

No. 50297-6-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

BRITT EASTERLY,

Appellant,

and

ELZY EDWARDS and CLIFFORD EVELYN,

Plaintiffs,

v.

CLARK COUNTY,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

This case addresses the entitlement of Britt Easterly, who successfully pursued a discrimination claim under the Washington Law Against Discrimination, RCW 49.60 (“WLAD”) against Clark County (“County”) to an award of attorney fees and legal expenses under RCW 49.60.030. *See* Appendix. The underlying facts in this case are well-documented in this Court’s opinion in *Easterly v. Clark County*, 194 Wn. App. 1029, 2016 WL 3351562, *review denied*, 187 Wn.2d 1010 (2017).

Easterly prevailed at trial and was entitled to a fee/expense award. The trial court, however, abused its discretion in setting the lodestar fee, in denying a contingent risk and quality of work multiplier to Easterly’s counsel, and in denying Easterly’s recovery of the expense of his trial consultant, Kesten Media.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering the fee award order on February 10, 2017.

2. The trial court erred in entering its order denying reconsideration on March 14, 2017.

(2) Issues Pertaining to Assignments of Error

1. Where an attorney in a specialized field of practice customarily charges an hourly rate for her/his services, and that rate is supported by the testimony of other attorneys in that field of practice, did the trial court abuse its discretion in employing a lower hourly rate, without explanation, in setting the lodestar fee? (Assignments of Error Numbers 1 and 2)

2. Where an attorney was assisted at trial by the services of trial consultants in selecting the jury, and choosing and presenting video testimony to the jury, did the trial court abuse its discretion in failing to allow recovery of the consultants' fee as a part of the lodestar fee, or, alternatively, as a recoverable legal expense? (Assignments of Error Numbers 1 and 2)

3. Where an attorney represented a client in an employment racial discrimination case on a contingent basis and achieved an outstanding result for that client, did the trial court abuse its discretion in failing to award a multiplier as to the lodestar fee? (Assignments of Error Numbers 1 and 2)

C. STATEMENT OF THE CASE

Easterly prevailed on his WLAD action, and the County has not disputed that he was entitled to an award of his attorney fees and legal expenses under RCW 49.60.030. CP 401-02.

Easterly moved for an award of fees and costs, CP 214-33, and Easterly's lead counsel, Thomas Boothe, amply documented his firm's time and expenses incurred in achieving a successful result for Easterly. CP 40-213. Boothe exercised appropriate billing discretion in reducing many of the hours requested. CP 43-44, 218-22. Easterly also submitted evidence of Boothe's paralegal time in the case. CP 7-9, 20-27, 36-39. As part of the fee request, Easterly sought the recovery of the fees of Kesten Media,

the firm that assisted him at trial with respect to jury selection, computer and power point services, and video synchronization. CP 41.

In particular, Easterly sought to recover an hourly rate of \$475 per hour for the services Boothe rendered to Easterly. CP 223. Boothe supported that request with evidence from other cases in which he had an hourly rate of \$400 in 2010. CP 40-41. That rate increased to \$450 in 2014. CP 18. He charged hourly clients \$475 as of 2016. CP 43. He also supported that rate request by submitting declarations from other well-respected attorneys in the plaintiff employment law bar, CP 16 (Egan), CP 30-31 (Fuller), CP 245 (Mann), CP 435 (Colven), CP 437 (Good), CP 440-41 (Fels), CP 492 (McHugh); declarations from attorneys in the local jurisdiction, CP 12 (Price), CP 435 (Colven), CP 437 (Good), CP 440-41 (Fels), CP 492 (McHugh); and evidence from applicable rates for Oregon counsel. CP 212-13, 223-24.

Boothe's hours spent on the case were reviewed by attorney Gregory Price. CP 10-13. He opined that the hours spent by Boothe and his staff on the case were reasonable. CP 11-12.

Further, Easterly sought a multiplier. CP 226-32. He documented that request with evidence on the risk Boothe incurred in representing him

on a contingent basis, and the extraordinary quality of his work.¹ In this regard, the testimony of Mary Ruth Mann was particularly pointed:

This case is among the highest risk cases employment lawyers face. Public Jurisdictions have unlimited resources to fight these cases and law enforcement organizations typically aggressively oppose any discrimination case whether because of inherent biases or temperament or policy decisions. The Defense evaluation of this case confirms that it was a high risk case. Their Offer of Judgment, bet on this as not more than a "\$40,000" case (which would also be referred to as "defense costs" or "nuisance value" in litigation) and from my observation they never raised their Offer of Judgment from that level. The Court's rulings also show this was a high risk case with difficult factual and proof issues.

