on reconsideration. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 977 P.2d 639 (1999).

1475-82; Appendix D. Its findings and conclusions conform to Washington attorney fee law in every respect.[26] The trial court did not abuse its discretion. Its findings and conclusions should be affirmed.

B. New Arguments And Theories—Raised For The First Time On Reconsideration—Should Not Be Considered In This Appeal

Washington law is clear that a plaintiff cannot propose new case theories that could have been raised before entry of an adverse decision in a motion for reconsideration. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). As DOT argued in opposition to the arguments raised for the first time on reconsideration, CR 59(a) bars reconsideration on the basis of evidence Ms. Johnson "could not with reasonable diligence have discovered and produced" prior to the decision for which reconsideration is requested. CP at 1335.

The two arguments Ms. Johnson raised for the first time on reconsideration—that the fees for her administrative claim before the PRB cannot be segregated (CP at 1203-04, App. Opening Br. at 19-21) and that she was misled by the State's course of conduct and intent to deceive (CP at 1199-1203, App. Opening Br. at 13-19) should be stricken by this court as "new theories" that were not raised before entry of the trial

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[26] For example, Washington, law requires that in determining attorney fees in a case in which an attorney has requested a multiplier, "Counsel must provide contemporaneous records documenting the hours worked." *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

court's adverse letter decision. Compare CP at 450-63 (Johnson's Petition) and 900-07 (Johnson's Reply).

Allowing a party to introduce new theories after an adverse decision (when they are not based upon new evidence that was undiscoverable before the adverse decision) squanders judicial resources. Insofar as the trial court's findings of fact and conclusions of law represent a rejection of the two "new theories" offered by Ms. Johnson on reconsideration, the trial court's rejection of those theories must be measured against a manifest abuse of discretion standard. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 977 P.2d 639 (1999). Since there is no evidence that rejection of those theories was made on untenable grounds or for untenable reasons, the trial court's rejection of them should not be disturbed by this court.

C. Under Civil Rule 68, The Offer Of Judgment And Acceptance Formed A Contract That Governs This Case

Ms. Johnson does not dispute that in this litigation she accepted a settlement offer and is now before the court on a contractual issue: the meaning of a contractual term. Although the parties referred the matter of what fees were "reasonable" to the court, this is a contractual dispute, not a

fee petition.[27] Under both Washington and Federal law, civil rule 68 offers are contractual in nature and allow an offer or to limit recovery "to the effect specified in [its] offer." CR 68; *Hodge v. Dev. Servs. of America*, 65 Wn. App. 576, 579, 828 P.2d 1175 (1992); *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir. 1997).[28] Civil rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or offer, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

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[27] The contract forms the foundation for the trial court's findings of fact 16 though 19. CP at 1478-79. The reasonableness of the fee is determined in accordance with the case law governing fee petitions. See Section V.B, below.

[28] The federal civil rule 68 is identical to Washington's civil rule 68 and Washington courts may look to federal cases for guidance. *Hodge*, 65 Wn. App. at 579.

The purpose of civil rule 68 is to encourage settlement by promoting certainty and eliminating unintended results. *Wallace v. Kuehner*, 111 Wn. App. 809, 822, 49 P.3d 823 (2002). As several courts have noted, a defendant is the master of what is offered. *Nusom*, 122 F.3d at 833; *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wn. App 261, 272, 131 P.3d 910 (2006); *Hodge*, 65 Wn. App. at 584. Waiver of attorney fee recovery in a civil rule 68 offer, however, must be clear and unambiguous. *Nusom*, 122 F.3d at 833.

A civil rule 68 offer of judgment limiting recovery to attorney fees accrued *as of the date of an offer* has been found to be clear and unambiguous. In *Guerrero v. Cummings*, the Ninth Circuit addressed a civil rule 68 offer virtually identical to the offer in this case. 70 F.3d 1111, 1112-13 (9th Cir. 1995) (noting that similar language was effective to limit recovery to fees after the date of the offer). Here, DOT offered Ms. Johnson a sum plus "awardable costs and reasonable attorney fees accrued in this lawsuit up to the date/time of this offer." Under the plain terms of the offer, Ms. Johnson is limited to fees accrued "up to" October 5, 2011. CP at 533-34, 1135, 1476-77.

The *Guerrero* court addresses each of the arguments raised here by Ms. Johnson. 70 F.3d 1111 (9th Cir. 1995). The court affirmed the general rule that a plaintiff is entitled to the costs accrued in litigating the reasonableness of fees. *Guerrero*, 70 F.3d at 1113. However, the court then

noted that a party waives its right to recover those fees by accepting an offer of judgment with the language, "incurred by this plaintiff prior to the date of this offer in an amount to be set by the court." *Guerrero*, 70 F.3d at 1113. The *Guerrero* court found this language to be a clear and unambiguous waiver of costs and fees accrued after the offer of judgment, including the fees incurred in litigating the issue of reasonableness. *Id.* In this case, DOT's counsel specifically notified Ms. Johnson that he was relying on the plain language of the offer of judgment. CP at 1194. This is the last statement the offeree made prior to Ms. Johnson's unconditioned acceptance.

The *Guerrero* court rejected the public policy argument Ms. Johnson raises on appeal. App. Opening Br. at 11-12. Ms. Johnson argues that using CR 68 in this manner would deprive civil rights plaintiffs of attorneys. The *Guerrero* court notes that the civil rights claims are subject to the same CR 68 settlement provisions as all other plaintiffs. 70 F.3d at 1114. A plaintiff need not accept the settlement offer and can always proceed to trial. In this case, as in *Guerrero*, the CR 68 offer unambiguously excluded fees and costs accrued after October 5, 2011. By accepting the offer rather than rejecting it, Ms. Johnson waived her right to recovery of fees incurred after the date/time of the offer.

The district court case from Southern Illinois relied upon by Ms. Johnson does not alter this analysis, nor is its reasoning applicable to

this case.[29] App. Opening Br. at 17-19. In *Lasswell*, the offer stated, "costs accrued to date." *Lasswell v. City of Johnston City*, 436 F. Supp. 2d 974, 981 (S.D. Ill 2006). The court determined that phrase "to date" was ambiguous and could have meant costs until the date of offer or until judgment was entered. The court then construed the ambiguity against the drafter. *Lasswell*, 436 F. Supp. at 981. In reaching its decision, the *Lasswell* court specifically noted that the language in *Guerrero* was effective to limit recovery. *Lasswell*, 436 F. Supp. 2d at 981 ("However, in *Guerrero*, the offer provided for "costs incurred by this plaintiff *prior to the date of this offer*."). *Id.* (Emphasis added). Thus, under both *Guerrero* and *Lasswell*, the result is the same. Ms. Johnson is bound by her acceptance of the unambiguous offer of judgment.

Even if this court were to consider the extrinsic evidence offered by Ms. Johnson (App. Opening Br. at 14-19), first submitted on reconsideration, the result would be the same. First of all, Ms. Johnson cannot establish a course of conduct by pointing to the litigation decisions of another AAG representing a different client in a different lawsuit in a case for which there was no appellate review. As Ms. Mann's February 16, 2012 declaration confirms, the only discussion of *Burklow* in the present litigation was with respect to Ms. Mann's hourly rate and the use of a multiplier. CP 948, 1352.

[29] Even if it altered this analysis, a Ninth Circuit appellate decision should have greater persuasive effect than a district court decision.

Counsel did not discuss *Burklow* with regard to whether the October 5, 2011 cut-off for the offer of judgment precluded recovery of attorney fees accrued after that date. CP at 948, 1352, 1375.

Examining the complete email chain (CP At 1194-96), rather than the fragment relied upon by Ms. Johnson, only reinforces this conclusion (App. Opening Br. at 15-16). The AAG's email unambiguously states that DOT rejected Ms. Johnson's interpretation of the offer to allow recovery of fees incurred during post-offer in fee litigation. CP at 1194. The email concludes, "The best I can do at this time is rest on the plain language of the settlement offer and of the offer of judgment." CP at 1194.

The email chain provided by Ms. Johnson creates the following time line: Ms. Johnson's counsel inquired about recovery for subsequent fee litigation, DOT's counsel indicated no such recovery was allowed under the offer, Ms. Johnson's counsel erroneously asserted that there was a rule allowing recovery in the CR 68 context, DOT's counsel stated he did not agree to any such rule and was relying on the plain language limiting recovery to fees incurred before October 5, 2011. CP at 1194. Ms. Johnson then accepted the offer of judgment without qualification. CP at 2150. The only reasonable conclusion to be drawn from this email exchange is that the offer excluded attorney fees incurred in fee litigation. Ms. Johnson's

unqualified acceptance—shortly after Robinson O'Neill's last email—was of the plain language of the offer. CP at 2147-53

If anything, the extrinsic evidence establishes that Ms. Johnson may have misapprehended the law regarding CR 68 offers. However, Ms. Johnson's mistaken view of the law is not grounds for rewriting the settlement offer to accommodate her mistake. Restatement (Second) of Contracts §154, cmt c. (1981) (allocating risk of a mistake to a party who asserts they possess knowledge that is ultimately inaccurate).

Ms. Johnson accepted the offer as written and is bound to the plain language of the offer. Her mistake as to the law is properly allocated to her. The contract should be enforced as written. This Court should uphold the trial court's findings regarding the plain terms of the contract between the parties. CP at 1478-9.

