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NO. 72663-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CINDI BRIGHT,

Plaintiff-Appellee,

v.

FRANK RUSSELL INVESTMENTS,

Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
HONORABLE KEN SCHUBERT

BRIEF OF APPELLANT FRANK RUSSELL INVESTMENTS

Reply Brief

Thomas A. Lemly, WSBA #5433
Steven P. Caplow, WSBA #19843
Davis Wright Tremaine LLP
Attorneys for Defendant-Appellant

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court must “actively” assess the reasonableness of all attorney fee requests. Washington’s Law Against Discrimination (WLAD) contains no exception immunizing fee applications submitted under the Act from such scrutiny. The trial court, placing untenable reliance on WLAD’s liberal construction, did not segregate plaintiff Cindi Bright’s unsuccessful race-based claims from her successful failure to accommodate claim, and abused its discretion by its complete failure to review Ms. Bright’s degree of success. Having dissuaded the trial court from undertaking a proper review of the fee application, the Opposition argues this Court now lacks the authority to review the decision below.

Qualitatively, the trial court dismissed claims asserted by Ms. Bright after the close of discovery because they did not set forth even a *prima facie* case. Applying standard non-dispositive quantitative benchmarks, Ms. Bright achieved between a 18% and 50% success. This accords with the trial court’s reduction of Ms. Bright’s *post-trial* fees by 43% when the trial court properly exercised its discretion. Russell respectfully requests this Court reverse the Order awarding fees and costs and remand for the trial court with instructions to deny fees and costs for services on the unsuccessful claims, or reduce the fees and costs based on Ms. Bright’s lack of success.

II. ARGUMENT

A. The Trial Court Abused Its Discretion

Trial courts must actively assess the reasonableness of all attorney fee awards and may not simply accept the amounts stated in fee affidavits. *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013), review denied sub nom., *Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026 (2014). This Court reviews the reasonableness of the attorney fees award for an abuse of discretion. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.2d 1255 (2014). A trial court abuses its discretion regarding the amount of attorney fees when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.*

“An error of law constitutes an untenable reason.” *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). Paragraph 14 of the trial court’s Order—stating Ms. Bright’s unsuccessful claims cannot be segregated—adopted the legally erroneous contention that WLAD operates to “unify” claims for relief “based on different facts and legal theories.” Opp. 28. Paragraph 15 of the Order, which essentially acknowledges Ms. Bright’s successful and unsuccessful claims were unrelated is based on the trial court’s unprecedented concept that Russell’s defense themes “intertwined” Ms. Bright’s otherwise admittedly “unrelated” claims.

Failure to “exercise discretion” is another “abuse of discretion.” *Amalgamated Transit Union Local No. 1576 v. Snohomish Cnty. Pub. Transp. Ben. Area.* 178 Wn. App. 566 n.29, 316 P.3d 1103 (2013). The trial court failed to undertake any meaningful evaluation of Ms. Bright’s success as a whole. The Opposition tries to backfill the trial court’s omission of this key consideration with the empty suggestion that the trial court likely deemed her wholly successful because of the “salutary” benefits of bringing a claim to enforce WLAD. Opp. 36.

B. The Trial Court Failed to Segregate Unsuccessful Claims

The trial court awarded Ms. Bright prevailing party attorneys’ fees for both her successful and unsuccessful claims. Order ¶ 14 (CP 1628). The trial court declined to “segregate and reduce the fees” for Ms. Bright’s unsuccessful claims on the grounds that as all of her claims were asserted under WLAD, the case “did not involve discrete and severable claims.” *Id.* Russell assigned error to the trial court’s finding that her “claims arising under WLAD cannot be segregated.” Br. 3 (Russell’s first assignment of error). Russell’s discussion on the merits identifies paragraph 14 of the Order. *Id.* 15. Ms. Bright’s opposition airily dismisses Russell’s first assignment of error stating the “trial court made no such finding” and Russell’s brief fails to cite “any record reference[s]

for its unsubstantiated claim.” Opp. 2. However, the record establishes that the trial court incorrectly ruled it was “*not appropriate*” to consider Ms. Bright’s “lack of success on one or more claims” arising under WLAD, CP 1628 ¶ 14 (emphasis added), and that Russell identified paragraph 14 of the Court’s Order in its discussion of the issue. Br. 15-16.