CP 425. She further noted:

¹ Britt Easterly confirmed the risk to Boothe, testifying that he was unable to pay the expense of litigation on his own, and that had he lost, Boothe would not have paid for costs:

3. Mr. Boothe fronted all costs for the litigation. While I have enjoyed reasonable income from my employment, it does not leave sufficient funds to pay attorney fees or to even contribute meaningfully to the ongoing costs. I knew that if we lost at trial I would have no viable means of repaying the costs Mr. Boothe would advance on my behalf. It learned that he had never lost and had made it clear in the past that if he did lose in court, he would not look for the civil rights client to reimburse his out of pocket expenses, let alone pay for his or his staff's time or the other costs. When the case went up on appeal, Mr. Boothe paid the appellate attorney's fees out of pocket on a current basis. Despite this, Mr. Boothe never cut back on representation, never reduced the time he and his staff put into it, and never shirked from his willingness to spend money to advance my case.

4. If I had lost at trial, I (and by this I really mean my family) would not have been able to pay for all the money Mr. Boothe incurred in representation.

CP 253-54.

In my opinion that a substantial multiplier of over “2 times” the hourly fees would be necessary to make this an economically reasonable risk, to convince other attorneys to undertake the risk of this case and cases like it on a contingent. Contingency representation is disappearing for employees facing discrimination because of unpleasant and expensive and time consuming and endless litigation to prevail in such cases, as well as social biases that make the cases extremely risky. Attorneys are progressively having to ask for up front partial fees and for cost deposits, diminishing access to justice and defeating the statutory scheme for “private attorneys general” to take cases for employees without resources due to discrimination.

CP 426-27.

The County opposed Easterly’s fee request, arguing for a lower fee award. CP 401-32. Its expert, David Burkett, argued that the fee request was excessive because the rates were too high, and the hours excessive. CP 266-83. He contended that a multiplier was not merited. CP 280-81.²

The trial court, however, awarded Easterly a lodestar fee that set Boothe’s hourly rate at \$400 per hour. CP 500-03. The court did not explain its reason for doing so. CP 500. The court allowed 1,100 attorney hours and 1,320 paralegal hours spent on the case, CP 501, but it declined to award the Kesten Media time as part of the lodestar, concluding that

² Burkett purported to base his opinion on what he described as “an informal, non-scientific, non-random” survey of employment lawyers as to their rates. CP 273-74, 437, 492. He was not entirely forthcoming about his contacts with such attorneys, as the declaration of Peter Fels documents. CP 439-42. He may also have misrepresented his background in employment law. CP 444-46.

technical support and courtroom video-assistance do not constitute attorney or paralegal time, CP 501, and setting over the question of the recovery for the Kesten Media services as a recoverable expense. CP 502-03. It subsequently allowed recovery of \$13,000 of the Kesten fees as a cost. CP 553-54. The court rejected the award of a multiplier. CP 501-02.

Easterly timely moved for reconsideration, CP 635-40,³ but the trial court denied the motion. CP 642-43. This timely appeal followed. CP 555-60, 645-48.

D. SUMMARY OF ARGUMENT

The trial court abused its discretion in making its WLAD fee award to Britt Easterly. That fee award is governed by the lodestar methodology. A lodestar fee is set by multiplying reasonable hourly rates for the billing attorneys or staff times the reasonable hours spent by those billers in securing the successful result for a WLAD claimant like Easterly.

The trial court erred in its calculation of the lodestar by employing an hourly rate for Easterly's counsel that was less than the rate he customarily charged for hourly work where payment is regular and assured. In doing so, without explanation, the court ignored the fact that the rate was

³ Boothe missed the court's hearing on the Kesten Media fee issue and mistakenly failed to file a reply on those fees. CP 635-36. The trial court noted that these mistakes were "inadvertent" and "excusable," but noted that neither the argument or reply would have changed its ruling. CP 643.

reasonable in employment litigation, a specialized field, and was supported by expert testimony from numerous employment litigators. The County offered no contrary expert testimony.

