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NO. 72259-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CYMA TUPAS,

Appellant,

v.

DEPARTMENT OF ECOLOGY,

Respondent.

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

This attorney's fee appeal arises out of an employment lawsuit against the Department of Ecology. In the underlying lawsuit, Cyma Tupas, represented by The Law Firm of Judith Lonnquist (Lonnquist Firm), ultimately prevailed on only one of more than a dozen claims filed against the Department and three of its employees. The Lonnquist Firm then requested attorney's fees in the amount of $842,441.48 covering work performed on the entire case, including claims that had been abandoned by Tupas, dismissed by the court, or rejected by the jury. The trial court did not abuse its discretion when it reasonably reduced the $842,441.48 fee request by 25 percent and declined the requested lodestar multiplier of 50 percent. The fee award granted by the trial court was already generous; any award that did not discount for time spent on the unsuccessful claims would have been a windfall to the Lonnquist Firm and not appropriately commensurate with the limited success at trial.

On behalf of Ms. Tupas, the Lonnquist Firm initially filed national origin discrimination and retaliation claims against the Department and several Department employees in their individual capacities. These three defendants were all ultimately dismissed either by Tupas, by the court on motion of the Department, or were found not liable by the jury. After a year of discovery, the original complaint was amended to dismiss the national

origin allegations, and to add new claims of disability discrimination and failure to accommodate a disability. Ultimately, the failure to accommodate claim against the Department was the single successful claim, and the jury awarded Ms. Tupas $329,580, less than half of what she sought. Despite losing the vast majority of the claims, the Lonnquist Firm did not segregate any billing for work performed on the unsuccessful claims.

The trial court did not abuse its discretion when it reduced the Lonnquist Firm's fee request for this routine employment case by 25 percent and declined to apply a multiplier to the lodestar. The $842,441.48 fee request reflects billing over 1,700 hours for three attorneys at rates of $475, $300, and $275 per hour. In submitting the fee request, the Lonnquist Firm failed to eliminate extraneous billing for work expended pursuing the dismissed claims, work that was duplicative or unnecessary, and work that was unrelated to Tupas's failure to accommodate claim. Moreover, the lawyers' billing rates already contemplated the contingent nature of Ms. Tupas's representation. The Lonnquist Firm failed to demonstrate that the entire requested fee award was necessary in securing Tupas's very limited success at trial. Indeed, the trial court would have been justified in even further reducing the award. Tupas also appeals the denial of prejudgment interest, despite well-settled case law holding that it is not an available remedy in state tort claims.

The trial court made findings sufficient to support this reasonable reduction, thereby making the fee award more commensurate with the extremely limited success reached at trial, and relied on settled authority to deny prejudgment interest. This Court should affirm.

II. RESTATEMENT OF THE CASE

A. Overview Of Tupas's Employment History At The Department

Tupas was employed by the Department of Ecology from December 1987 until she was disability separated in October 2012. CP at 71, 82. During her employment, Tupas filed several complaints against her supervisor, Gerald Shervey, claiming she had been subjected to his discriminatory and retaliatory behavior. CP at 2-5. The allegations were vague and did not specify the basis for the discrimination, although she later claimed it had been because of her national origin. The Department investigated each of Tupas's complaints, and each ensuing investigation determined that Tupas's allegations were without basis. CP at 2-5, 174-76.

In addition to investigating Tupas's complaints, because of Tupas's inappropriate behavior on several separate occasions, Human Resources conducted an investigation focused there. CP at 5, 176-77. During the course of this investigation some employees stated that they were concerned that Tupas's behavior was disruptive to the workplace,

and some expressed concern for their safety. CP at 176-77, 230-31. As a result, Tupas was placed on home assignment pending an independent medical examination. CP at 231. Tupas participated in a medical examination with Dr. Mark McClung in April 2012. CP at 231-32. Dr. McClung opined that due to a disability, specifically an anxiety disorder, Tupas was unable to perform some of the essential functions of her job, namely maintaining focus on work tasks, accepting supervision and maintaining professional communication with others. CP at 232.

Tupas denied she had a disability, but because of Dr. McClung's findings, the Department invited Tupas to participate in the reasonable accommodation process. CP at 178. As part of the interactive accommodation process, Human Resources asked Tupas's medical provider, Dr. Cuc Nguyen, whether Tupas suffered from a disability that prevented her from returning to work. CP at 178-79. The Department also asked for her opinion on any accommodations that would allow Tupas to continue to work. CP at 178. On July 6, 2012, Dr. Nguyen reported that she did not know if Tupas could perform the essential functions of her job due to her disability. CP at 178. Human resources sought clarification, and on August 23, 2012, Dr. Nguyen opined that Tupas could not perform some of the essential functions of her job due to her disability; specifically that Tupas could not work effectively and

efficiently in a stressful environment, manage her workload, or meet deadlines. CP at 179. Dr. Nguyen felt that Tupas could be reasonably accommodated by telecommuting Wednesday mornings, despite the fact that she had already been telecommuting on Wednesdays for three years. CP at 179.

Between May and October 2012, Wendy Holton, the Department's Senior Human Resources Consultant, coordinated efforts to accommodate Tupas's disability-related limitations, including reviewing and considering potential alternate jobs that would not require the problematic functions. CP at 177-80. Ultimately, it was determined that all of the vacant positions in which Tupas had expressed interest had the same essential job functions that Drs. McClung and Nguyen had both indicated Tupas could not perform due to her disability. CP at 180. On October 15, 2012, because the Department could not accommodate Tupas's disability as outlined by her medical provider, Tupas was disability separated. CP at 180.