In any event, Ms. Bright devotes much of her opposition to uphold the trial court’s ruling that WLAD claims should not be segregated regardless of success. *See, e.g.*, Opp. 31 (“well grounded”). To defend the trial court’s fee award, Ms. Bright argues that by operation of law WLAD unifies otherwise separate claims. *See, e.g.* Opp. § IV.D.b (“The Trial Court’s Consideration of WLAD as a Unitary Statute Was Appropriate”). Under this untested proposal, because WLAD seeks to eliminate “all forms of discrimination,” it is a so-called “unitary statute” such that “different claims for relief that are based on *different facts and legal theories*” are *not “different claims.”* Opp. 28 (emphasis added). This approach dictates that because WLAD statutorily unified Ms. Bright’s claims, the trial court could not properly consider her unsuccessful claims in its fee award: “reliance on such *factor* would *not be appropriate in WLAD cases.*” CP 1205 (emphasis added); CP 1628, Order ¶ 14 (“not appropriate”). Ms. Bright relies on various untenable arguments to preclude the proper segregation of her unsuccessful claims.

First, Ms. Bright asserts that as a statutory matter, courts lack discretion to segregate unsuccessful WLAD claims. Opp. 28-31. Ms. Bright, implicitly acknowledging no court has ever adopted this interpretation of WLAD, asks this Court to analogize to fee awards under a different statute, Washington’s Industrial Insurance Act. RCW 51.52.130 (Title 51). Opp. 28-31. Ms. Bright points to a decision issued by the Supreme Court in 1999, which held that for Industrial Insurance Act claims, the worker’s degree of overall recovery is “not a relevant factor in calculating the attorney fees award” because fee awards under the statute must issue “without regard to the worker’s degree of success.” *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 670-71, 989 P.2d 1111 (1999). However, the Supreme Court adopted this interpretation of the Industrial Insurance Act based on comparison to “other sections” of the same Act that “specifically limit attorney fee awards” and the fact the Act establishes a statutory compensation scheme that affords an “already limited recovery” in amounts less than the “worker’s actual losses.” Omitting to address these unique features of the Industrial Insurance Act, Ms. Bright suggests the same standard should now apply to WLAD claims. “And like ILA, nothing in [WLAD] suggests that the ‘Legislature intended to limit attorney fee[s] to those attributable to successful claims.’” Opp. 30; *see also* CP 1208.

However, in the sixteen years since the Supreme Court issued *Brand*, Washington courts have *not* extended the Supreme Court’s analysis of the Industrial Insurance Act to the WLAD. Indeed, to the contrary, a subsequent Supreme Court decision specifically addressing WLAD held that expended time “not sufficiently related to the successful claim” is among the “proper factors” for reducing fees in a WLAD claim. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 540, 151 P.3d 976 (2007). The interpretation of WLAD as precluding consideration of the plaintiff’s unsuccessful claims contradicts Washington law.

Second, Ms. Bright argues that Washington common law “[u]niformly” establishes that “WLAD cases involve a common core of facts and related legal theories.” Opp. 31. During oral argument, Ms. Bright similarly advanced the argument that “every single case” has held “as long as the claims are brought within the confines of the Washington law against discrimination,” they involve “a common core of facts.” RP (9/26/14) 6:17-21. Consistent with this mechanistic approach, the trial court’s Order duly references a “common core of facts and related legal theories,” but fails to identify any basis other than the fact “Plaintiff’s claims were all based on the Washington Law Against Discrimination.” CP 1628 ¶ 14. The lack of common fact and law with respect to Ms. Bright’s claims is further established by Ms. Bright’s extensive review of

the September 26, 2014 fee hearing, which similarly fails to identify or reference any actual overlap in fact or law in her claims. *See* Opp. 12-13. Any further doubt is erased by the next paragraph of the trial court’s Order, which all but acknowledges the unsuccessful claims were “unrelated.” CP 1628 ¶ 15. Ms. Bright’s opposition does not contest that her unsuccessful race-based claims were originally addressed separately in her lawsuit, each claim had different legal elements, and the special verdict form separately asked the jury to determine liability for these claims. Br. 16. Neither Ms. Bright, nor the trial court, identify any basis for a “common core” of claims other than the fact that Ms. Bright asserted “all” of her claims under WLAD. CP 1628 ¶ 14.

Instead, Ms. Bright’s discussion of Washington decisions—without any mention of the actual claims in her own case—advances a purely legal argument that courts should not segregate out unsuccessful WLAD claims. Opp. 31-32. Ms. Bright misplaces her reliance on these authorities.¹ In *Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 101-102, 231 P.3d 1211 (2010), although plaintiff’s claims were “based on a number of facts essential to the overall lawsuit,” the “trial court properly subtracted [counsel’s] time spent on unsuccessful claims.” Ms. Bright’s Opposition tries to argue that *Collins* somehow supports her