D. The Trial Court's Award Did Not Abuse Its Discretion And Should Be Affirmed

This Court reviews a trial court's attorney fee award for a manifest abuse of discretion: an award is only reversed if a trial court exercised its discretion on untenable grounds of for untenable reasons. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). The manifest abuse of discretion standard applies to all attorney fee awards,

including those interpreting the award of reasonable attorneys' fees under RCW 49.60.030(2) (WLAD). See, e.g., *Pham*, 159 Wn.2d at 538-41[30] (affirming the trial court's discretion to determine the lodestar amount and multiply it by a reasonable hourly rate,[31] determine whether claims have a "common core of facts and related legal theories,"[32] and determine whether hours spent were unproductive); and *Collins v. Clarke Cnty. Fire Dist. No. 5*, 115 Wn. App. 48, 98-106, 231 P.3d 1211 (2010)[33] (affirming the trial court's discretionary decision to reduce the requested hourly rate, not use a multiplier, and subtract fees for unsuccessful claims).

In *Pham*, the Washington Supreme Court, after noting that the WLAD's "liberal construction clause is not without limitation:" stated:

> In this case, the trial judge took care to enter 35 findings of fact justifying his reasonable fee calculation....In all cases, but especially in ones as complex as this one, it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation. *See also Hensley* [*v. Eckerhart,* 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).] That is why the law requires us to defer to the trial court's judgment on these issues. The issue before us is not whether we would have awarded a different amount, but whether the trial court abused its discretion. Pham and Lara

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[30] A race discrimination case under WLAD where, as here, the trial court entered a large number of findings of fact justifying its reasonable fee calculation.

[31] Under *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

[32] Under *Martinez v. City of Tacoma*, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996).

[33] A RCW 49.60 case where female workers brought action against fire district alleging gender discrimination, sexual harassment, negligent supervision and retention, and outrage.

> have not shown that the trial court abused its discretion in calculating attorney fees in this case.

159 Wn.2d at 540.

The party seeking an award for attorney fees bears the burden of proving that such fees are reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). The trial court must independently determine a reasonable fee. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Scott Fetzer Co.*, 122 Wn.2d at 147. The trial court may not simply rely upon the billing records of the attorney seeking fees. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

In the present case, the parties prepared joint calculations that served as the foundation for the court's order, and the trial court entered thirty-one findings of fact and six conclusions of law as the basis for its final order. CP at 1475-82; Appendix D. Its findings and conclusions conform to Washington attorney fee law in every respect.

The trial court made all of the primary decisions in the original litigation. It considered all of the pleadings and exhibits discussed in the counterstatement of facts (Section III above) as basis for its exercise of discretionary judgment on the reasonable attorney fees and costs available

to Ms. Johnson under the October 5, 2011 offer of judgment and RCW 49.60.

On appellate review, this Court may only reverse an award if a trial court exercised its discretion on untenable grounds of for untenable reasons. As in *Pham*, the trial court in this case exercised its discretion with care, on a clearly articulated foundation. The law applicable to fee determinations in WLAD cases requires that the trial court's discretionary decisions regarding reasonable fees and costs[34] be affirmed by this court.

E. If This Court Considers Johnson's New Arguments, It Should Affirm The Trial Court's Denial Of Fee Recovery For Johnson's Unsuccessful PRB Administrative Claim

Even if this court chooses to address Ms. Johnson's new theories, this court should affirm the trial court's denial of fee recovery for Johnson's administrative accommodation claim. The trial court properly excluded the hours that the parties jointly identified as related to the unsuccessful accommodation claim.[35] The only hours the parties agreed upon were those spent drafting the administrative summary judgment pleadings, correspondence in that proceeding, and the limited administrative

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[34] These include findings of fact 5 through 15, 20 through 31, and all conclusions of law. CP 1475-82; Appendix D.

[35] The sole overlapping issue Ms. Johnson identifies on appeal (App. Opening Br. at 7-8) is whether or not she was entitled to accommodation with another state agency. That argument was rejected, under *Havlina*, by both the PRB and the trial court. It is a distinct theory, separate in every respect from Johnson's WLAD discrimination claim.

depositions. The parties jointly identified hours directly and solely identified as attributable to the unsuccessful claim. Those are the only hours the trial court excluded. CP at 1464-67.

Under the lodestar method, the trial court may properly discount hours spent on unsuccessful claims, including time on ancillary or parallel litigation. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn App. 841, 847, 917 P.2d 1086 (1995). This rule applies in discrimination cases as well, where the trial court may, in its discretion, discount hours spent on unsuccessful claims. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d at 538. One commentator described the rule in this way: "*Pham* represents a significant statement by the Supreme Court that trial courts must be very aggressive about excluding attorney time spent on unsuccessful portions of an overall successful litigation effort." Talmadge, Philip and Mark Jordan, *Attorney Fees in Washington*, p. 146 (Lodestar Publishing 2007).

If attorney fees are recoverable, the award must reflect segregation of time even if the claims overlap or are interrelated. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004). If the claims are so related that no reasonable segregation can be made, then the court need not segregate. *Id.* at 691 citing *Pannell v. Food Servs. of Am.*, 61 Wn. App. 418, 447, 810 P.2d 952 (1991), *review denied,* 118 Wn.2d 1008, 824 P.2d 490 (1992). The burden of proving a

claim is not segregable is on the one claiming fees. *See e.g. Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 501-02, 589 P.2d 26 (1993) ("plaintiff can be required to segregate its attorney fees between successful and unsuccessful claims.").

Here, Ms. Johnson's accommodation claims are not so overlapping or interrelated that they are not segregable. The claims involve different actors at different times. Ms. Johnson's claims regarding gender and age discrimination, retaliation, and various negligence theories revolve around Ms. Johnson's treatment by Corey Moriyama, her supervisor, in the northwest region from June 2007 to August 2008. The administrative accommodation claim, by contrast, focuses on DOT's July 2009 decision to disability separate Johnson by individuals in DOT's headquarters unit and not Ms. Johnson's supervisors. CP at 1729.

For the purposes of this accommodation claim, it is irrelevant whether the disability was caused by discriminatory actions or evolved in some other way; the duty to accommodate is triggered by the fact of the disability, not its cause. The disability accommodation claim is completely independent of the discrimination claims and based on separate facts; i.e. whether the DOT was obligated to transfer Ms. Johnson to another state agency some eleven months after Johnson was no longer working with

Moriyama. Time spent pursuing this distinct and separate theory is segregable and was properly excluded from the fee award.

Ms. Johnson asserts that the depositions from the administrative claim were efficient and did not need to be retaken. App. Opening Br. at 20-21. That is not accurate. Ms. Johnson did seek to re-depose Lorena Eng. CP at 1426. Furthermore, the AAG in the administrative accommodation case cases limited the depositions to the disability claim and refused to allow Johnson's counsel to conduct tort discovery.[36] CP at 1328-29. Ms. Johnson cannot claim now that these depositions were efficient and relevant to her discrimination claims. App. Opening Br. at 20-21. DOT also notes that if the administrative depositions were not segregable, the eight depositions requested in the civil case combined with the five administrative depositions would have exceeded the ten deposition limitation under the King County local rules. KCLR 26(b)(3). The truth is that the five brief administrative depositions related to the disability separation issue not the discrimination claim.

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[36] DOT refers this court to the extended analysis of the statements made by AAG Lawson Dumbeck during the administrative depositions of Corey Moriyama, Lorena Eng, Brenda Nnambi, Dave Dye, and Kermit Wooden included in response to Johnson's motion for reconsideration. CP 1328-29. In each deposition Dumbeck announced that WAC 357-46-160 limited the questions to Johnson's disability separation. The deposition transcripts describe Ms. Mann as making "loud" objections regarding the deposition limitations. Dumbeck did not allow tort discovery and stated he would request a protective order. All depositions lasted less than the one hour scheduled for each. All were continued by Ms. Mann. CP 1328-29.

In this context, it was not an abuse of discretion for the trial court to find that time spent on litigating the administrative summary judgment motion and on the discovery limited to the administrative claim should be segregated. This Court should affirm the trial court's ruling.

F. This Court Should Affirm The Trial Court's Denial Of Fees For "Reconstructed" Time

The trial court's order directing the exclusion of reconstructed hours was dictated by the same contract principles discussed above. The offer of judgment required, as a condition, that the request for fees be substantiated by billing records attached to the acceptance of the offer. CP at 533-34; Appendix A. Ms. Johnson should be limited by the plain terms of the offer to the billing records provided in October 2011. CP at 528-52.

Even if that were not the case, the trial court's denial of payment for reconstructed time was within the trial court's discretion. In Washington, the law requires that in determining attorney fees in a case in which an attorney has requested a multiplier, "Counsel must provide contemporaneous records documenting the hours worked." *Mahler v. Szucs*, 135 Wn.2d at 434. These contemporaneous records need not be exhaustive or in minute detail. *Id.*

This requirement is repeated and explained in the federal case relied upon by Ms. Johnson. App. Opening Br. at 23. *Miles-Hickman v. David*

Powers Homes, Inc., 2009 WL 9995632 at *4 (S.D. Texas 2009)[37] ("Despite [plaintiff's counsel's] good faith, the court is unpersuaded and will not condone his practice of writing time entries long after the events reported. Counsel who plan to seek attorneys' fee awards in litigation must keep some type of reliable records, which generally requires that the records be made contemporaneously with - or at least close in time - to when the work is performed."). The *Miles-Hickman* court used the lack of contemporaneous records as a basis to reduce the entire award by 10 percent even where plaintiff's attorney attempted to underestimate hours spent. *Id. See also*, *Hensley v. Eckerhart*, 461 U.S. 424, 428-29, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983) (upholding a district court decision reducing an award by a third in part for failure to keep contemporaneous records.).[38]

As one commentator has advised: "An attorney must keep specific,

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[37] RAP 14.1 allows a party to cite to an unpublished case from jurisdictions other than Washington State only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. Fed. R. App. P. 32.1 approves citation to an unpublished case issued after January 1, 2007. The *Miles-Hickman* decision was filed in 2009. In accordance with RAP 14.1, a copy of the *Miles-Hickman* decision is included as Appendix E.