The court also erred in refusing to allow the fees of Easterly's video consultant, Kesten Media. The Kesten staff met the criteria for the status of legal assistants to Boothe and their services qualified for inclusion in the lodestar calculation. Alternatively, the services in question qualified as a recoverable legal expense in light of a WLAD claimant's expanded entitlement to recovery of litigation costs.

Finally, the trial court erred in refusing to award Easterly a multiplier. A multiplier was appropriate in this case given the contingent nature of the representation, the protracted and bitter nature of the litigation, and the outstanding quality of the result achieved for Easterly by his counsel. Absent a multiplier in a case like this, counsel will be deterred from taking on difficult WLAD matters by the sheer economics of not being timely compensated for their services. WLAD's important public policy of preventing discrimination will be frustrated.

E. ARGUMENT⁴

⁴ This Court reviews fee awards for an abuse of discretion. *Mahler v. Scuzs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

(1) General Principles Governing the Award of Fees/Expenses Here

Washington courts in WLAD actions liberally award fees and expenses in order to enable its vigorous enforcement, making it financially feasible for victims of discrimination to enforce that law. *Martinez v. City of Tacoma*, 81 Wn. App. 228, 234, 914 P.2d 86, review denied, 130 Wn.2d 1010 (1996); *Bright v. Frank Russell*, 191 Wn. App. 73, 361 P.3d 245 (2015); *Tupas v. State, Dep't of Ecology*, 191 Wn. App. 1036, 2015 WL 8160678 (2015).⁵

The award of fees under the WLAD is governed by the lodestar methodology. *Bright*, 191 Wn. App. at 77-78. Under that methodology, the party seeking fees must generally document its attorneys' hours by "reasonable documentation of the work performed." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Mahler*, 135 Wn.2d at 434. In general terms, the lodestar is calculated by multiplying a reasonable hourly rate times a reasonable number of hours. In calculating the reasonable number of hours, a court must exclude wasteful, duplicative, or otherwise unproductive efforts. *Id.* at 434. *See*

⁵ RCW 49.60.020 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."); *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989) ("... the statutory protections against discrimination are to be liberally construed and its exceptions narrowly confined.").

generally, Philip A. Talmadge, Thomas M. Fitzpatrick, *The Lodestar Method for Calculating a Reasonable Attorney Fee in Washington*, 52 Gonz. L. Rev. 1 (2016/17).

(2) The Trial Court Erred in Establishing the Appropriate Hourly Rate for Easterly’s Counsel

The trial court here erred in confining Easterly’s counsel to a hourly rate of \$400 per hour, without explanation. CP 500.

The lodestar methodology requires a party seeking fees to establish reasonable hourly rates for the attorneys rendering professional services. A court must also set a reasonable hourly rate for each attorney involved in the litigation, and “[W]here the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.” *Bowers*, 100 Wn.2d at 597. The attorney’s skill, experience, and reputation, the nature of the issues at stake, the venue, and other factors are legitimately before a trial court in assessing the reasonableness of the hourly rates. A factor assessing the hourly rates is the fee customarily charged in the locality for similar legal services. RPC 1.5(a)(3); *Mahler*, 135 Wn.2d at 433 n.20. Moreover, it is also appropriate to assess the fee charged for “similar services,” RPC 1.5(a)(3). In other words, courts should look to fees charged in a specialized area of practice.

Plainly, employment litigation is a specialized subset of litigation practice. It is state-wide in scope; rates charge by employment lawyers are specialty-based, not geographically based. This is certainly supported by the fact that employment lawyers have their own state-wide specialty organization – that conducts continuing legal education. WELA is described on its home page:⁶

WELA is composed of attorneys, law professors, paralegals and law students devoted to the promotion of employee rights. WELA works to promote and increase public awareness of the rights of individual employees; enhance the quality of legal representation of employees; advocate for employee rights before courts and legislative bodies; and assist and support members in their practice of plaintiffs' employment law.