¹ *Cockle v. Caterpillar*, 93 Wn. App. 1081 (1999) is unpublished. *See* GR 14.1

interpretation of WLAD because on appeal Division II denied the defendant's request for a "further reduction" of plaintiff's fees. Opp. 31. In *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987), the Supreme Court upheld the trial court's determination that based on the record "a division based on successful and unsuccessful claims" would be "impossible without being arbitrary." *Id.* at 573; see also Opp. 31-32. But in addressing the particular claims at issue, the Supreme Court upheld the principle, relevant here, that if the "claims are unrelated, however, the court should award only the fees reasonably attributable to the recovery." *Blair*, 108 Wn.2d at 573. Finally, in *Steele v. Lundgren*, 96 Wn. App 773, 783, 982 P.2d 619 (1999), Division I similarly applied *Hensley*'s two-part framework to determine (i) whether claims are related to such a degree that fees can be apportioned, and (ii) in such cases where this is not practical, reduce the award to account for limited success. In the proper exercise of its discretion, the trial court would have based its "common core" evaluation on more than whether Ms. Bright's claims "were all based on Washington's Law Against Discrimination." CP 1628 ¶ 14.

Third, responding to Russell's second assignment of error, Ms. Bright argues this Court should uphold the trial court's alternative basis for awarding attorneys' fees for Ms. Bright's unsuccessful claims, Opp.

33-35, based on the novel theory that Russell's defense themes "paint" Ms. Bright in an "unfavorable light," which acted to "intertwine[]" Ms. Bright's otherwise separate race and accommodation claims. CP 1628 Order ¶ 15.

Ms. Bright asks this Court to uphold the trial court's ruling because it observed the trial first hand. Opp. 33. However, Ms. Bright's Opposition does not contest that the trial court's Order untenably redefines how trial courts should evaluate the segregation of successful and unsuccessful claims. Under the trial court's new legal standard, defense themes may "intertwine" otherwise "unrelated" claims and evidence. As redefined, anything from the statute of limitations to "painting the plaintiff in a bad light" could unify a plaintiff's otherwise unrelated claims. But the trial court's substitution of the correct legal standard, based on the plaintiff's claims, with a new test based on the defendant's trial themes, relies on a false equivalency. As the defendant, Russell already pays all of its own fees. The question before the trial court was which claims asserted by plaintiff were "successful" such that Russell should also pay the fees incurred on behalf of the plaintiff, Ms. Bright. The Opposition also offers no opposition to Russell's point that its "painting the picture" theme was not even a true affirmative defense because she successfully persuaded the trial court her accommodation claim was a "stand-alone claim" that was

“[d]istinct” from any liability arising from the faulty performance or poor character that led to her termination. CP 919.

C. The Trial Court Failed to Even Consider Ms. Bright’s Lack of Success as a Whole

Russell’s third assignment of error is that even if Ms. Bright’s claims could not be segregated, the trial court abused its discretion by its failure to then examine the degree of success as a whole. The “extent of the plaintiff’s success is a crucial factor in determining the proper amount of attorney fees.” *Blair*, 108 Wn.2d at 572; *see also Steele*, 96 Wn. App. at 783 (finally, the court should “award only that amount of fees that is reasonable in relation to the results obtained”); *Hotchkiss v. CSK Auto, Inc.*, 949 F. Supp. 2d 1040, 1049 (E.D. Wash. 2013) (abuse of discretion to award attorney’s fees without considering the relationship between the extent of success and the amount of the fee award).

Ms. Bright’s meritless race-based claims did not advance the purpose of the WLAD. Unfounded claims of race discrimination make it more difficult for legitimate victims to seek redress. Here, after massive discovery, Ms. Bright’s race discrimination claims were summarily dismissed because they did not set forth a *prima facie* case. Unwilling to acknowledge this basic defect, Ms. Bright’s counsel filed a motion for reconsideration and recast her race claim as a retaliation claim. The court

rejected the motion for reconsideration; the jury rejected the retaliation claim. Now, after the repeated failure of these claims to advance, Ms. Bright tries to rewrite the record by suggesting she somehow prevailed because the trial court reached a “novel conclusion” in dismissing her race-based claim and its dismissal with prejudice for failure to establish a *prima facie* case did not foreclose the possibility that race discrimination may exist at Russell. Opp. 8 n.4. Using this new method to define prevailing, Ms. Bright decides for herself whether her claims were successful, regardless of the court’s actual disposition of her claims.

Ms. Bright’s counsel similarly failed to exercise proper discretion in her role as a private attorney general in asserting claims individually against Russell’s general counsel, Mr. Golob. Mr. Golob’s motion for summary dismissal was based on Ms. Bright’s own testimony that he was not her supervisor, and controlling case law providing a party fails to state a claim when they assert personal liability against a non-supervisor. CP 157-58. Ms. Bright did not even oppose Mr. Golob’s motion. CP 546 n.1. Ms. Bright’s Opposition, without identifying a single document, claims that if Russell had produced unspecified discovery, she would have prevailed on this claim. Opp. 9 n.5. Like the failed race discrimination claim, Ms. Bright asks this Court to rewrite the record and make her the prevailing party on a claim in actual fact dismissed with prejudice.