B. Tupas Filed Three Discrete Sets Of Claims, Each Against Both The Department And Three Individually Named Department Employees

During the course of this litigation, Tupas filed three discrete sets of claims: 1) discrimination based on national origin and retaliation for reporting the discrimination; 2) discrimination based on disability; and

3) failure to accommodate a disability. With each set of claims, Tupas named the Department and the same three Department employees. Out of this multiplicity of claims against multiple defendants, Tupas prevailed on a single claim—failure to accommodate a disability against the Department.

In November 2012, the Lonnquist Firm filed the initial complaint in Superior Court against the Department and Gerald Shervey, Kevin Fitzpatrick, and Wendy Holton for national origin discrimination and retaliation for reporting the discrimination. CP at 585-90.[1]

Gerald Shervey was Tupas's supervisor at the Department from April 2008 to 2012. CP at 149, 153. As her supervisor, he had been the subject of several complaints of discrimination made by Tupas. CP at 149-52. Mr. Shervey had no involvement in the disability accommodation process, and was unaware that Tupas suffered from a disability. CP at 154.

Kevin Fitzpatrick supervised Shervey. CP at 133. He briefly supervised Tupas beginning in March 2012. CP at 135. His only involvement in the reasonable accommodation process was to be present at a

[1] Although at page 3 of her Opening Brief counsel argued that this was a high risk case as evidenced by the "undisputed" fact that she took on the case when Tupas was unemployed, the record shows Tupas was represented by current counsel for at least 10 months while she was employed by the Department. CP at 420-21, 445-50. The record does not include a fee agreement for this period of time.

meeting when Tupas confirmed that she had received documents pertaining to the process. CP at 136.

Wendy Holton is a Senior Human Resources Consultant who was involved in the interactive accommodation process. CP at 172. She also advised Tupas several times how to file her complaints of discrimination, and investigated Tupas's claims of discrimination lodged against Shervey. CP at 174-75. Wendy Holton later advised Tupas that the Department was requesting an independent medical exam because of her behavior. CP at 177. Holton corresponded with Tupas regarding the reasonable accommodation process and coordinated the paperwork. CP at 178-79. Holton engaged in the reasonable accommodation process with Tupas, but did not make the decision to disability separate Tupas. CP at 180, 233-34.

1. National Origin Discrimination

Initially, Tupas filed a claim for discrimination based on national origin and retaliation for reporting such discrimination against the Department and all three individuals, for a total of eight claims. CP at 585-90. The bases for these claims included allegations that beginning around 2007 she had applied for several promotions that had been denied to her in favor of Caucasian employees, and that after she complained, retaliatory harassment had ensued. CP at 587. The four national original

claims were dismissed by Tupas one year after she filed them, but the retaliation claims remained.

2. Disability Discrimination

Tupas filed an amended complaint one year after she filed the first complaint, alleging discrimination based on a disability. CP at 592-605. Again, she named the Department and the same three employees, adding a total of four new claims. Her allegations appear to be broad based, but largely consisted of allegations that her interactions with her supervisors were impaired by her anxiety and depression and that, in her perception, they treated her poorly. CP at 599-600. Confusingly, throughout discovery Ms. Tupas maintained that she was not disabled and did not need an accommodation. CP at 879 -80, 9:23-25 to 10:1-4, CP at 905, 110:15-17, CP 884, 28:15-20. At trial, for the first time, she testified she was disabled. CP at 883, 25:10-15.

To prevail on her disability discrimination claims, Tupas was required to show that she was able to perform the essential functions of her job, and that her disability was a substantial factor in the decision to terminate her. CP at 953. Tupas failed to prevail on her disability discrimination claims against the Department or any of the three individual defendants. CP at 381-82, 607-08, 610-11.

3. Failure To Reasonably Accommodate A Disability

Also in her amended complaint, Tupas added what would ultimately be her only successful claim against the Department, failure to accommodate a disability. Again, she named the Department and the same three employees she had named in her other claims for a total of four new claims. She prevailed solely against the Department. Her claims against the three employees were dismissed because they had not been involved in the accommodation process nor in the decision to disability separate her, thus leaving her with her only successful claim. CP 381-82, 607-08, 610-11. Tupas's single successful claim is easily segregable from all of the other unsuccessful claims.

The reasonable accommodation interactive process at issue in this claim took place during a finite period of time—June 25, 2012 through October 15, 2012. CP at 178-80. During the entire accommodation process Tupas was on home assignment. CP at 177-80, 603. Given the limited nature of the accommodation process, the vast majority of the testimony covering Tupas's 23-year history of employment was not relevant to this claim. The majority of the evidence pertained to her history of claims that she had been the subject of national origin discrimination, and the alleged retaliation that ensued. Out of the 17 witnesses Tupas called at trial, only five witnesses had testimony relevant to the accommodation process:

Tupas herself, the two medical doctors and two HR Department personnel. CP at 844. Likewise, the documents relating to the accommodation process pertained solely to the attempt to accommodate her disability in another position and were not relevant to her discrimination and/or retaliation claims. CP at 178-80. Put simply, Tupas's failure to accommodate a disability claim has no relation whatsoever to her claims for national origin discrimination or retaliation for reporting national origin discrimination claims, yet the majority of the trial was focused there. Moreover, given the segregated nature of the accommodation process here, and the discrete witnesses and facts relevant to it, Tupas's failure to accommodate claim has only very limited relation, if any, to her failed claims of disability discrimination.