[38] There is also federal case law suggesting that the failure to maintain contemporaneous records is a permissive but not mandatory reason to reduce the number of reasonable hours in the lodestar formula. *Frank Music Corp. v. Metro-Goldwyn Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) ("The lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation."). The failure to keep contemporaneous records justifies discounting fees. The *Frank Music* court, in remanding the case, noted, "Plaintiff's counsel's inadequate showing has invited substantial discounting of his fee." *Id* at 1557. If the federal rule is persuasive authority here, the fact that Ms. Johnson's counsel failed to keep accurate contemporaneous records justifies a downward departure from the total hours.

contemporaneous time records of fees incurred . . . Courts are justifiably skeptical about fee declarations creating time after the fact." Talmadge, *Attorney Fees in Washington*, p. 132.

It should be noted that the trial court in this case faced an unusual situation. Ms. Johnson's counsel *did keep* contemporaneous records. But her contention before the trial court (and on appeal) is that her contemporaneous record keeping was inaccurate. She asserts that her latter reconstruction (based on file review) should control over her contemporaneous billing. The need for added time for correspondence review is puzzling in light of Ms. Johnson's many entries in her initial billing for other correspondence review.[39] Ms. Johnson offers no viable explanation for why some hours were included in the initial billing but not other hours. The trial court was well within its discretion when it found that "the reconstructed time is wholly unreliable." CP at 1499. Where Ms. Johnson claimed 443 total hours, the trial court's decision to reduce the award by those hours for which there was no contemporaneous billing (58.54) is a reasonable downward deduction of 14 percent of the total hours requested in the January 2012 invoice. CP at 1499.

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[39] See for example, entries for July 29, 2009, August 27, 2008, September 10, 2008, September 12, 2008, October 31, 2008, January 15, 2009, May 14, 2009, June 24, 2009, July 28, 2009, December 14, 2009, March 23, 2011, April 20, 2011, May 6, 2011, June 14, 2011, June 16, 2011, July 11, 2011, July 12, 2011, August 11, 2011, August 17, 2011, August 29, 2011, and August 31, 2011 from Johnson's initial October 2011 billing statement. CP at 535-53.

Ms. Johnson relies upon *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012) as Washington authority for the proposition that billing records need not be contemporaneous. App. Opening Br. at 22. The *Clausen* court did not, however, address the issue of contemporaneous records. The holding in *Clausen* is that the trial court did not abuse its discretion when it applied a 10 percent reduction, a holding that supports the trial court's discretion to apply a reduction here after finding the reconstructed time to be wholly unreliable. *Clausen* does not reach a holding regarding the obligation to maintain contemporaneous records. *Clausen* is not authority for this point and does not apply to this case.

G. This Court Should Affirm The Trial Court's Denial Of Cost Recovery For "Legal Consultation" By Johnson's Treating Psychologist

The trial court was required to award costs that were reasonable and necessary. *Blair v. Washington State Univ.*, 108 Wn.2d 558, 573, 740 P.2d 1379 (1987). Dr. Reisenauer billed $43,718.56 for "legal consultation" for time concurrent with the time he was treating Karen Johnson. Ms. Johnson was compensated for medical expenses as part of the settlement. The trial court correctly found that Ms. Johnson should not be allowed to change a treating psychologist into an expert *post hoc* and double recover.

Ms. Johnson cites two sources of law in support of reimbursing Dr. Reisenauer's cost bill: CR 26(b)(7), which relates to discovery from

treating physicians; and RCW 49.60.030, which allows recovery for expert witness fees. *See also Blair*, 108 Wn.2d at 574-75 (allowing recovery for expert witness fees). Neither of these sources of law supports recovery of Dr. Reisenauer's cost bill.

In this case, Dr. Reisenauer was compensated by DOT for his deposition and for what he termed his "editorial review" of the records. Ms. Johnson has conceded that Dr. Reisenauer was not retained as an expert, but that he spent an unusually large amount of time treating her because of the complexity of the issues and her involvement in the legal matter. CP at 1214. This is a concession that his billing is not an expert litigation fee, but part of the course of his treatment. Accordingly, Dr. Reisenauer's October 20, 2011 cost bill was a medical bill compensated in the $350,000 judgment, just as any other damage suffered by Ms. Johnson was compensated.

The trial court's decision is also confirmed by Dr. Reisenauer's testimony. On the date of his deposition (June 17, 2011) Reisenauer testified that he was not an expert witness and that the medical bills submitted to DOT covered all of the time he billed on this case except for some administrative time that he did not bill. CP at 792-93.

If it is true now, as Ms. Mann asserts on Dr. Reisenauer's behalf, that he was in fact billing time for extra work before June 17, 2011, then his

testimony at this deposition was false and misleading. Either way, without specific billing records for the period before June 17, 2011, the trial court did not abuse its discretion if it discounted the credibility of Dr. Reisenauer and his billing records. CP at 1135, 1481.

On appeal, Ms. Johnson argues that Dr. Reisenauer should be compensated for the extra time he put into this case as her treating physician. App. Opening Br. at 24-25. The trial court's ruling does not require that he be deprived of compensation. It simply follows case law in holding that expert witness fee recovery is for expert witnesses and not a back door to double recovery for the medical bills of a treating physician. The trial court's ruling regarding Dr. Reisenauer's fees is correct and should be upheld.

V. CONCLUSION

DOT requests that this court affirm the trial court's award of reasonable attorney fees and costs.

RESPECTFULLY SUBMITTED this 11 day of January, 2013.

ROBERT M. MCKENNA
Attorney General

TAD ROBINSON O'NEILL
WSBA No. 37153
CATHERINE HENDRICKS
WSBA No. 16311

Assistant Attorneys General
800 Fifth Ave
Suite 2000
Seattle, WA 98104
(206) 389-2033

DECLARATION OF SERVICE

I certify that I caused to be served a copy of Respondent's Brief on all parties or their counsel of record on the date below, via ABC Legal Services, as follows:

MARY RUTH MANN
JAMES W. KYTLE
MARK W. ROSE
MANN & KYTLE, PLLC
200 SECOND AVENUE W.
SEATTLE, WA 98119

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 11th day of January, 2013, at Seattle, Washington

Nerissa Raymond

NERISSA RAYMOND
Legal Assistant

APPENDICES

Appendix A - Offer of Judgment

Appendix B - Acceptance of Offer of Judgment

Appendix C - Court's Letter Regarding Plaintiff's Fee and Cost Petition, dated March 26, 2012

Appendix D - Findings of Fact and Conclusions of Law Regarding Plaintiff's Petition for Attorney Fees and Costs

Appendix E - *Miles-Hickman v. David Powers Homes, Inc.*, 2009 WL 995632 (S. D. Tex.)

Appendix A

The Honorable Judge Heller

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

KAREN JOHNSON, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Defendant.	NO. 10-2-24681-9 OFFER OF JUDGMENT

TO: KAREN JOHNSON, Plaintiff

AND TO: MARY RUTH MANN, JAMES W. KYTLE, MANN AND KYTLE, PLLC, Plaintiff's Attorneys.

Under Civil Rule 68, Defendant Department of Transportation, State of Washington offers to allow Plaintiff, Karen Johnson, to take judgment against the State of Washington in this matter pursuant to RCW Ch. 4.92, which judgment shall be Three Hundred and Fifty Thousand dollars ($350,000). Additionally, Defendant State of Washington hereby offers to pay Karen Johnson's awardable costs and reasonable attorney's fees accrued in this lawsuit up to the date/time of this Offer, which sum shall be determined by the King County Superior Court in the event that counsel for the parties cannot agree within 10 days of Plaintiff's timely acceptance. Plaintiff's claimed costs and fees shall be substantiated by billing records

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

attached to Plaintiff's acceptance of this Offer detailing the nature and date of the work performed and hours accrued.

This Offer is conditioned upon the dismissal of the Defendant with prejudice, and pursuant to the provisions of RCW 4.92 et seq., judgment may only be entered against and payment made by the State of Washington. This Offer is extended to settle and finally resolve all legal and equitable relief sought by Karen Johnson in this case against the Defendant State of Washington, as well as any other current or former employees or agents of the state, arising from the facts and causes of action described in her complaint.

This Offer is made for the purposes of Civil Rule 68, and may not be construed as a waiver of any defenses or objections, an admission that any Defendant is liable, or that any claimed injuries or damages are the result of any action or inaction on the part of any Defendant. This Offer is made in an attempt to allow Plaintiff and Defendant to compromise their respective litigation positions, to eliminate the added costs of further trial preparation, and to avoid the risks and expenses of trial.

DATED this 5th day of October, 2011.

ROBERT M. MCKENNA
Attorney General

TAD ROBINSON O'NEILL, WSBA No. 37153
Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

PROOF OF SERVICE

I declare that I caused a copy of this document to be served on all parties or their counsel of record on the date below as follows:

☒ Hand delivered:

Mary Ruth Mann
200 Second Avenue W.
Seattle, Washington 98119

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of October, 2011, at SEATTLE, WA.