That mission is state-wide in its scope:

WELA's mission is to enforce and advance employee rights, in recognition that employment with dignity and fairness is fundamental to the quality of life. We do this by promoting and increasing public awareness of the rights of individual employees; enhancing the quality of legal representation of employees; advocating for employee rights before courts and legislative bodies; and assisting and supporting members in their practice of plaintiffs' employment law. WELA began in spirit in the late 1980's as an informal network of plaintiff employment lawyers. In 1994, WELA began to develop formal programs including its Amicus Curiae Committee and education programs. In 1996, WELA was incorporated as a Washington non-profit corporation, and has been growing ever since. WELA's Board of Directors consists of the four elected officers (Chair, Vice-Chair, Secretary and Treasurer), the Immediate Past Chair

⁶ <http://welalaw.org> (last visited June 20, 2017).

and five appointed members. The appointed members serve as chairs of the Amicus, CLE, Programs, Membership Committees, Legislative, and Communications Committees as follows:

As noted *supra*, Boothe presented ample testimony that he charged the rate of \$475 per hour in other cases. *Numerous* eminent employment litigators testified that the rate was reasonable. Nevertheless, without explanation, the trial court fastened on an hourly rate of \$400 per hour. CP 500. In doing so, the trial court abused its discretion.

(3) The Trial Court Failed to Properly Address the Kesten Media Request

Kesten Media were trial consultants for Easterly. The trial court here concluded that the fees of Kesten Media were categorically not recoverable as a part of the lodestar fee. CP 501 (“Technical support and courtroom assistance with video is [sic] not attorney or paralegal time and is not recoverable at a reasonable hourly rate.”). In that decision, the trial court erred.

(a) Kesten’s Staff Hours Should Have Been Part of the Lodestar Fee

Washington law has long provided that legal assistants’ time may be recoverable as part of the lodestar so long as the assistants’ work is legal as opposed to clerical. In *Absher Construction Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995), Division I broadly

defined a legal assistant:

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves a performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

The *Absher* court looked to the function performed, rather than a title like “paralegal,” or “trial consultant.”

The court then established criteria for determining whether the legal assistants’ time is compensable:

(1) the services performed by the non-lawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.

This Court has adopted Division I’s *Absher* criteria. *Trainer v. Kitsap Cty.*, 107 Wn. App. 1035, 2001 WL 873826 (2001), *review denied*, 147 Wn.2d 1005 (2002) (applying *Absher* and allowing recovery of paralegal time).

The criteria established by the *Absher* court have been applied for various personnel since *Absher*. For example, in *TJ Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 346 P.3d 777, *review denied*, 184 Wn.2d 1003 (2015), Division III utilized the *Absher* criteria to conclude that only the work of APR 9 – licensed legal interns qualified for inclusion in a lodestar calculation. *Id.* at 261-63. *See also*, *N. Coast Electrical Co. v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007) (under *Absher* criteria, clerical work of secretarial personnel excluded); *Philips Oral Healthcare, Inc. v. Federal Ins. Co.*, 2005 WL 3020014 (W.D. Wash. 2005) (applying *Absher*, allowing recovery of paralegal time, but excluding time of staff whose background was not adequately articulated or who performed clerical work).

Here, Easterly presented ample evidence that Michael Kesten and Emily Smith Harrington⁷ of Kesten Media met the definition of “legal assistants” and the services he provided were “legal” in nature. Kesten spelled out his education and experience, which supported his rate. CP 33. Kesten further explained the precise services he provided Easterly, assisting Boothe before and during trial on the editing and captioning deposition video tapes, integration of exhibits, and theme and story development, each

⁷ Kesten had the assistance of his associate Emily Smith Harrington. CP 33.

a function that Boothe or his staff would otherwise have had to try to do themselves, albeit less efficiently. CP 33, 509-10. Kesten worked under Boothe's supervision. CP 567. Kesten's roles in trial preparation and presentation support legal assistant equivalence. Kesten kept time records, submitting a bill for his work. CP 34. Easterly sought recovery of Kesten's hourly rate of \$150 per hour, and Harrington's rate of \$100 per hour. CP 34.⁸ That time was fully documented. CP 514-22.