Nor does Ms. Bright address that even her successful failure to accommodate claim conferred “only an incremental non-pecuniary benefit upon the public.” *Hotchkiss*, 949 F. Supp. 2d at 1051 (jury’s finding “merely another reminder that retaliating against an employee for complaining about harassment is illegal”).

Instead, like her discussion of segregating unsuccessful claims, Ms. Bright tries to suggest WLAD fee awards are all but immune from scrutiny. Ms. Bright sidesteps any discussion of the relative benefit associated with her various claims by proposing she be deemed wholly successful based on just the “salutary” benefit of bringing a claim to enforce WLAD. Opp. 36; *id.* 17-18. Under this circular logic, a WLAD claim never fails to succeed because the mere act of asserting the claim under WLAD, regardless of its actual merit, renders it wholly successful.

Ms. Bright adopts a similar approach to standard quantitative measures of success. She fails to acknowledge Russell’s discussion of these metrics and instead resorts to generalized statements that WLAD’s fee provision should be “construed liberally” to encourage enforcement, *id.* 19 n.13, and citation to state and federal authority which state “attorney’s fees are not to be limited by the amount of the jury verdict.” *Id.* 19-22. Ms. Bright does not address the actual qualitative results in this case. Nor does she contest that based on standard quantitative

benchmarks, she achieved between a 18% and 50% success. Or that this range of success accords with the trial court's findings when it exercised its discretion as to Ms. Bright's *post-trial* fees, and reduced them by 43%. CP 1629.

D. The Trial Court Awarded Excessive Billing Rates and Costs

1. Excessive Billing Rates

Ms. Bright's fee application purported to specify the hours and billing rate supporting the fee claim. The Opposition emphasizes that Russell elected not to submit its billing records in order to challenge the *hours* Ms. Bright's attorneys expended on this case. Opp. 11-12. However, the Opposition does not contest that her billing *rates* were significantly higher than defense counsel, CP 1627-28 (Order ¶¶ 10 & 11), or that in calculating fees based on a rate that exceeds \$500/hour, *id*, lead counsel is charging significantly more than the "rates that experienced employment counsel charge in this District." *Conti v. Corp. Servs. Grp., Inc.*, 30 F. Supp. 3d 1051, 1079-80 (W.D. Wash. 2014). Nor does counsel dispute that these inflated rates are based on an unscheduled notice in the fifth month of the year, which increased her time keeper fees by up to 43%. Br. 11. It is not standard practice to make massive, unscheduled rate increases during an engagement.

The change in rates was also not disclosed in the fee application, and in fact was obscured in the sworn declaration supporting the fee application. *Id.* 10-11. If nothing else, as a bright line, the trial court should not have award fees based on enhanced billing rates that were not disclosed in the application submitted to the trial court. Counsel’s assertion that the trial court’s tolerance of these billing practices and lack of full disclosure should be swept aside as a “reasonabl[e] exercise[] [of] discretion” is simply wrong. Opp. 24.

2. Unsegregated Costs

Like its failure to adjust Ms. Bright’s fees, the trial court abused its discretion by its failure to make any adjustments to Ms. Bright’s costs associated with her unsuccessful claims or to reflect her lack of success. The trial court further abused its discretion by its disregard of Russell’s objection to the lack of detail necessary to evaluate the eligibility of recovery of her costs.

III. CONCLUSION

Russell respectfully requests this Court reverse the Order awarding fees and costs and remand to the trial court with instructions to deny fees and costs for services on the unsuccessful claims, or reduce the fees and costs based on Ms. Bright’s lack of success.

RESPECTFULLY SUBMITTED this 26th day of May, 2015.

Davis Wright Tremaine LLP
Attorneys for Appellant Frank Russell
Investments, Inc.

By 

Thomas A. Lemly, WSBA #5433
Steven P. Caplow, WSBA #19843
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
Email: tomlemly@dwt.com
Email: stevenaplow@dwt.com

CERTIFICATE OF SERVICE

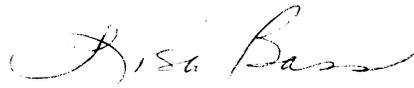
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On May 26, 2015, I caused a true and correct copy of the foregoing to be served upon the following individual in the manner indicated below.

Judith Lonnquist
Law Offices of Judith A. Lonnquist, P.S.
1218 Third Avenue, Ste. 1500
Seattle, WA 98101-3083
Email: lojal@aol.com

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