C. The Lonnquist Firm's Representation Of Tupas

All in all, Tupas prevailed on one claim out of 16 claims that she filed.[2] The discrete claim on which she prevailed was easily segregable from the other 15 unsuccessful claims. Nonetheless, the fee request submitted by the Lonnquist Firm reflected hours expended by the firm over

[2] As detailed here, counting each claim against the Department and the individual defendants, the total number of discreet claims Tupas filed was 16. In the Department's post-trial briefing, it argued that Tupas prevailed on only 1 out of 12 claims. CP at 549. This did not include the four national origin discrimination claims Tupas initially filed then dismissed after a year of discovery. The trial court in her findings indicated that Tupas prevailed on two of the three claims *presented to the jury*, counting each of the claims against the Department and the individuals as one. CP at 691.

the entire course of its representation of Tupas. The Lonnquist Firm provided billing records in support of its motion for fee award dating back to February 2012, 10 months before Ms. Tupas was disability separated from the Department, and almost two years before Tupas's complaint was amended to include her only successful claim, failure to accommodate. CP at 420-21, 445-50. The fee request was also not reduced to account for any amount of time spent by the Lonnquist Firm on the national origin discrimination claims that she dismissed a year into the case, or the retaliation claims that related to the alleged national origin discrimination. The fee request did not segregate time spent on all the claims against the two individual defendants that Tupas voluntarily dismissed just before the trial began. The fee request also was not reduced to account for time spent on the claims that were dismissed mid-trial by the court before the case went to the jury. And the fee request was not reduced to account for the claims that the jury found in favor of the Department. The trial court's mere 25 percent reduction in fees was generous in light of the all-encompassing scope of the request and Tupas's limited success.

While Tupas was still employed, the Lonnquist Firm represented her and filed a state tort claim on her behalf, alleging national origin discrimination and retaliation for reporting the discrimination. CP at 85-88. After the Lonnquist Firm filed the initial national origin discrimination

complaint in superior court, the parties engaged in written discovery for nearly a year, which generated substantial billing. CP at 420-21, 445-50. On October 23, 2013, the Lonnquist Firm moved to amend the complaint to remove the national origin discrimination claims against both the Department and the individual defendants, and added the new claims alleging that the Department and the individual defendants engaged in disability discrimination and failure to reasonably accommodate a disability. CP at 70-83. The Lonnquist Firm failed to segregate <u>any</u> billing for time the firm represented Tupas while she was still employed by the Department (April 2012-October 2012). Furthermore, the Lonnquist Firm included billing for time spent preparing the national origin discrimination and retaliation tort claim, and billing for time preparing and filing the superior court complaint that she ultimately dismissed. After the close of discovery, one month before trial was scheduled to begin, Tupas voluntarily dismissed all claims against Kevin Fitzpatrick and Wendy Holton. CP at 607-08. Lonnquist did not segregate any billing for these dismissed claims against those defendants.

This matter ultimately proceeded to trial on March 17, 2014, and lasted 10 court days. Tupas called 17 witnesses to testify, of which only 5 testified regarding the reasonable accommodation claim: 1) Tupas, 2) Dr. McClung, the Department's mental health expert; 3) Dr. Nguyen,

Tupas's treating physician; 4) Polly Zehm, the Deputy Director of Ecology; and (5) Wendy Holton, a Human Resource consultant. CP at 844. In total, the Lonnquist Firm billed for 264.2 hours of preparation time throughout the course of the 10-day trial, (CP at 844), but did not reduce the time at all to account for the unsuccessful claims.

At the close of Tupas's case the Department moved for dismissal pursuant to CR at 50. CP 365-80. Although Tupas continued to allege that Gerald Shervey had discriminated against her, the trial court agreed that Tupas had failed to provide any evidence that Mr. Shervey had discriminated or had any involvement in the accommodation process, and the court dismissed the disability discrimination and failure to accommodate claims against him. CP at 381-82. Again, the fee request does not account for the significant work pursuing and trying these unsuccessful claims.

The remaining claims that went to the jury were disability discrimination (against the Department); retaliation for reporting national origin discrimination (against the Department); retaliation for reporting national origin discrimination (against Mr. Shervey); and failure to accommodate (against the Department).[3] The jury returned a verdict in favor of the defendants on three of the four claims submitted. CP at 610-11.

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[3] The court's instructions to the jury referred to the retaliation claim as "discrimination on the basis of race." CP at 951.

Tupas was awarded $329,580.00 (CP at 383) which was less than half the amount of $782,780.00 that she requested. CP at 549. The Lonnquist Firm submitted a request for fees and costs in the amount of $842,441.48, which included a lodestar multiplier of 50 percent on the fees. CP at 398. The fee request did not reduce any hours as duplicative or unnecessary. Tupas was represented throughout discovery and at trial by three attorneys, one of whom did not conduct a single deposition, never presented nor cross examined a witness, and never even addressed the court. CP at 843, 845. Despite her complete lack of participation in either the depositions or the trial, this attorney submitted 829.90 total billing hours at a rate of $300 per hour for a total of $248,970.00 CP at 394.

The trial court recognized that the lodestar submitted by the Lonnquist Firm represented all of the work on all of the claims, including the dismissed and unsuccessful claims, and did not include any reductions to account for work spent on the claims rejected by the jury. CP at 691. This case represents a perfect example of "limited" success and the trial court's fee award appropriately reflects the degree of success Tupas enjoyed; indeed, a 25 percent reduction is small in light of the percentage of claims on which Tupas did not prevail. Tupas also sought prejudgment interest on her award. The trial court's small reduction, denial of a multiplier and prejudgment interest should be affirmed.