During the trial, the County usually had two lawyers and a paralegal at counsel table, with a video person intermittently present in the gallery. CP 510, 567. Other than during voir dire, Easterly had one attorney and Kesten. *Id.* Kesten helped pick the jury, he conferred on strategy, and he helped shape plaintiff's presentation, both substantively and stylistically. CP 34. In addition, throughout trial Easterly's counsel regularly conferred with Kesten about juror reactions, whether a particular passage should be played, sequencing of excerpts and other concerns reflective of Kesten's expertise in communications and trial experience. CP 509-10. Kesten and Easterly's counsel worked together for almost fifteen years, so Boothe had a level of trust in Kesten's judgment. CP 567. Kesten synced multiple deposition tapes for use at trial, was present and participating through the

⁸ Emily Smith, Boothe's paralegal, had an hourly rate of \$150 per hour. CP 7. The trial court approved that rate. CP 501.

entire trial, had his equipment operating reliably, and assisted materially in the presentation of Easterly's closing, which involved a detailed power point presentation with active slides. CP 567-68.

These trial consultant services met the *Absher* criteria and should not have been categorically excluded, as the trial court here decided. Other courts have found such services to be appropriately addressed as part of a lodestar fee. In *Bender v. Los Angeles*, 217 Cal. App. 4th 968, 990-91, 159 Cal. Rptr. 3d 204 (2013), the California Court of Appeals reversed a trial court decision allowing award for a trial video computer, PowerPoint presentation, and videotaped deposition synchronizing. The court there pointedly observed that use of technology in the courtroom has become "commonplace," *id.* at 997, and that it would be inconceivable that plaintiff's counsel would forego the use of videotapes in the appropriate case. *Id.* Similarly, in *BD v. DeBuono*, 177 F. Supp. 2d 201, 204 (S.D.N.Y. 2001), the district court deemed trial consultants to be the equivalent of attorneys and allowed recovery of their hourly rates for time spent assisting trial counsel, stating:

Litigation consultants (also known as litigation support specialists) are trained in various aspects of courtroom practice and procedure. They are consulted by litigators to hone their trial skills in the context of a particular case. It seems to this Court that litigation consultants, used in the manner that plaintiffs' counsel used them here, are the equivalent of additional attorneys or legal para-

professionals. The services they provide are not those of an expert witness, which has been the traditional purview of “expert fees.” DOAR provided neither substantive testimony nor information relating to the underlying dispute. Therefore, even though they are expert at what they do, they do not fall within the rubric of “experts” as that term traditionally has been used.

If plaintiffs’ counsel had organized mock trials themselves, or done their own jury consulting research, the hourly rates they charged for those services would be reimbursable as part of an attorneys’ fee award. The fact that counsel chose to engage the services of an independent contractor to perform those same services, rather than assign the same work to employees, does not alter the nature of the services rendered. DOAR’s litigation consulting services fall properly under the rubric of attorneys’ fees and are a reimbursable expense in a litigation of this magnitude.

Id. at 204. *See also, Green v. City of Riverside*, 238 Cal. App. 4th 1363, 1374, 190 Cal. Rptr. 3d 693 (2015); *Phillips v. Morris*, 2014 WL 7051722, at *4 (D. Col. 2014) (applying *BD* to jury focus activities); *Kreidler v. Pixler*, 2011 WL 39054, at *6 (W.D. Wash. 2011) (allowing recovery of trial consultant time as to videotaped testimony).

Given how integral the video presentation was to Easterly’s case and how Easterly’s counsel did not even have paralegals in the courtroom except for voir dire, Kesten’s \$150 per hour rate was reasonable. CP 568. The trial court abused its discretion in denying recovery of Kesten Media’s rates as part of the lodestar fee.

(b) Kesten’s Services Should Have Been Part of the Costs Awarded to Easterly

Alternatively, the trial court erred in only allowing \$13,000 for such services as a recoverable legal expense, confining that award to the “amount actually expended in procuring such services.” CP 501, 553-54. Washington courts liberally allow recovery of legal expenses in WLAD actions. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987). There, our Supreme Court made clear that in WLAD actions, courts are not bound by the definition of recoverable costs in RCW 4.84.010. Rather, the Court adopted

the federal rule allowing more liberal recovery of costs by the prevailing party in civil rights litigation, in order to further the policies underlying these civil rights statutes: to make it financially feasible to litigate civil rights violations, to enable vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy, to compensate fully attorneys whose service has benefited the public interest, and to encourage them to accept these cases where the litigants are often poor and the judicial remedies are often nonmonetary.