COURTNEY AMIDON, Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

Appendix B

The Honorable Judge Bruce Heller

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KAREN JOHNSON, Plaintiff, vs. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Defendant.	NO. 10-2-24681-9 **ACCEPTANCE OF OFFER OF JUDGMENT**

COMES NOW Plaintiff Karen Johnson, who hereby gives notice of acceptance of Defendant's October 5, 2011 Offer of Judgment attached hereto.

DATED this 17 day of OCTOBER 2011 in SEATTLE, WASHINGTON.

MANN & KYTLE, PLLC

By: _____
Mary Ruth Mann, WSBA #9343
mrmann@mrmannlaw.com
James W. Kytle, WSBA #35048

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CERTIFICATE OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be e-filed with the Court, and served via legal messenger on the following attorneys:

Tad Robinson O'Neill
John R. Morrone
Assistant Attorneys General
Office of the Attorney General
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

DATED this 17th day of OCTOBER 2011 in SEATTLE, WASHINGTON.

Jo Heinan, Paralegal

LAW OFFICES OF
MANN & KYTLE, PLLC
200 Second Avenue West
Seattle, WA 98119
Tel. 206-587-2700
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Appendix C

Superior Court of the State of Washington
for the County of King

Bruce E. Heller
Judge

King County Superior Court
516 Third Avenue
Seattle, Washington 98104

March 26, 2012

Via Email

Mary Ruth Mann
200 Second Ave West
Seattle, WA 98119
Attorney for Plaintiff

Tad Robinson O'Neill
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
Attorney for Defendant

RE: Karen Johnson v. State of Washington; Cause No. 10-2-24681-9 SEA

Dear Counsel:

The Court concludes as follows with respect to plaintiff's fee and cost petition:

(1) The reasonable hourly rate for Ms. Mann and Mr. Kytle is $425.00; for Mr. Rose $225; for their paralegal $125.00;
(2) Plaintiff is not entitled to fees for hours expended after October 5, 2011 pursuant to the terms of the offer of judgment. *Guerrero v. Cummings*, 70 F.3rd 1111, 1113 (9th Cir. 1995);
(3) Plaintiff is only entitled fees based on hours that were contemporaneously billed. *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998).
(4) Plaintiff is entitled to fees for all hours expended on this case through October 5, 2011, with the exception of time spent on her administrative challenge to her transfer to another state agency.
(5) Plaintiff is entitled to a multiplier of 1.3.
(6) Plaintiff is entitled to reimbursement for all costs, with the exception of Dr. Reisenauer's bills for work performed before June 17, 2011 as her treating physician. Dr. Reisenauer did not submit a cost bill that segregated the costs incurred as an expert witness rather than as a treating physician. His costs are therefore not recoverable.

Superior Court of the State of Washington
for the County of King

Bruce E. Heller
Judge

King County Superior Court
516 Third Avenue
Seattle, Washington 98104

The Court requests that the parties attempt to agree on stipulated Findings of Fact and Conclusions of Law consistent with the above findings, including the number of attorney hours and costs that are reimbursable. If outstanding issues remain, the Court will resolve them.

Sincerely,

Bruce E. Heller
Judge

Original: Court File

Appendix D

Hon. Bruce E. Heller

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

KAREN JOHNSON, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Defendant	NO. 10-2-24681-9 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFF'S PETITION FOR ATTORNEY FEES AND COSTS

This matter came for hearing on February 10, 2012, on Plaintiff's Petition for Attorney Fees and Costs. The Court has considered the following:

1. Plaintiff's Petition for Attorney Fees and Costs;
2. Declaration of Mary Ruth Mann in Support of Plaintiff's Petition for Attorneys Fees and Costs and the exhibits attached thereto;
3. Defendants' Response to Petition for Attorney Fees and Costs;
4. Declaration of Tad Robinson O'Neill, and the exhibits attached thereto
5. Declaration of D. Michael Reilly, and the exhibits attached thereto;
6. Declaration of Courtney Amidon, and the exhibits attached thereto;
7. [Proposed] Findings of Fact and Conclusions of Law Regarding Plaintiff's Petition for Attorney Fees and Costs;
8. Plaintiff's Reply;
9. Declaration of James W. Kytle in Support of Plaintiff's Reply on Plaintiff's Fee Petition;

10. Supplemental Declaration of Mary Ruth Mann in Support of Plaintiff's Petition for Attorney fees and Costs;
11. Plaintiff's Supplemental Authorities in Support of Petition for Attorney Fees and Costs; and,
12. Supplemental Declaration of Mary Ruth Mann in Support of Plaintiff's Supplemental Authorities in Support of Petition for Attorney Fees and Costs;
13. Court's Letter of Decision, dated March 26, 2012.
14. Plaintiff's Motion for Reconsideration of Letter of Decision on Fee Petition;
15. Declaration of James W. Kytle In Support of Plaintiff's Motion for Reconsideration of Letter of Decision on Fee Petition, and the exhibits attached thereto;
16. Declaration of Mary Ruth Mann In Support of Plaintiff's Motion for Reconsideration of Letter of Decision on Fee Petition, and the exhibits attached thereto;
17. Defendants' Response to Motion for Reconsideration;
18. Supplemental Declaration of Tad Robinson O'Neill In Response to Plaintiff's Motion For Reconsideration on Petition For Fees, and the exhibits attached thereto.

The court, having been fully advised, now makes the following findings of fact and conclusions of law:

1. These findings and conclusions are made in connection with Plaintiff's request for an award of attorney fees and litigation costs pursuant to Washington's law Against Discrimination, RCW 49.60. Findings are required in fee award decisions pursuant to *Mahler v. Szucs,* 135 Wn.2d 398, 435 P.2d 632 (1998).

2. On October 5, 2011, Defendant served on Plaintiff an Offer of Judgment for $350,000. In addition, the Offer of Judgment stated that Defendant offered "awardable costs and reasonable attorney's fees accrued in this lawsuit up to the date/time of this Offer..." The

Offer of Judgment further indicated that "Plaintiff's claimed costs and fees shall be substantiated by billing records attached to Plaintiff's acceptance of this Offer..."

3. On October 17, 2011, Plaintiff timely accepted the Offer of Judgment without reservation. Although the Offer was accepted 12 days after it was served, the 10th day was a Saturday. Plaintiff's acceptance on the following Monday was timely.

4. The parties attempted, but failed, to reach agreement regarding awardable costs and reasonable fees. Pursuant to the terms of the Offer, the parties referred the dispute to this court.

Reasonable Rate

5. Under the Offer of Judgment, Plaintiff is entitled to an award of reasonable attorney fees and litigation expenses. *Blair v. Washington State University*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987).

6. This court applies the "lodestar" amount which is a calculation of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

7. The parties dispute what this court should find as the "reasonable hourly rate" for Plaintiff's counsel.

8. Counsel Mary Ruth Mann, James Kytle, and Mark Rose, and the law firm of Mann and Kytle, have represented plaintiff since this case since 2008. Ms. Mann and Mr. Kytle are partners and Mr. Rose is an associate.

9. The court finds that $425 is a reasonable hourly rate for Ms. Mann and Mr. Kytle.

10. The court finds that $225 is a reasonable hourly rate for Mr. Rose.

11. The parties do not dispute the hourly rate for the plaintiff's paralegal. The court finds that $125 is a reasonable hourly rate for the paralegal hours expended on this case.

Hours Reasonably Expended

12. Based on the October 17 and October 21 billing records, the court finds that the following hours were reasonably expended: 170.55 hours for Ms. Mann, 19.44 hours for Mr. Kytle, 41.27 hours for Mr. Rose, and 15.06 paralegal hours.

Hours Spent on Reasonable Accommodation Claim

13. Plaintiff's claim that reasonable accommodation to another state agency was unsuccessful both in the administrative challenge to the Personnel Resources Board and to this court.

14. The court finds that the Plaintiff spent 27.4 partner hours and 25.18 associate hours on pleadings in the unsuccessful administrative claim and on depositions limited to the administrative claim are not recoverable. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

15. These hours can be segregated from the remainder of the hours spent on the litigation because they did not involve a common core of facts and related theories. *Martinez v. City of Tacoma,* 81 Wn.App. 228, 242-43 (1996). Plaintiff's claims of gender and age discrimination, retaliation and negligence related to her treatment by her supervisor in the Northwest Region from June 2007 to August 2008. The accommodation claim, by contrast, focused on the Department's July 2009 decision by the Department's HQ unit, not plaintiff's supervisors. The court finds that they are not recoverable.

Post October 5, 2011 Hours and Costs

16. The Parties dispute whether the hours expended after October 5, 2011 are recoverable under the Offer of Judgment.

17. The Plaintiff is not entitled to fees for hours expended after October 5, 2011 pursuant to the terms of the Offer of Judgment. *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir. 1995). There, the court rejected the argument Plaintiff makes here, namely, that

disallowing post-offer fees undermines the attorney's fees policy in civil rights actions. *Lasswell v. City of Johnston City*, 436 F.Supp.2d 974 (S.D. Ill. 2006), cited by Plaintiff, is distinguishable and not contrary to *Guerrero*. There, the court determined that the words "to date" was ambiguous and could mean costs incurred until date of judgment. *Lasswell*, 436 F.Supp.2d at 981. There is no such ambiguity in the Offer of Judgment here.

18. The court has reviewed the correspondence between the parties in light of Plaintiff's contention that she was misled by defense counsel into believing the state would not contest post offer of judgment fees and costs. The court finds that defendant's position is consistent with the representations defense counsel made to plaintiff's counsel. Supplemental Decl. of Robinson O'Neil, Exhibits A, B, and C. ("I understand your position . . .[M]y position would be that, as in other litigation contexts, the American Rule would apply and the parties would be their own costs").