III. RESTATEMENT OF THE ISSUES

1. Did the trial court properly exercise its discretion in reducing the attorney fee award based on the plaintiff's limited success at trial, lack of detail in the billing records, and billing for unrelated claims?

2. Did the trial court properly exercise its discretion in declining to apply a multiplier to the lodestar when the attorneys' billing rates were $475, $300, and $275, there were three attorneys working on a low risk case, much of whose work was duplicative and unnecessary, and Tupas only prevailed on one of her numerous claims?

3. Did the trial court properly exercise its discretion by following well-settled precedent that prejudgment interest was not applicable because the State has not waived sovereign immunity?

IV. ARGUMENT

Tupas asserts that because she prevailed on one of her claims, she is therefore entitled to full recovery for all of her unsuccessful claims as well. Her position is not supported by law, and the trial court correctly reduced her fee by a small amount. Specifically, she fails to account for all the other claims upon which she did not prevail that generated substantial billing hours. Tupas prevailed on only 1 of 16 distinct claims, and because she failed to meet her burden to show that her fees encompassing all of these claims were reasonable and necessary to secure her success on the one claim, the trial court did not err in reducing her fees by a mere 25 percent. Additionally, the trial court's determination that a multiplier was not

warranted by a routine employment case where three attorneys shared the work load and billed at high rates was not an abuse of discretion. Lastly, the trial court followed well-settled law in ruling that prejudgment interest is not available to Tupas because the State has not waived its sovereign immunity regarding that specific remedy. The trial court's ruling should be affirmed.

A. Standard Of Review

The reasonableness of an award of attorney's fees is reviewed under the abuse of discretion standard. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-7, 312 P.3d 745 (2013) (citing *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007)). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The trial court must exercise its discretion in light of the particular circumstances of each case. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

The fee applicant has the burden of proving the reasonableness of the fee request and "must provide reasonable documentation of the

work performed." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). The documentation must be as detailed as it would be if it were submitted to the requesting party's own client, and must clearly and convincingly demonstrate that the time and effort expended "*was necessary to achieve the results obtained.*" *Hensley v. Eckerhart*, 461 U.S. 424, 441, 103 S. Ct. 1933, 76 L. Ed. 2d 40, (1983) (Burger, concurring) (emphasis added).

This court reviews the award or denial of prejudgment interest for an abuse of discretion. *Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 790, 189 P.3d 777 (2008).

B. The Fee Request Was Unreasonable Because It Was Not Commensurate With Tupas's Limited Success

Tupas requested an award for 1,700 attorney hours spent on her case, without any reduction for the fact that she prevailed on only one of 16 claims. Contrary to Tupas's arguments, the great majority of the claims she raised did not overlap with the single issue on which she prevailed. The trial court's 25 percent reduction of the requested amount was well within the court's discretion. The trial court order properly takes into account the fact that Tupas's inflated request did not segregate attorney hours spent pursuing unrelated, unsuccessful claims, and

duplicative billing for depositions and discovery. The court reasonably found that the Lonnquist Firm did not convincingly demonstrate that the total number of hours submitted represented time "spent preparing and presenting evidence on the successful, as opposed to non-successful claims." CP at 691. The court found that a 25 percent reduction was "appropriate to account for time spent on the unsuccessful claims that do not encompass a 'common core of facts and related legal theories'" as Tupas's successful reasonable accommodation claim. CP at 691. Because the Lonnquist Firm did not segregate hours related to unsuccessful claims, the court employed this method rather than cutting the duplicative hours submitted by the three attorneys on the case. CP at 691, n.2. Given her minimal success on the merits, and her counsels' failure to segregate the billing records, the amount awarded by the trial court verges on a windfall gain for the Lonnquist Firm.

1. The Trial Court's Reduction Was Appropriately Commensurate With Tupas's Limited Success

The burden of showing the reasonableness of the requested attorney fees "is upon the fee applicant." *Scott Fetzer Co.*, 122 Wn.2d at 151. Tupas has failed to show how it could possibly be reasonable to request full attorney fees after losing on 15 of her 16 claims.

The trial court's reasonable reduction of the attorney fees fully complied with the decisions of the state and federal courts. In determining a reasonable award of attorney fees, a trial court must begin by calculating a lodestar fee. *Bowers*, 100 Wn.2d at 597. The lodestar is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the successful claim. *Henningsen v. WorldCom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000), citing *Bowers*, 100 Wn.2d at 593-94. The extent of the plaintiff's success is a crucial factor in determining the proper amount of attorney fees. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987); *Hensley,* 461 U.S. at 440. Where only partial success is obtained, the court must segregate out the hours spent on the unsuccessful claims. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999); *Kastanis v. Educ. Emp. Credit Union*, 122 Wn.2d 483, 502, 859 P.2d 26, *amended by* 865 P.2d 507 (1994). When plaintiff's success is limited, the trial court "should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*

When the lodestar figure grossly exceeds the amount involved in the successful claim, a downward adjustment is appropriate. *Scott Fetzer Co.*, 122 Wn.2d at 150, citing *Bowers*, 100 Wn.2d at 607; *Kastanis*, 122 Wn.2d at 502 (error to award employment discrimination plaintiff all her attorney's fees when she prevailed on only one of four claims). A

downward adjustment is appropriate "even where the plaintiff's claims were interrelated." *Hensley*, 461 U.S. at 436. If the court is unable to identify the specific attorney hours that should be eliminated, "it may simply reduce the award". *Id.* at 436-37.