Id. at 573. In so doing, the Court cited authorities allowing recovery of such expenses as transportation, lodging, parking, food and telephone expenses, reasonable photocopying and paralegal expenses, statistician and computer expenses, supplies, equipment, depositions, and expert witness fees. *Id.* at 573-74. *Accord, Panorama Village Condo. Owners Ass’n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 120, 26 P.3d 910 (2001) (successful insured in insurance coverage action may recover necessary legal expenses such as

expert fees as part of reasonable attorney fee); *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 128 P.3d 128 (2006) (employees in minimum wage case could recover expert fees, depositions and transcripts not used at trial, travel expenses, mediation fees, ordinary office expenses, and parking); *Amer. Civil Liberties Union of Wash. v. Blaine Sch. Dist.*, 95 Wn. App. 106, 975 P.2d 536 (1999) (PRA).

Thus, the trial court should either have allowed Kesten’s staff hours as part of the lodestar fee or awarded the full Kesten Media expense to Easterly as a cost, rather than limiting the recovery to \$13,000.

(4) The Trial Court Erred in Declining to Award Easterly a Multiplier

The trial court here denied Easterly a multiplier on the lodestar fee, concluding that it had allowed hourly rates “at the higher end for legal work of a similar character in this area,” and that those rates encompassed the difficulty and novelty of the work at issue. CP 501. The court did not address the quality of work performed. *Id.* Similarly, the court found that although the representation was contingent, a multiplier was not justified. *Id.*

The trial court’s denial of a contingent risk and/or quality of work multiplier will only result in the frustration of WLAD’s important public

policy⁹ because counsel will be deterred from taking cases to enforce that policy by the adverse economics of such cases.

The general rule in Washington is that the lodestar fee may often be presumed to adequately compensate an attorney for his or her services. *Henningsen v Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000); *Fiore v. PPG Indus.*, 169 Wn. App. 325, 355, 279 P.3d 972, 989, *review denied*, 175 Wn.2d 1027 (2012). However, in the appropriate instances the lodestar should be adjusted to reflect factors such as the quality or contingent nature of the work. *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007); *Ewing v. Glogowski*, 198 Wn. App. 515, 394 P.3d 418 (2017) (contingent risk); *Hill v. Garda CL Northwest, Inc.*, 198 Wn. App. 326, 394 P.3d 390 (2017) (contingent risk); *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014) (outstanding quality of work).¹⁰ Multipliers are

⁹ RCW 49.60.010 states in pertinent part:

This chapter shall be known as the “law against discrimination.” It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

¹⁰ Division I examined the award of multipliers in detail in *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014)

appropriate, particularly in an employment case, as here, where an important public policy has been vindicated by counsel's services. Indeed, Justice Brennan noted in *Hensley v. Eckerhart*, 461 U.S. 424, 449, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) that multipliers are appropriate to encourage lawyers to take cases to vindicate key public policies:

... on many occasions awarding counsel fees that reflect the full market value of their time will require paying more than their customary hourly rates. Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference, however, reflects the time-value of money and the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate. Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case.

Therefore, district courts should not end their fee inquiries when they have multiplied a customary hourly rate times the reasonable number of hours expended, and then checked the product against the results obtained. They should also consider both delays in payment and the pre-litigation likelihood that the claims which did in fact prevail would prevail. These factors are potentially relevant in every case. Even if the results obtained do not justify awarding fees for all the hours spent on a particular case, no fee is reasonable unless it would be adequate to induce other attorneys to

concluding that most cases where multipliers are awarded in Washington, such multipliers do not ordinarily exceed 1.5. *Id.* at 681. Easterly requested a 1.5 multiplier, consistent with *Berryman*. CP 231-32.

represent similarly situated clients seeking relief comparable to that obtained in the case at hand.

(Brennan J., concurring in part/dissenting in part (citations omitted)).

Cases like *Pham* and *Berryman* indicate that merely because a favorable result is achieved or the work is performed on a contingent fee basis, however, a multiplier is not automatically merited. Rather, the analysis is necessarily more nuanced. The trial court's decision here does not reflect any reasoned analysis on the multiplier question.

First, the quality of work performed by Easterly's counsel merited a multiplier. Quality of work multipliers are recognized in Washington law. *Bowers*, 100 Wn.2d at 599; *Miller*, 180 Wn. App. at 825. This was not a garden-variety employment case. It was hard-fought. The case was tried over 8 days. It required a trip to the Court of Appeals. The trial court was oblivious to these realities. For virtually the identical reasons plaintiffs' counsel was entitled to a quality of work multiplier in *Miller*, Easterly was entitled to a multiplier here.