19. The court finds that Plaintiff expended 59.76 partner hours, 5.85 associate hours, 4.08 paralegal hours, and $7,438.91 in costs after October 5, 2011. These hours are not recoverable under this offer of judgment.

Reconstructed Time

20. Counsel seeking reimbursement under the loadstar methodology must provide contemporaneous records documenting the number of hours worked. *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998). The lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary records. *Fran Music Corp. v. Metro-Goldwyn Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989).

21. On January 23, 2012, Plaintiff submitted detailed billing records that added hours and costs that were not present in the October billing records. Plaintiff's counsel represented that the new additional hours were for time expended that did not get billed at the

time. Plaintiff's counsel reconstructed the amount of time by reviewing correspondence and other documents in the file and then assigning a time estimate. It does not appear that Plaintiff's counsel kept informal time records to assist in this process. A considerable amount of the reconstructed time relates to correspondence. For example, it includes: 4/15/09, correspondence with client, .33 hrs; 4/16/09, correspondence with Schneider re: responses, .33 hrs; 5/4/09, correspondence with Schneider re: responses, .33 hrs. Amidon Decl., Exhibits A and B.

22. The court is skeptical that anyone can recollect how much time she spent on correspondence more than 18 months prior to the reconstruction of the time. This difficulty likely explains why the same amount of time was assigned to all three letters – assuming the second and third letters are not duplicative. Finally, Plaintiff's counsel does not explain why many entries in her initial billings contained contemporaneous records for correspondence, and yet failed to account for time spent on other correspondence.

23. The court does not question Plaintiff counsel's good faith. However, it finds that the reconstructed time is wholly unreliable. Therefore, the additional 58.54 partner hours and .15 paralegal hours in reconstructed time billed before October 5, 2011 will not be credited. This represents a downward deduction of 14% of the total 422 hours claimed. Stipulated Calculations, Table I.

Multiplier

24. The court finds that Plaintiff is entitled to a 1.3 multiplier for the attorney fees. Multipliers are based on the notion that attorneys will generally not take high risk contingency cases for which they risk no recovery, unless they receive a premium for taking that risk. *Pham*, 159 Wn.2d at 541. This case presented high risks and difficulties related to plaintiff's post traumatic stress and anxiety, as well as the resources available to a large public agency to defend the action.

25. By way of summary, the court finds that the following hours were reasonably expended on this lawsuit and are recoverable under this Offer of Judgment:

Partner hours	189.99
Associate hours	41.27
Paralegal hours	15.06

26. When multiplied by the reasonable hourly rates discussed above, the total amount of reasonable attorney's fees is $91,914.00

27. When the 1.3 multiplier is applied, the total amount is $119,448.20.

28. The court finds that the following fees are awardable under this Offer of Judgment: $119,448.20.

Costs

29. Plaintiff is entitled to reimbursement of all costs with the exception of Dr. Reisenauer's bills for work performed as her treating physician. Plaintiff's counsel has conceded that Dr. Reisenauer was not retained as a expert witness but acted as a treating physician. His costs are therefore not recoverable as a litigation expense but would be considered medical damages. *Baker v. John Morrell & Co.*, 263 F.Supp.2d 1161 (N.D. Iowa 2003) and *Blair v. Washington State University*, 108 Wn.2d 558 (1987), do not support Plaintiff's position since they addressed expert fee issues, whereas Dr. Reisenauer is a treating physician.

30. The court therefore does not address an additional issue identified by Defendant, Dr. Reisenauer's failure to properly segregate the time he spent before and after June 17, 2011.

31. After removing Dr. Reisenauer's billing from Plaintiff's October billing records, the remaining costs, $12,034.38 are reasonable.

THE COURT NOW MAKES THE FOLLOWING CONCLUSIONS OF LAW

1. STATUTORY ATTORNEY FEES AND COSTS. A plaintiff who prevails under RCW 49.60 and RCW 49.60.030; the costs of suit including reasonable attorney fees or any other appropriate remedy.

2. LODESTAR METHOD. The lodestar method is the proper method for calculating attorney fees in Washington.

3. HOURLY RATES. Under *Bowers v. Transamerica Title Ins. Co.* 100 Wn.2d 581, 675 P.2d 193 (1983) an attorney's established rate is typically considered reasonable. The Court finds that $425 an hour for Mr. Kytle and Ms. Mann are appropriate as part of the total fee awarded herein, and otherwise the Court finds that $ 225 an hour is appropriate as the rate for Mr. Rose, and that $125 an hour is an appropriate rate for the paralegal in this case.

4. HOURS BILLED. The reasonable hours expended on this case are as stated in Paragraph 25 of this order. Accordingly, the court orders the award as indicated in Paragraph 25.

5. COSTS. The awardable costs in this case are as stated in Paragraph 26 of this order.

6. JUDGMENT. A judgment consistent the offer of judgment and with these findings and conclusions should be entered by the Court.

ENTERED this 15 day of June, 2012.

JUDGE BRUCE E. HELLER

Appendix E

Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Houston Division.
Pamela MILES–HICKMAN, Plaintiff,
v.
DAVID POWERS HOMES, INC., Defendant.

Civil Action No. H–07–0754.
April 14, 2009.

Steven E. Petrou, Attorney at Law, Cypress, TX, for Plaintiff.

Carol P. Keough, Coats Rose et al, Houston, TX, for Defendant.

MEMORANDUM AND ORDER

NANCY F. ATLAS, District Judge.

***1** Pending before the Court is Plaintiff Pamela Miles–Hickman's ("Hickman") Motion for Attorney Fees and Costs [Doc. # 154].[FN1] Also pending before the Court is Defendant David Powers Homes' ("DPH") Motion for Attorney Fees and Costs of Prevailing Party [Doc. # 153].[FN2] DPH does not dispute that Plaintiffs are entitled to recovery of some fees and costs; DPH only disputes the amount Hickman seeks. Hickman, however, disputes whether DPH is entitled to recover any of its own fees or costs. Upon review of the parties' submissions, all pertinent matters of record, and applicable law, the Court concludes that Plaintiffs' Motion should be **granted in part** and **denied in part,** and that DPH's Motion should be **denied.** The Court awards Hickman attorneys' fees and costs totaling **$60,602.57.**

FN1. DPH has filed a Response to Plaintiff's Application for Attorney Fees and Costs and Objection to and Motion to Strike Declarations and Affidavit [Doc. # 157]. Hickman has additionally filed a Supplemental Memorandum of Law [Doc. # 156] in connection with her Motion for Attorney Fees and Costs.

FN2. Hickman has Responded [Doc. # 159]. DPH has additionally filed an Appendix to its Motion [Doc. # 155].

I. *FACTUAL BACKGROUND*

Hickman filed this lawsuit in March 2007, alleging violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.,* the Texas Commission on Human Rights Act ("TCHRA"), TEX. LAB.CODE § 21.001 *et seq.,* the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.,* the Employee Retirement Income Security Act of 1974 ("ERISA"), 20 U.S.C. § 1001 *et seq.,* and the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. § 1161 *et seq.* Hickman asserted at least eleven theories. At the hearing held March 27, 2009, Hickman argued that she had three "groups of claims": disability discrimination claims (including retaliation); FMLA claims; and ERISA/COBRA claims. The Court is not persuaded by Hickman's attempt to combine her claims in this manner. Each of her eleven claims had different legal elements requiring separate analysis. However, the Court has grouped certain claims into pairs because they are sufficiently similar to one another that the legal and factual analysis on the pairs of claims cannot be meaningfully separated. For the purposes of attorneys' fee analysis, the claims under consideration will be grouped as follows:

(1) ADA and TCHRA disability discrimination;

(2) ADA and TCHRA failure to accommodate;

(3) ADA and TCHRA retaliation;

(4) FMLA retaliation and interference; and

(5) ERISA retaliation and interference.[FN3]

FN3. The Court does not include in these calculations the COBRA claim Hickman asserted. The Court denied Plaintiff's request for attorneys' fees associated with that claim. *See* Amended Memorandum and Order [Doc. #

105], at 69–72. Hickman does not seek in the pending fee application any compensation for her counsel's time spent on that claim.

On October 21, 2008, the Court issued a Memorandum and Order [Doc. # 82] [FN4] granting in part DPH's Motion for Summary Judgment [Doc. # 46], Hickman's Motion for Partial Summary Judgment [Doc. # 43], and DPH's Motion for Partial Summary Judgment on Alleged Damages [Doc. # 48]. As a result, several of Hickman's original claims were dismissed. Four claims proceeded to trial: (1) retaliation under the ADA; (2) retaliation under the TCHRA; (3) retaliation under the FMLA; and (4) interference under the FMLA.

FN4. The Court subsequently issued an Amended Memorandum and Order [Doc. # 105] on December 9, 2008, correcting several clerical errors in the October 21, 2008, Memorandum and Order.

On December 19, 2008, after five days of trial and one day of deliberation, the jury returned a verdict in Hickman's favor. The jury found that DPH violated the ADA by terminating Hickman's employment because she requested accommodations for claimed disabilities. The jury awarded damages for the ADA violation. The jury also found that DPH violated the TCHRA by terminating Hickman's employment because she opposed a discriminatory practice under the TCHRA, but awarded no damages for this violation. The jury found that DPH did not retaliate against Hickman for engaging in FMLA-protected activity and did not interfere with, restrain, or deny Hickman's right to FMLA leave or her attempt to exercise her right to FMLA leave.[FN5]

FN5. *See* Verdict of the Jury [Doc. # 144].