In this case, the trial court properly exercised its discretion in making a downward adjustment to the lodestar. Because Tupas did not submit billing records that would enable the trial court to identify which attorney hours were related to the unsuccessful claims, the court properly exercised its discretion to "simply reduce the award." *Id.*

Tupas made no effort to show that the requested fees were reasonable by reducing the request to account for attorney hours spent pursuing the unsuccessful claims, during the year before she added the successful claim, during the discovery period, or during the trial itself. Under *Kastanis* and *Hensley*, the trial court's modest reduction from the requested attorney fee was well within her discretion.

A significant portion of the attorney fees could easily have been segregated by Tupas. Her attorneys pursued numerous unrelated, unsuccessful claims for a year, prior to filing the single claim on which she ultimately prevailed. Tupas also should have segregated the attorney hours spent on discovery of claims that were voluntarily dismissed or were unsuccessful. CP at 820. Counsel took depositions of 10 witnesses billing

a total of 84 hours. CP at 820. Only 11.6 hours of this deposition time related to the reasonable accommodation claim. CP at 820-21. And finally, there was no effort to reasonably segregate trial expenses related to the unsuccessful claims. Tupas called 17 witnesses, but only 5 testified in support of her accommodation claim. CP at 821. Because Tupas made no effort to account for time spent on unsuccessful claims, the trial court properly "reduce[d] the award to account for the limited success." *Hensley*, 461 U.S. at 436-37.

Given Tupas's limited degree of success, a substantial downward adjustment of the lodestar was warranted. The Lonnquist Firm submitted a fee request for $842,441.48 without attempting to segregate unsuccessful claims. The law does not require the trial court to do counsel's work. Determining the attorney "fee award should not become an unduly burdensome proceeding . . . An 'explicit hour-by-hour analysis of each lawyer's time sheets' is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded." *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995) (quoting *Animal Welfare Soc'y v. Univ. of Wash.*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989)). Because the court could not "identify specific hours that should be eliminated, or it may simply reduce the award." *Hensley*, 461 U.S. at

436-37. The trial court had no doubt that the total request accounted for "work on all claims." CP at 691. The trial court, having presided over the entire trial was in the best position to know that the fee request didn't adequately reflect any reduction for the number of unsuccessful claims, and that the one successful claim was not the sole source of the total fee request.

2. Tupas Only Successful Claim Occurred During A Different Time Period, Involved Different Legal Standards And Did Not Evolve From A Common Core Of Facts

Tupas argues that the common core of facts necessary to prove the accommodation claim here were the same as the discrimination claim, despite the record showing they involved differing legal theories and facts, different witnesses, different documents and encompassed different time periods. CP at 812-14, 844-45, 865-72, 951-57. Her argument fails.

The majority of Tupas's claims centered around her allegations of discrimination and retaliation beginning around 2007 and continuing until 2012. These claims focused on her interactions with her supervisors and coworkers in the work place during that time period. Her reasonable accommodation claim was solely focused on the interactive process she engaged in with the Human Resources Department in June to October 2012, mostly involving an exchange of e-mail and paperwork with the

medical experts and Human Resources staff. All of this took place after Tupas was put on home assignment, and did not involve any of her interactions with her Department colleagues. Merely because all of her claims were "employment" claims does not mean they shared a common core of facts or legal theories.

This court addressed a very similar "common core" argument in a recent employment case against the Department of Transportation. Plaintiff's attorney's fee request was based on allegations that discrimination and accommodation claims were based on a common core of facts. "Johnson maintains that these hours [attributable to her accommodation claim] were non-segregable from her WLAD claim, as they involved a common core of facts and related theories." *Johnson v. State, Dept. of Transp.*, 177 Wn. App. 684, 693, 313 P.3d 1197, 1202 (2013) (*review denied* ___ Wn. 3d ___, 2014). This court rejected Johnson's argument and affirmed the finding that they did not involve a common core of facts and legal theories for the same reason it should reject it here: the successful claims were based on different acts, witnesses, and documents as the unsuccessful claims, even though they related *generally* to Johnson's employment discrimination claims. *Id.* Because Tupas failed to make reasonable concessions and cut extraneous duplicative billing pertaining to her numerous unsuccessful claims, the

court was entitled, indeed required, to make its own determination of reasonable fees.

a. The Retaliation Claim Did Not Share A Common Core Of Facts Or Legal Theories

As she described in the Amended Complaint, Tupas's claim of retaliation for reporting national origin discrimination centered on allegations she made beginning in 2007 that resulted in actions against her, mostly by Fitzpatrick or Shervey. CP at 594-95. Her complaints of race discrimination continued through the next several years, with allegations of discrimination and the ensuing retaliation lodged in December 2009, September 2010, October 2010, March 2011, April 2011, June 2011, July 2011, November 2011, December 2011, and February 2012. CP at 595. Her claims of retaliation for asserting race discrimination did not share a "common core of facts" with any of the facts surrounding the disability accommodation process. These specific incidents of retaliation that she alleged occurred long before the accommodation process was even contemplated in May 2012. Tupas relied on incidents in 2007 and 2011 in which Caucasian employees were promoted and she was not. CP at 595-96. Tupas asserted that she was retaliated against in 2009 when her position was expanded with no commensurate pay raise. CP at 596. She asserted she was retaliated against by the Department in the way in which

her performance was scrutinized, such as her file maintenance, communication practices, and notations on her calendar. CP at 597. Tupas asserted that after she complained of discrimination, she was treated with hostility and was repeatedly reprimanded. CP at 598. She asserted that the (perceived) retaliation increased her anxiety during the 2010-2012 period, again well before the accommodation process. CP at 599. None of this had any bearing on the 2012 reasonable accommodation procedures.