Second, Easterly was entitled to a multiplier because of contingent risk in the representation. Division I's decision in *Tupas, supra*, is instructive as to why the trial court here erred in failing to award a contingent risk multiplier. Like this case, *Tupas* involved a WLAD action. Division I emphasized that WLAD cases are special:

Despite a presumption that the lodestar represents a reasonable fee, an exception to the presumption exists in antidiscrimination cases because the law “places a premium on encouraging private enforcement and ... the possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases.” *Berryman v. Metcalf*, 177 Wn. App. 644, 666, 312 P.3d 745 (2013) (quoting *Pham*, 156 Wn.2d at 542). In this type of case, “it is possible the lodestar figure does not adequately account for the high risk nature of a case.” *Berryman*, 177 Wn. App. at 666.

191 Wn. App. 1036 at *8. The court reversed a trial court fee award where the trial court seemingly failed to assess risk at the outset of the litigation. *Accord*, *Pham*, 159 Wn.2d at 542; *Martinez*, 81 Wn. App. at 235. *See also*, *Wash. State Commc’ns Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 293 P.3d 413, *review denied*, 178 Wn.2d 1010 (2013) (WLAD action establishing need for assistive listening devices in theaters).

Here, it is impossible to determine from the trial court’s findings precisely how, or when, it analyzed the risk in Easterly’s counsel’s representation.¹¹ The trial court certainly did not address the fact that this is a WLAD case. There is little doubt here that the risk was real at the outset of the litigation that Easterly’s counsel would face an aggressive opponent in the County and might never be paid. This is the *sine qua non* of why a

¹¹ The absence of *meaningful* findings and conclusions requires a reversal. *E.g.*, *In re Matter of Beverly C. Morgan Family Trust*, 189 Wn. App. 1027, 2015 WL 4730237, at *9 (2015) (TEDRA action); *Thomas v. LeVasseur*, 189 Wn. App. 1042, 2015 WL 5012573, at *2-3 (2015) (CR 11 or RCW 4.28.328(3)).

contingent risk multiplier is necessary to encourage capable employment counsel to represent clients who have been victimized in employment in violation of WLAD.

The trial court here erred in failing to allow a multiplier.

(5) Easterly Is Entitled to Fees on Appeal

Insofar as Easterly recovered his attorney fees below, he is entitled to recover his fees on appeal. RAP 18.1(a).

F. CONCLUSION

The trial court failed to fully compensate Easterly under the lodestar analysis for his counsel's services in this WLAD action. Such a failure will ultimately negate the incentive for competent employment lawyers to take risky WLAD actions and to effectuate its important public policy of eradicating discrimination.

This Court should reverse the trial court's fee award and remand the case to the trial court for entry of a fee award that encompasses the appropriate hourly rate for Easterly's counsel and proper compensation for the services of Kesten Media, and awards a multiplier of the lodestar. Costs on appeal, including reasonable attorney fees, should be awarded to Easterly.

DATED this 20th day of June, 2017.

Respectfully submitted,



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Attorneys for Appellant Britt Easterly

APPENDIX

RCW 49.60.030(2):

Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 *et seq.*)

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Scott G. Weber, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY**

BRITT EASTERLY,)	
	)	NO. 09-2-05520-7
Plaintiff,)	
	)	ORDER AWARDING
vs.	)	PLAINTIFF ATTORNEY FEES
	)	AND COSTS
)	
CLARK COUNTY,	)	[Clerk's Action Required]
)	
Defendant.)	

THIS MATTER came on regularly before the undersigned judge of the above entitled court on December 9, 2016, on the motion of plaintiff, Britt Easterly, for attorney fees and costs. Plaintiff was represented by and through his attorney, Thomas Boothe. Respondent Clark County, Washington, was represented by and through its attorney, Mitchell Cogen. The court considered the records and files herein, the materials and declarations submitted concerning the motion, and the arguments of the parties.

Based on such review and consideration, the court makes the following determinations concerning the motion:

1. The plaintiff is entitled to an award of reasonable attorney fees and costs under the Washington's law against discrimination, RCW 49.60.030.
2. A reasonable hourly rate for attorney time in this matter is \$400 per hour.