***2** After trial, DPH filed a Renewed Motion for Judgment as a Matter of Law [Doc. # 143] which the Court denied by Memorandum and Order [Doc. # 152] on March 24, 2009. With respect to issues tried to the bench, the Court concluded that DPH retaliated against Hickman for requesting disability accommodations under the ADA and exercised its equitable discretion to grant Hickman a back pay award of $23,755.30. The Court declined to award compensatory damages as a matter of law and denied front pay damages on Hickman's ADA retaliation claim based on the facts proven at trial. The Court also denied back pay and front pay damages on the TCHRA retaliation claim.

The parties both seek to recover their own attorneys' fees and costs. Hickman requests the Court award $134,225.00 in attorneys' fees and $1,340.36 in costs. DPH objects on various grounds to the amount sought and argues that the fees and costs recoverable should not exceed $16,954.26. DPH, on its own behalf, seeks an award of $64,651.24 in attorneys' fees and costs for its defense of this suit. Hickman opposes this relief in its entirety. On March 27, 2009, the Court conducted a hearing and afforded the parties an opportunity to present evidence on the reasonableness of their own fees and costs and to argue their points in opposition to entitlement and/or the reasonableness of the other party's claim.[FN6]

FN6. The Court also permitted the parties to cross-examine the opponent's counsel on the award requested.

II. *ANALYSIS*

A. *Hickman's Attorneys' Fees*

1. Legal Standards

The parties do not dispute that Hickman is entitled to recover attorneys' fees and costs; at issue is the amount to be awarded. Attorneys' fee requests in the Fifth Circuit are governed by the "lodestar" analysis. *Green v. Adm'rs of Tulane Educ. Fund,* 284 F.3d 642, 661 (5th Cir.2002), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The lodestar is the product of the number of hours reasonably expended on the litigation by the movant's attorneys and the attorneys' reasonable hourly billing rate. *Id.* (citing *Rutherford v. Harris County, Tex.,* 197 F.3d 173, 192 (5th Cir.1999)); *Tyler v. Union Oil Co. of Cal.,* 304 F.3d 379, 404 (5th Cir.2002).

In determining whether the amount of time expen-

ded on a matter is reasonable, courts are to review time records supplied by the movant and exclude from the lodestar calculation all time that is "excessive, duplicative, or inadequately documented." *Mid–Continent Cas. Co. v. Chevron Pipe Line Co.,* 205 F.3d 222, 234 (5th Cir.2000) (citing *Watkins v. Fordice,* 7 F.3d 453, 457 (5th Cir.1993)). In deciding whether a fee is excessive, the court must consider whether "the requested fees ... bear a reasonable relationship to the amount in controversy ...." *Northwinds Abatement v. Employers Ins.,* 258 F.3d 345, 354 (5th Cir.2001) (citing *Jerry Parks Equip. Co. v. Southeast Equip. Co.,* 817 F.2d 340, 344 (5th Cir.1987)); *see Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith."); *see also Migis v. Pearle Vision,* 135 F.3d 1041, 1047–48 (5th Cir.1998). However, disproportion between the amount of attorneys' fees sought and the damages recovered in the lawsuit does not alone "render the award of attorneys' fees excessive." *Northwinds,* 258 F.3d at 355.

***3** Plaintiffs seeking attorneys' fees have the burden of showing the reasonableness of hours billed, which includes proving that they exercised billing judgment. *Saizan v. Delta Concrete Prods. Co.,* 448 F.3d 795, 799 (5th Cir.2006). "Billing judgment requires documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant." *Id.* In setting a reasonable billing rate, courts are directed to consider the attorneys' regular rates as well as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *see also La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 328 (5th Cir.1995). Where "the attorney's normal billing rate is within the range of market rates for attorneys with similar skill and experience, and the trial court chooses a different rate, the court must articulate its reasons for doing so." *Islamic Center of Miss. v. Starkville,* 876 F.2d 465, 469 (5th Cir.1989).

Once the lodestar is determined, the court may adjust the figure upward or downward as necessary to make the award of attorneys' fees reasonable, *see Green,* 284 F.3d at 661, while ensuring that the fee award does not provide a windfall to the plaintiff, *see Kellstrom,* 50 F.3d at 328. However, while the court has "broad discretion in setting the appropriate award of attorneys' fees," *Watkins,* 7 F.3d at 457 (citing *Hensley,* 461 U.S. at 436–37), the lodestar is "presumptively reasonable and should be modified only in exceptional cases." *Id.* (citing *City of Burlington v. Dague,* 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992)); *see also Saizan,* 448 F.3d at 800.

In deciding whether to make an adjustment to the lodestar figure, the court is to consider the *"Johnson"* factors, which include:

1. The time and labor required to represent the client(s);

2. The novelty and difficulty of the issues in the case;

3. The skill requisite to properly perform the legal services;

4. Preclusion of other employment by the attorney due to acceptance of the case;

5. The customary fee charged for those services in the relevant community;

6. Whether the fee is fixed or contingent;

7. The time limitations imposed by the client or circumstances;

8. The amount involved and the results obtained;

9. The experience, reputation, and ability of attorney(s);

10. The undesirability of the case;

11. The nature and length of the professional relationship with the client;

12. Awards in similar cases.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir.1974); *see also Abner v. Kansas City Southern Ry. Co.,* 541 F.3d 372, 376 (5th Cir.2008) .

While the court is to "give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation, and ability of counsel," *Migis,* 135 F.3d at 1047, the most critical factor in this analysis is the "degree of success obtained." *Saizan,* 448 F.3d at 799 (citing *Singer v. City of Waco,* 324 F.3d 813, 829 (5th Cir.2003)); *see also Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). However, this factor alone does not require that the Court adjust a fee award. *Saizan,* 448 F.3d at 799 ("While a low damages award is one factor which the Court may consider in setting the amount of fees, this factor alone should not lead the court to reduce a fee award."); *see also Hollowell v. Orleans Reg'l Hosp. LLC,* 217 F.3d 379, 392 (5th Cir.2000). Moreover, "[t]he lodestar may not be adjusted due to a *Johnson* factor ... if the creation of the lodestar amount already took that factor into account; to do so would be impermissible double counting ." *Saizan,* 448 F.3d at 800 (citing *Migis,* 135 F.3d at 1047).

2. Lodestar Calculation

***4** In calculating the lodestar figure, Hickman bears the burden of demonstrating that the hours expended *and* the rates charged by counsel are reasonable. *See Hensley,* 461 U.S. at 427. In this case, Hickman seeks to recover fees paid to her two attorneys, Steven Petrou, Esq. and Stanley Santire, Esq. Hickman has submitted an after-the-fact billing summary prepared by Petrou months or years after the work was performed. Petrou reports that he spent 516.35 hours on this case and seeks compensation at an hourly rate of $250. Santire (who keeps contemporaneous time records) reports working 93 .00 hours and bills at the rate of $250 per hour. Because the Court denied attorneys' fees to Hickman on her COBRA claim, counsel subsequently reduced the amount of hours for which she seeks compensation by 72.45 hours—40.20 hours from Petrou's time and 32.25 hours from Santire's time. Accordingly, Hickman now requests compensation for 476.15 hours for Petrou's work and 60.75 hours for Santire's services. Hickman's ultimate lodestar calculation totals $134,225.00. DPH argues that this figure is too high, both because the number of hours reported includes time that is unnecessary given Hickman's limited ultimate success and because Santire's hourly rate is too high. DPH argues that Hickman instead should only recover attorneys' fees totaling $16,322.49.

a. Hours Expended

Regarding whether the hours expended by Hickman's counsel were reasonable, DPH primarily argues that Hickman was ultimately successful on only one of the eleven original claims.[FN7] DPH argues that the time records of Hickman's counsel are not described or limited by issues and, therefore, the Court should reduce all hours claimed to account for Hickman's limited success. DPH also urges that Hickman should recover only one-eighth of counsel's hours billed, which equals 59.5 of the hours claimed for Petrou and 7.59 of Santire's requested hours. The Court disagrees with DPH's analysis in various respects but concurs that an award of attorneys' fees and costs to Hickman should not include all the hours or expenses requested.

> FN7. DPH more specifically contends that Hickman brought essentially eight claims and that she was successful on only one of them. DPH urges also that she obtained damages only on her ADA retaliation claim.

First and most significantly, Petrou testified his time entries were after-the-fact estimates based on his review of his files in preparation for his attorneys' fee request. As he explained at the fee hearing, he attempted to reconstruct the amount of time he spent on many hundreds of tasks involved in this suit. Despite Petrou's obvious good faith, the Court is unpersuaded and will not condone his practice of writing time entries long after the events reported. Counsel who plan to seek attorneys' fee awards in litigation must keep some type of reliable records, which generally requires that the records be made contemporaneously with—or at least close in time—to when the work is performed. Having

reviewed carefully Petrou's summary of work performed, the Court finds that he has not demonstrated that his estimates are sufficiently reliable and the time requested was all necessary. His time clearly was not adequately documented in such a way to warrant compensation every hour sought. The Court therefore adjusts downward by 10% the total time reported in Petrou's summary. The Court does not make this downward adjustment for the total time reported in Santire's summary because he kept contemporaneous time records.

***5** Second, it is clear that Hickman achieved only limited success in this case. She recovered damages on only her ADA retaliation claim.[FN8] Therefore, to find a reasonable fee in this case the Court will consider the relationship of the hours expended on the successful claims and those worked on the other claims asserted.