At trial, in order to prevail on her retaliation claim Tupas would have had to prove that she had opposed what she reasonably believed to be discrimination on the basis of race and that her opposition was a substantial factor in one or more materially adverse employment actions. CP at 951. There is no connection, factually or legally in this ultimately unsuccessful claim to her failure to accommodate claim.

b. The Disability Discrimination Claim Did Not Share A Common Core Of Facts Or Legal Theories

While Tupas was also unsuccessful on her disability discrimination claim, the facts she relied on to support this claim were not related to the failure to accommodate claim, other than they both involved her anxiety disability. The incidents she relied on to support her claims were also well before the May 2012 accommodation process began. She asserted that

when she complained of discrimination and retaliation, her supervisors "took other actions calculated to make [her] uneasy and then criticized" her reactions. CP at 597. Tupas asserted numerous incidents involving her supervisors that she alleged increased her anxiety, most of them incidents in 2010-2012 in which she was asked to follow HR and Department protocol and didn't like the manner in which her supervisors interacted with her. CP at 599-602.

In order to prevail on the failure to accommodate claim, Tupas had to prove that the defendant knew about her disability, and that either the disability had a limiting effect on her ability to perform her job, or that working without an accommodation would aggravate her disability, and that she could perform the essential features of her job, and that the defendant failed to accommodate the disability. CP at 954. The documents relating to the accommodation process pertained solely to the attempt to accommodate her disability in another position and were not relevant to her discrimination and/or retaliation claims. CP at 178-180. Tupas called 17 witnesses at trial, of which only five testified regarding the reasonable accommodation. CP at 844. This narrow testimony was only a fraction of the entire trial and had limited overlap with the other issues presented.[4]

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[4] Not considering the earlier dismissed race discrimination claims, 91 percent of Tupas's amended claims were unsuccessful (CP at 821) and thus Tupas enjoyed a mere 9

Because Tupas failed to show that there was a common core of facts or legal theories among all her numerous claims, a reduction was required. CP at 691. The trial court, having presided over the entire 10- day trial, was well aware that the unsuccessful claims took up most of the trial, and that Tupas was unsuccessful on easily identifiable claims that were easily segregated by dates, witnesses, and documents. CP at 844. The trial court recognized that there was some overlap in Tupas's employment history and thus concluded that only a 25 percent reduction was necessary, despite the very narrow degree of success. CP at 691. The court reasonably limited the reduction for an adjusted lodestar of $407,771. The trial court did not abuse its discretion and the award of attorney's fees should be affirmed.

3. Tupas Failed To Reduce The Fee Request To Segregate Any Deposition Or Trial Time Spent Pursuing Unsuccessful Claims

More than 88 percent of the Lonnquist Firm's deposition time was spent on dismissed or unsuccessful claims. CP at 820. Counsel took depositions of 10 witnesses billing a total of 84 hours. CP at 820. Only 11.6 hours of deposition time related to the reasonable accommodation claim. CP at 820-21. Yet the Lonnquist Firm billed for every hour of deposition preparation and time in deposition without reducing any

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percent success rate. In that light, the trial court's 25 percent reduction was both reasoned and restrained.

amount for time spent pursuing the unsuccessful claims. Additionally, 70 percent of the trial witnesses called by Tupas pertained only to unsuccessful claims. CP at 821. Tupas called 17 witnesses, but only 5 were testifying about the accommodation process. CP at 821. Again, the Lonnquist Firm did not eliminate any trial time that was extraneous to the one successful claim.

A substantial discount of all fees sought was mandated. Because Lonnquist submitted a fee request that did not account for the majority of the claims being unsuccessful, the court appropriately "reduce[d] the award to account for the limited success." *Brand v. Dep't of Labor & Indus.*, 91 Wn. App. 280, 295, 959 P.2d 133 (1998), *rev'd,* 139 Wn.2d 659 (1999), citing *Hensley*, 461 U.S. at 436-37. The Lonnquist Firm was awarded 75 percent of the relief it sought, yet they only prevailed on a small fraction of the claims they brought on behalf of Tupas. A smaller award would have been justified. The court did not abuse its discretion and should be affirmed.

4. The Request For Fees Did Not Account For Duplicative And Redundant Billing By Three Attorneys

The billing records submitted to the trial court are replete with duplicative work pertaining to both discovery and depositions. CP at 420-459. For example, the attorney fees requested for time spent on depositions

are highly questionable. In a declaration supporting the motion for attorney's fees, Ms. Lonnquist states that the tasks were divided among three attorneys. CP at 402. She declared that she assigned "all issues relating to discovery, reviewing documents, preparing deposition questions and selecting documents to be used in depositions, and at trial, related tasks, and jury instructions" to Attorney Wendy Lilliedoll. CP at 402. Yet the records reflect that Attorney Brian Dolman also submitted numerous hours for reviewing discovery with Ms. Lonnquist, reviewing and editing discovery requests, and preparing for depositions. CP at 426-42. All of the depositions were conducted by Mr. Dolman, with the exception of a single deposition that Ms. Lonnquist handled. CP at 562. The Lonnquist Firm billed 379.8 hours for deposition preparation. Although Ms. Lilliedoll did not handle any of the depositions, the attorney fee request included 171.6 hours Ms. Lilliedoll billed for deposition work. CP at 845. This is in addition to the 189.9 hours Mr. Dolman billed for the depositions. CP at 845. It is clear that the three attorneys billed numerous hours on several matters that were duplicative and redundant, yet none of these hours were eliminated from the fee request.