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attorney's ability to take other work, do not justify the use of a multiplier in these circumstances. The total fee award is \$638,000.00.

11. The following costs are awarded, in addition to the fees listed above:

a.	Filing Fees:	\$ 480.00
b.	Service Fees:	\$ 1,422.80
c.	Hearing/Trial Videos:	\$ 125.00
d.	Discovery Master Fee:	\$ 1,181.00
e.	Subpoena/Witness Fee:	\$ 574.75
f.	Expert Witness Fee:	\$ 1,653.00
g.	Medical Records:	\$ 130.64
h.	Parking:	\$ 346.25
i.	Mileage:	\$ 836.11
j.	Meals:	\$ 43.30
k.	Postage/Delivery:	\$ 689.68
l.	Deposition Video:	\$ 12,833.45
m.	Court Reporter:	\$ 5,249.50
n.	Deposition Transcript:	<u>\$ 5,880.03</u>
	TOTAL COSTS ALLOWED:	<u>\$ 31,445.51</u>

12. Costs for video services (Kesten and Associates) are reserved. Plaintiff may present additional information concerning costs expended for these services. Supplemental materials must be filed and served by February 24, 2017. All other requested costs are denied.

13. This matter is scheduled for further consideration of costs for video services and for presentation of a supplemental judgment on **Friday, March 3, 2017 at 9:00 am (Department 9 Civil Motion Docket)**. The clerk shall note the case for hearing at that time. The court shall provide a copy of this order, as notice of the hearing date and time, to the attorneys for the parties.

DATED this 10th day of February, 2017.

/s/ ROBERT A. LEWIS

Judge Robert A. Lewis

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MAR 15 2017**

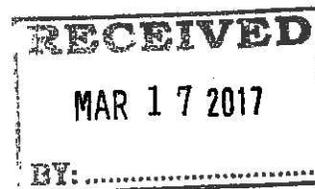
Scott G. Weber, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

BRITT EASTERLY,)	
)	
Plaintiff,	)	NO 09-2-05520-7
)	
vs.	)	ORDER DENYING
	)	PLAINTIFF'S MOTION
CLARK COUNTY,	)	FOR RECONSIDERATION
)	
Defendant.	)	[Clerk's Action Required]

This matter came on regularly before the undersigned judge of the above-entitled court on the motion of the plaintiff, Britt Easterly, for reconsideration of the court's order granting plaintiff's supplement re: Kesten Media, entered March 9, 2017. The decision awarded costs to the plaintiff and against the defendant for video services obtained by plaintiff. The motion, entitled Plaintiff Easterly's motion for relief from order re: Kesten Media, was timely filed on March 13, 2017. A response by the defendant is not necessary. Pursuant to local court rule, the court has considered the motion without oral argument.

The motion for reconsideration reasserts a number of the factual and legal points previously argued by the plaintiff. The court considered these assertions



prior to making its rulings on the original motion for costs. The plaintiff inadvertently failed to reiterate these assertions orally at a March 3, 2017 hearing, or by filing a reply memo prior to that hearing. While this mistake was excusable, the materials in the reply and the materials filed in support of the motion for reconsideration would not have changed the court's ruling. The plaintiff's position was thoroughly stated in his original request for costs. The court did not make an error of law and substantial justice with regard to this issue has been done.

Now, therefore, it is ORDERED as follows:

1. The April 21, 2017 hearing is stricken. The clerk shall remove the hearing from the court's docket.
2. Plaintiff Easterly's motion for relief from order re: Kesten Media, filed March 13, 2017, is denied.
2. The court shall provide a copy of this order to the attorney of record for each party.

Dated this 14th day of March, 2017.

/s/ ROBERT A. LEWIS

JUDGE ROBERT A. LEWIS

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the following document: *Brief of Appellant* in Court of Appeals, Division II Cause No. 50297-6-II to the following parties:

Thomas S. Boothe
7635 SW Westmoor Way
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Mitchell J. Cogen
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Vancouver, WA 98666-5000

Original e-filed with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402

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

DATED: June 20, 2017 at Seattle, Washington.



John Paul Parikh, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

June 20, 2017 - 1:20 PM

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Appellate Court Case Title: Britt Easterly, Appellant v Clark County, Respondent
Superior Court Case Number: 09-2-05520-7

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