> FN8. It is noted that Hickman obtained a favorable liability verdict from the jury on her TCHRA retaliation claim, although she was awarded no damages on that claim. The Court nevertheless deems the TCHRA claim a successful one. It was highly duplicative factually of the ADA retaliation claim. TCHRA-based front and back pay damages would have been duplicative of those on the ADA retaliation claim. Further, the absence of a jury award for compensatory damages for the TCHRA claim may well have been attributable to the fact that the jury awarded compensatory damages to Hickman on the ADA retaliation claim and likely assumed that the same category of damages for the TCHRA claim would have been redundant. The jury was unaware of the legal issues surrounding the right to compensatory damages under the ADA retaliation claim. *See* Memorandum and Order [Doc. # 152], at 4–8. Hickman could have but did not seek to eliminate a jury question on compensatory damages for her ADA retaliation claim.

After close and independent analysis of Petrou and Santire's summaries, the Court has concluded that the work can be divided into four categories:

(1) factual development, which includes client meetings and fact gathering from Defendant, its employees and third parties through discovery and other means;

(2) legal research and writing, which includes research and drafting of legal memoranda, motions, and letters containing legal points directed to DPH or to the Court, as well as preparation and review of correspondence;

(3) time spent in court and preparation for court appearances, including pre-trial conferences and hearings, trial and post-hearing proceedings; and

(4) clerical or administrative tasks.

The amount of time the Court finds reasonable varies with the type of work performed. Turning to the first category, factual development, the vast majority of Hickman's claims shared the same general factual bases. Under her theories, virtually all the claims required development of the entire chronology of events and she sought the same damages for most of these claims. On the other hand, the Court finds it appropriate to grant Hickman 90% of the requested hours spent on factual development—after the 10% reduction of Petrou's fees described above for lack of contemporaneous records. This additional 10% reduction is warranted because some of the discovery requested by Hickman and her resistance to DPH's discovery requests were unfounded and thus time spent on them was not reasonable.[FN9]

> FN9. It is noted that Hickman will receive attorneys' fees for the time spent on objecting to unreasonable discovery positions taken by DPH.

Hickman was ultimately successful on only one of the five categories of claims under consideration in this fee application. By and large, Petrou's time records on legal research and writing do not identify what claims he worked on in each session of time requested. The Court is unpersuaded that he spent the majority of his time on the successful claims. In the absence of any better available allocation mechanism, the Court grants one-fifth of the requested hours spent by Petrou on legal

research and writing. Some of Santire's time records are more detailed, allowing the Court to generally identify what time was spent on Hickman's successful category of claims. For this time, in accordance with Hickman's success on the issues in question, the Court grants one-half of the requested hours.

As to the third category of time expended by Petrou and Santire, *i.e.,* in-court and court preparation time, the Court grants Hickman two-thirds of the requested hours. The Court personally handled all hearings and the trial. The Court's best estimate is that two-thirds of those sessions were spent on matters that applied to all the claims asserted, including the ones on which Hickman was successful.

***6** Finally, the Court concludes that Hickman should recover 100% of the requested hours spent on clerical and administrative tasks.[FN10]

> FN10. At least 10 hours billed for tasks that amount to clerical and administrative work should have been performed by a legal assistant. As discussed in the next section, these hours will not be compensated at the rate of $250 per hour.

b. Attorneys' Hourly Rates

DPH disputes the $250 per hour rate charged by Santire. DPH argues that Santire should not be compensated at the same rate as lead counsel Petrou and that his rate should be at an associate level.

In support of her position, Hickman offers the affidavit of a local attorney, Ronald H. Tonkin, who practices in the area of employment law and who states that the $250 hourly fee charged by Santire is not only reasonable but is "on the low side."[FN11] DPH moves to strike this affidavit because Tonkin was not identified by Hickman as an expert in this case under Federal Rule of Civil Procedure 26 and/or in a timely designation of experts filed by Hickman. The Court agrees. Because Tonkin was not disclosed as an expert in accordance with the Court's pretrial schedule (to which the parties agreed), the Court strikes his affidavit regarding the reasonableness of the attorneys' fee rates of Petrou and Santire and does not rely on it.

> FN11. *See* Letter from James T. McMillen [Doc. # 53].

Based upon its personal knowledge, experience, and expertise, however, the Court finds that $250 per hour for Santire's time is a reasonable rate for his legal services. Santire's legal contributions to this litigation were constructive and necessary. The 60.75 hours he spent (other than on the COBRA research and writing) were amply justified at his full hourly billing rate of $250 per hour. Accordingly, DPH's objection to Santire's rate of $250 per hour is overruled.

DPH has not contested that Petrou's rate of $250 per hour is reasonable. When a rate is not contested, it is *prima facie* reasonable. *Islamic Ctr.,* 876 F.2d at 469. The Court concludes that Petrou's rate of $250 per hour is a reasonable rate for his legal services. However, with respect to time billed by Petrou for clerical or administrative work such as familiarizing himself with court procedures, filing documents, drafting ministerial correspondence, or filing materials in counsel's own files, the $250 per hour rate is excessive. This work should have been performed by a legal assistant, not by an experienced attorney. The Court finds that a rate of $100 per hour is a reasonable rate for a legal assistant who performs competently clerical and administrative work.

c. Lodestar Calculation

Accordingly, the lodestar calculation is as follows:

Petrou:

Factual Development, Client Meetings, and Discovery:

114.95 hours x 90% = 103.455 hours

103.455 x 90% x $250 per hour = $23,277.38

Legal Research and Writing:		
235.7 hours x 90% = 212.13 hours		
212.13 hours x (1/5) x $250 per hour	=	$10,606.50
Court Time and Trial Preparation:		
115.75 hours x 90% = 104.175 hours		
104.175 hours x (2/3) x $250 per hour	=	$17,362.50
Clerical:		
10 hours x 90% x $100 per hour	=	$900.00
Petrou Total	=	***$52,146.38***
Santire:		
Factual Development and Discovery:		
0 hours x 90% x $250 per hour	=	$0.00
Legal Research and Writing:		
22.25 hours x (1/5) x $250 per hour	=	$1,112.50
8 hours x (1/2) x $250 per hour	=	$1,000.00
Court Time and Trial Preparation:		
30.5 hours x (2/3) x $250 per hour	=	$5,083.33
Clerical:		
0 hours x 90% x $100 per hour	=	$0.00
Santire Total	=	***$7,195.83***

*7 In sum, the lodestar figure is **$59,342.21.**

3. *Johnson* Factors' Adjustment

DPH disputes Hickman's lodestar figure; however, DPH does not seek a downward adjustment of the lodestar on the basis of the *Johnson* factors in any way that has not already been taken into account in the creation of the lodestar figure. Hickman, on the other hand, asserts that an analysis of the *Johnson* factors supports awarding the requested lodestar figure of $134,225.00 based 536.90 hours of work on this case. Hickman directs the Court to three *Johnson* factors: the novelty and difficulty of the issues, the contingent nature of the fee, and the desirability of the case.

The Court concludes that the novelty and difficulty of the issues do not warrant an adjustment in this case. The issues of this case, while vigorously disputed and aggressively litigated by the parties, were not so unusual as to classify this case as legally or factually novel. The Court also concludes that the contingent nature of the fee and the desirability of the case do not warrant an adjustment. There is nothing to distinguish this case from many other employment disputes. Accordingly, the Court concludes the *Johnson* factors do not support an upward or downward adjustment to the lodestar figure of $59,342.21 calculated by the Court.

B. *Hickman's Costs and Expenses*

Rule 54(d) of the Federal Rules of Civil Procedure states that "costs—other than attorney's fees—should be allowed to the prevailing party." FED. R. CIV. P. 54(d). Indeed, the Fifth Circuit strongly presumes that costs will be awarded to a prevailing party. *See Energy Mgmt. Corp. v. City of Shreveport,* 467 F.3d 471, 483 (5th Cir.2006) (citing *Salley v. E.I. DuPont de Nemours & Co.,* 966 F.2d 1011, 1017 (5th Cir.1992)). In general, federal courts may award only those costs itemized in 28 U.S.C. § 1920, unless there is explicit statutory or contractual authorization to the contrary. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 444–45, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987); *see also Mota v. Univ. of Tex. Hou. Health Sci. Ctr.,* 261 F.3d 512, 529 (5th Cir.2001). Section 1920 provides that recoverable costs include

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees ...; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services ....

28 U. S.C. § 1920; *Mota,* 261 F.3d at 530. The Fifth Circuit has interpreted the "attorney's fee" allowed by 42 U.S.C. § 2000e–5(k) to include reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services. See *Mota,* 261 F.3d at 529; *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.,* 919 F.2d 374, 380 (5th Cir.1990). Thus, in this case, the Court may award reasonable out-of-pocket expenses that are part of the costs normally charged to a fee-paying client.

***8** The Court has discretion in determining an appropriate award of costs. *Gibbs v. Gibbs,* 210 F.3d 491, 500 (5th Cir.2000). The Court is to give "careful scrutiny" to the items proposed by the prevailing party. *Kellstrom,* 50 F.3d at 335. The Court is free to decline to award costs where the expenses are not deemed to have been "reasonably necessary" to the litigation. *See, e.g., CypressFairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 257–58 (5th Cir.1997); *see also Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1099 (5th Cir.1982).