Furthermore, the deposition time actually spent exploring the successful claim of reasonable accommodation was only a fraction of the total time spent in deposition. The Lonnquist Firm deposed 10 Department

employees and submitted 84 billable hours for deposition time. CP at 866-70. Of those 84 hours, only 62.1 were spent actually deposing a witness, and only 10.1 hours of actual deposition time were related to the reasonable accommodation claim. CP at 866, 870.

Because Tupas failed to do so, the trial court properly limited the lodestar to hours "reasonably expended," and "discount[ed] hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers*, 100 Wn. 2d at 597. The Lonnquist Firm spent significant portions of deposition and trial time pursuing unsuccessful claims. CP at 820-21. Given that Tupas prevailed on only a tiny fraction of her claims, and submitted billing that had not been reduced or segregated, the trial court was exceptionally judicious in reducing the award by only 25 percent.

C. Tupas Is Not Entitled To A Multiplier Of The Lodestar Due To The High Billing Rates Of Each Of The Three Attorneys And The Total Number Of Hours Billed On A Low Risk Case

Tupas sought a lodestar multiplier of 1.5, or 50 percent. CP at 398. The trial court did not abuse its discretion in declining to include a multiplier, finding that this was "not a particularly high risk claim for plaintiff's counsel to take on" because of many factual concessions made

by the Department.[5] CP at 692. The court also indicated that a multiplier was not warranted because the three attorneys' billing was duplicative and redundant. CP at 691-92. Tupas failed to meet her burden to justify an upwards adjustment of the lodestar. All of the factors she cites on appeal to justify a multiplier were already factored into the lodestar by the high billing rate, number of hours billed and number of attorneys on the case, as well as the low risk nature of the successful claim. Furthermore, the case presented no novel legal issues or any legal issue other than routine employment litigation. The court's decision not to apply a lodestar multiplier should be affirmed.

1. This Was A Low-Risk Employment Claim

Washington courts disfavor enhancements of attorney fee awards with multipliers. *Xieng v. Peoples Nat'l Bank of Wash.*, 63 Wn. App. 572, 587, 821 P.2d 520, *aff'd* 120 Wn.2d 512, 844 P.2d 389 (1991). There is a presumption that the lodestar amount (reasonable fees times the numbers of hours worked) is the reasonable fee. *Xieng*, 63 Wn. App. at 587 citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 728, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987). Enhancements are reserved for rare and exceptional cases. *Xieng*, 63 Wn. App. at 587, *Mahler*

[5] There is nothing in the record to support the contention that this trial was anything other than a routine employment case. The trial court expressly determined that it was not a high risk case and that the successful claim was not a high risk claim. CP at 691-92.

v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) (noting in "rare instances" an adjustment may be given). The exceptional and rare nature of a multiplier was confirmed even in cases involving a contingency fee. *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010) ("*Mahler* suggests that adjustments of the lodestar product are discretionary and rare.").

A party seeking a deviation from the lodestar bears the burden of justifying the deviation. *Wash. State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993). The fact that discrimination suits can be factually complex is already accounted for in the court's calculation of the hourly rate for employment attorneys. *See Bowers*, 100 Wn.2d at 598-99. Additionally, the lodestar already takes into account the quality of representation in the attorney billing rate. *Id.* at 593-594, citing *Miles v. Sampson*, 675 F.2d 5, 8 (1st Cir.1982).

Tupas argues that the trial court failed to address the risk of the case, the contingent nature of the fee arrangement and the quality of the representation. Br. Appellant at 1. The trial court did expressly address these points; it just disagreed with the Lonnquist Firm's assessment of the nature of the case. The court found that this was not a high risk case, (CP at 691) and the one successful claim was "not a particularly high risk claim for plaintiff's counsel to take on." CP at 692. The trial court also

expressed concern about redundant billing and having multiple attorneys attend depositions. CP at 691 n.2. Here, there simply was no evidence to support the contention that the case was high risk. Tupas failed to meet her burden that a multiplier was justified.

2. The High Billing Rates Account For Any Complexity Of Issues.

The Lonnquist Firm's assertion that the risky nature of a contingency case demands a multiplier is false. The contingent risk is accounted for here in the high billing rates of $475, $300, and $275 per hour. "[T]o the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made." *Bowers*, 100 Wn.2d at 599. The fact that the case was on a contingency basis is not sufficient to justify a modifier.[6] If it were, most if not all, cases would require a multiplier and would thus violate *Mahler*'s admonition that they be awarded rarely. *See e.g. Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 102, 231 P.3d 1211 (2010) (noting the issue of contingency is taken into account for the fee rate).

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[6] Although counsel asserts it is undisputed that this was a contingency case, counsel did not provide the trial court with a copy of the fee agreement. Counsel represented the appellant long prior to her separation from the Department and long before a lawsuit was filed. It is unknown if there was a different fee arrangement for the pre-litigation services.

The extremely high billing rates of the three attorneys on the case covers any complexity over and above the routine employment case. The Lonnquist Firm billed at rates of $475.00, $300.00, and $275.00 per hour, (CP at 393), rates that either exceeded or were at the high end of Seattle attorney rates. CP at 824, 830. Furthermore, despite billing 829.90 hours at a rate of $300 per hour, for a total of $248,970, (CP at 459) one of the lawyers didn't conduct any of the depositions, sat through the entire trial without presenting or cross examining any witnesses, and never argued a single motion to the court. CP at 843, 845. Because the law holds that these high rates account for any complexity and riskiness of the case, counsel's claim that the case demanded a multiplier fails. These rates, combined with obviously unnecessary billing, more than account for the routine nature of Tupas's one successful claim.

See also *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541 (1984) (rejecting upward adjustment of lodestar because the novelty and complexity of the issues was fully reflected in the number of hours billable reported by counsel). Here, there is no question that the over 1,700 hours reported more than compensated for any complexity of the case; indeed 1,700 hours for a 10-day employment trial is excessive and the result of poor efficiency and duplicative efforts. CP at 824. The trial court's determination that a multiplier was not warranted should be affirmed.

D. Prejudgment Interest Does Not Extend To Tort Claims Against The State Because The State Has Not Waived Sovereign Immunity For Prejudgment Interest

Washington appellate authority unequivocally holds that Tupas was not entitled to prejudgment interest in her employment action against the State. Although Tupas argues that tort claims under the WLAD are somehow exempt from laws applicable to other torts, she ignores the weight of authority that holds otherwise.

Tupas asserts that prejudgment interest should be available to her because it is available in actions against private employers under the WLAD. Br. Appellant at 42. But, prejudgment interest does not extend to tort claims against the State. *Norris v. State*, 46 Wn. App. 822, 733 P.2d 231 (1987). This maxim of law has been clear for the past twenty-seven years when *Norris* was decided. In affirming the denial of prejudgment interest in *Norris*, the Court explained that when the legislature enacted the post-judgment interest statute (RCW 4.56.115), it had expressly waived sovereign immunity for post-judgment interest on tort claims. *Norris*, 46 Wn. App. at 824-5. However, the court held the State did not waive sovereign immunity from prejudgment interest on tort claims. *Id.* Regardless of remedies available to plaintiffs who are suing private employers, this is not a remedy available against the State.

A more recent case in this Court reiterated that prejudgment interest is not available in tort claims against the State. "Because the State has never waived its sovereign immunity in this regard, the trial court did not abuse its discretion by declining to award prejudgment interest." *Maziar v Dep't. of Corr.,* 180 Wn. App. 209, 236 (2014).[7] *Maziar* involved a maritime claim in state court pursuant to the "savings to suitors" clause. In upholding the denial of prejudgment interest, the Court held that "federal maritime law does not supersede a state's sovereign immunity." *Id.* Likewise, the WLAD's "broad remedial" policies cannot supersede Washington's sovereign immunity.

In its ruling here, the trial court relied on *Foster v. Dep't. of Transp.*, 128 Wn. App. 275, 279, 115 P.3d 1029 (2005) to deny prejudgment interest. CP at 738. In *Foste*r, this Court reversed the trial court's award of prejudgment interest against the State because "the State has not waived sovereign immunity with respect to prejudgment interest in this case." *Foster*, 128 Wn. App. at 280. This Court emphasized the 1987 *Norris* holding:

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[7] The Washington State Supreme Court recently declined to accept review on this very question. See *Maziar v. Washington State Dep't of Corr.*, Wash. No. 90377-8 (Wash. Nov. 7, 2014) (order granting State's Petition for Review and denying request for review contained in Maziar's answer to the petition). Maziar had asked the Court to review the portion of the court of appeals decision affirming the denial of prejudgment interest. Answer To The Petition For Review And Cross Petition For Review at 1, *Maziar,* (Wash. Jul. 3, 2014).

> We held that when the legislature enacted RCW 4.56.115, it had expressly waived sovereign immunity from *post*-judgment interest on tort claims, while at the same time, by necessary implication, *not* waiving sovereign immunity from *pre* judgment interest on tort claims. Since 1987, the legislature has met many times without abrogating or altering *Norris*.

Id. at 278-79 (emphasis in original).

The *Foster* Court went on to specifically reject the plaintiff's argument that the state legislature waived sovereign immunity on certain tort claims but not on others, holding that "the authority for prejudgment interest on *any* tort claim is RCW 4.56.115, the very statute that *Norris* construed. Accordingly, *Norris* applies to a tort claim against the ferry system as much as to any other tort claim." *Foster,* 128 Wn. App at 279.

Prejudgment interest does not extend to tort claims against the State because the State has not waived sovereign immunity for prejudgment interest whether or not the tort is enumerated in the WLAD or any other tort statute. The decision to deny Ms. Tupas's prejudgment interest should be affirmed.

E. Remand for Reconsideration is Not the Appropriate Remedy.

Although the Department asserts that the findings are sufficient to support the nominal reduction in the Lonnquist Firm's fees, if this Court determines that the trial court's findings are insufficient to support the fee

award, the appropriate remedy is to remand for entry of findings. *Mahler*, 135 Wn.2d at 435.

V. CONCLUSION

The Lonnquist Firm failed to show that all of the 1,700 hours billed by Tupas's three attorneys were necessary to secure her limited success at trial, where she ultimately prevailed on only one of her numerous claims. The Lonnquist Firm likewise failed to show that the case was anything other than a routine employment case. Accordingly, the trial court properly exercised its discretion when it reduced the Lonnquist Firm's fee request by a mere 25 percent and declined to award a lodestar multiplier of 50 percent. Furthermore, the trial court properly exercised its discretion when it followed precedent holding that prejudgment interest was not applicable to state tort claims. For all the foregoing reasons, the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of January, 2015.

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DECLARATION OF SERVICE

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

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

DATED this 8th day of January, 2015, at Seattle, Washington

Nerissa Raymond

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