Hickman seeks $1,340.36 in costs and expenses, which include filing fees, witness fees, postage and delivery charges, copying, travel fees, and office supplies. DPH objects to $708.59 of this total. Specifically, DPH objects to various copy charges for documents (medical records) that were not admissible at trial; witness fees for a witness that did not appear at trial (Dr. Hussein) and for a witness that was excluded (Ms. Garcia); and office supplies and postage and delivery charges that DPH contends fall outside 28 U.S.C. § 1920.

The Court concludes that the expenses that DPH objects to fall outside the scope of § 1920; however, most of these expenses were appropriate, necessary, and reasonable out-of-pocket expenses that would be part of the costs normally charged to a fee-paying client. For instance, the copying charges for Hickman's medical records were clearly necessary to the factual development of the case. The Court, however, will not award Hickman the costs of witness fees for the two witnesses[FN12] who did not appear at trial. Accordingly, the Court exercises its discretion to award Hickman costs of $1,260.36.

FN12. Dr. Ayub Hussain and Maria Garcia.

C. *DPH's Attorneys' Fees and Costs*

DPH argues that it is a prevailing party on five of Hickman's eight original claims and that it is entitled to recover attorneys' fees and costs on three of these claims. Specifically, DPH contends that it is entitled to recover attorneys' fees and costs on Hickman's ADA and TCHRA disability discrimination claims, Hickman's ADA and TCHRA failure to accommodate claims, and Hickman's ERISA interference and retaliation claims. DPH, accordingly, requests the Court to award $64,651.24 in attorneys' fees and costs. Hickman objects, arguing that DPH is not entitled to recover any attorneys' fees or costs as a prevailing party on these claims because DPH has not demonstrated that these

claims were frivolous.

1. Legal Standards: ADA and TCHRA Claims

In an action under the ADA, the Court may award the "prevailing party" reasonable attorneys' fees, including litigation expenses and costs. *See* 42 U.S.C. § 12205 . Similarly, under the TCHRA, the Court may award the "prevailing party" reasonable attorneys' fees as part of the costs. TEX. LABOR CODE § 21.259. Notwithstanding the "prevailing party" language, the United States Supreme Court has held that a court may award attorneys' fees to a prevailing defendant only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garmet Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). "Fee shifting statutes usually create a presumption in favor of awarding fees to a prevailing plaintiff but allows fees to be awarded to a prevailing defendant only if the suit was frivolous." *Stover v. Hattiesburg Public School Dist.,* 549 F.3d 985, 997 (5th Cir.2008) (citing *Sullivan v. William A. Randolph, Inc.,* 504 F.3d 665, 670 (7th Cir.2007)).

***9** The *Christiansburg* Court cautioned that a district could should "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* at 421–22. The Fifth Circuit has explained that to determine if a suit is frivolous under *Christiansburg,* the court must ask "whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful." *Stover,* 549 F.3d at 997–98 (citing *Jones v. Tex. Tech Univ.,* 656 F.2d 1137, 1145 (5th Cir.1981)). These same legal principles apply to requests for attorneys' fees by a prevailing defendant under the TCHRA. *See, e.g., Winters v. Chubb & Son, Inc.,* 132 S.W.3d 568, 580 (Tex.App.-Houston [14th Dist.] 2004, no pet.).

2. ADA and TCHRA Claims: Attorneys' Fees and Costs

DPH argues that Hickman had no colorable claim under the ADA or TCHRA for discrimination or for failure to accommodate because she had no evidence to show she had a disability as defined by the ADA and the TCHRA. DPH contends that Hickman, as a matter of law, offered no probative evidence to establish this essential element of these claims and that, therefore, these claims were frivolous, unreasonable, and without foundation. Hickman responds that DPH has not presented any evidence that any of Hickman's unsuccessful claims were frivolous, but rather has simply repeated arguments from its summary judgment motion.

"Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg ." Hughes v. Rowe,* 449 U.S. 5, 15–16, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980). While this Court ultimately determined that Hickman was unable to establish a *prima facie* case of disability discrimination, this conclusion was not easily reached on certain issues and required an extensive review of voluminous evidence presented by both parties. On the basis of the entire record in this case, the Court is not persuaded that Hickman's ADA or TCHRA disability discrimination or failure to accommodate claims were frivolous, unreasonable, or without foundation. DPH's request for attorneys' fees under the ADA and TCHRA is accordingly denied.

3. Legal Standards: ERISA Claims

In an action under ERISA, the Court "in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Fifth Circuit applies a bifurcated approach in awarding attorneys' fees and costs under ERISA. *See Wade v. Hewlett–Packard Dev. Co. LP Short Term Disability Plan,* 493 F.3d 533, 542–43 (5th Cir.2007). To determine whether attorneys' fees should be awarded, the Court must analyze the following *"Bowen"* factors:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal

question regarding ERISA itself; and (5) the relative merits of the parties' position.

***10** *Salley v. E.I. DuPont de Nemours & Co.,* 966 F.2d 1011, 1017 (5th Cir.1992) (quoting *Iron Workers Local No. 272 v. Bowen,* 624 F.2d 1255, 1266 (5th Cir.1980), *appeal after remand,* 695 F.2d 531 (11th Cir.1983)). An award of costs, however, should be granted to a "prevailing party" under a standard analogous to that provided by Federal Rule of Civil Procedure 54(d). *See Wade,* 493 F.3d at 543; *see also Hobbs v. Baker Hughes Oilfield Operations, Inc.,* 2008 WL 619419, at *2 (S.D.Tex.2008). Under Rule 54(d), "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs ." FED. R. CIV. P. 54(d).

4. ERISA Claims: Attorneys' Fees

Hickman claimed that DPH violated ERISA when it terminated her in retaliation for exercising her right to health benefits and interfered with her entitlement to future benefits. The Court granted DPH summary judgment on these ERISA retaliation and interference claims. To determine whether it is appropriate to award DPH attorneys' fees on Hickman's ERISA claims, the Court must apply the five *"Bowen"* factors. The Court concludes that the factors weigh against an award of attorneys' fees to DPH as a prevailing defendant.

a. Degree of the Opposing Party's Culpability or Bad Faith

While the Court concluded that Hickman did not establish a *prima facie* case of ERISA retaliation or interference, this alone does not demonstrate that Hickman acted in bad faith in brining these claims. Based on all the circumstances and substantial record in this case, the Court is not persuaded that Hickman acted in bad faith in bringing her ERISA claims. Accordingly, this factor weighs against a fee award or is neutral.

b. Ability of Opposing Party to Satisfy an Award

The Court has little information on Hickman's current financial condition. Nevertheless, the record reveals she has been unemployed a material amount of time since her employment with DPH. She and her son apparently have serious medical needs. Accordingly, Hickman appears unable now or for the foreseeable future to satisfy an award of attorneys' fees to DPH. Thus, this factor is neutral or weighs against a fee award.

c. Deterrence of Similar Conduct

DPH advances no argument how an award of attorneys' fees would deter plaintiffs acting under similar circumstances from engaging in similar conduct by bringing suit. The Court is unable to conceive of such an argument. This factor weighs against a fee award.

d. Benefit to all Participants and Beneficiaries of an ERISA Plan or to Resolve Significant Legal Question Regarding ERISA Itself

There is no evidence that DPH's recovery of attorneys' fees would benefit other beneficiaries of an ERISA plan or resolve a significant legal question regarding ERISA itself. This factor weighs against a fee award.

e. Relative Merits of the Parties' Positions

The Court concluded that Hickman was unable to establish a *prima facie* case of ERISA retaliation or interference because she was unable to raise a genuine fact issue that DPH acted with specific discriminatory intent or that DPH acted with the specific intent to interfere with Hickman's ERISA rights. However, discovery was necessary for Hickman to learn DPH's actual motivations. Much of this discovery was necessary for the claim on which she was successful. Considering all the circumstances in the case, the Court concludes that this factor is neutral.

***11** In sum, the Court concludes that all five of the *Bowen* factors are neutral or weigh against awarding DPH attorneys' fees on Hickman's ERISA claims. Balancing these factors and considering the record and all the circumstances of the case, the Court declines to award attorneys' fees to DPH for defending against Hickman's ERISA claims. Because the Court declines to award attorneys' fees, the Court does not engage in the lodestar analysis to determine whether the fees requested by DPH are reasonable.

5. ERISA Claims: Costs

The Federal Rule of Civil Procedure 54 applies to

the Court's analysis of whether DPH is entitled to costs associated with her ERISA claims. Because DPH was the prevailing party on Hickman's ERISA claims, the Court is authorized to tax costs in favor of DPH pursuant to a standard analogous to that provided by Rule 54. Hickman does not address Rule 54. She does not contend that DPH was not the prevailing party on her ERISA retaliation and interference claims. Nevertheless, DPH's request for compensation does not provide a breakdown of which costs are attributable to Hickman's ERISA claims. The Court accordingly declines to award DPH costs as a prevailing party under Hickman's ERISA claim.

III. *CONCLUSION*

Based on the foregoing, it is hereby

ORDERED that Hickman's Motion for Attorney Fees and Costs [Doc. # 154] is **GRANTED in part** and **DENIED in part.** Plaintiffs are awarded fees and costs totaling **$60,602.57.** It is further

ORDERED that DPH's Motion for Attorney Fees and Costs of Prevailing Party [Doc. # 153] is **DENIED.**

The Court will issue a separate Final Judgment.

S.D.Tex.,2009.
Miles-Hickman v. David Powers Homes, Inc.
Not Reported in F.Supp.2d, 2009 WL 995632 (S.D.Tex.), 21 A.D. Cases 1608

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