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NO. 72259-0-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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CINDI BRIGHT

Plaintiff-Appellee

v.

FRANK RUSSELL INVESTMENTS

Defendant-Appellant

*Respondent's Brief*

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BRIEF OF PLAINTIFF-APPELLEE CINDI BRIGHT

Appeal from the Superior Court for King County  
Honorable Ken Schubert

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## **I. INTRODUCTION**

After four weeks of trial, a King County jury found for Plaintiff Cindi Bright (hereinafter “Bright”), and awarded her \$475,000. The case had been extremely hard-fought, with many contested motions, lengthy depositions and discovery issues, a vigorous defense raised by Defendant accusing Bright of workplace misconduct that absolved it of the need to accommodate her and justified her discharge, and conflicting trial testimony and contentious evidentiary matters. After weighing all of these disputes, and considering the evidence in the jury trial over which he presided, King County Superior Court Judge Ken Schubert issued his decision awarding lodestar fees and costs to Plaintiff, but denying her request for a multiplier. Defendant Russell Investments (hereinafter “Russell”) paid Bright the \$475,000 awarded to her by the jury, but appealed the trial court’s award of fees and costs in the amount of \$1,021,025.23.

## **II. ASSIGNMENTS OF ERROR**

Russell sets forth three Assignments of Error: 1) the trial court erred in finding claims arising under WLAD cannot be segregated; 2) the trial court erred in finding that Russell’s litigation strategy of “painting the plaintiff in a bad light intertwined the claims in the case; and 3) the trial

court erred in failing to exercise its discretion to undertake any consideration of Bright's lack of success. (Br. p. 3).<sup>1</sup>

As to Assignment of Error #1, the trial court made no such finding. Notably, nothing in Russell's brief cites to any record reference for its unsubstantiated claim. As shown below, the trial court's findings that Russell's defense intertwined the WLAD claims litigated in the case were well within the trial court's discretion and should be affirmed. Finally, Russell disregards the trial court's conclusion, based on well-established WLAD precedent, that Bright was the prevailing party herein and is entitled to her lodestar fees and reasonable costs. Russell has not met and cannot meet its heavy burden of proof herein that the trial court manifestly abused its discretion. The decision of the trial court should be affirmed in its entirety.

### **III. STATEMENT OF THE CASE**

#### **A. Bright's Unlawful Discharge**

Cindi Bright was terminated from her employment at Russell Investments on December 13, 2012 – less than two months after she first requested disability accommodations and three weeks after filing the present lawsuit. (CP 115). Ms. Bright's December 13, 2012 termination letter,

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<sup>1</sup> The term "Br." with a number following refers to pages in Russell's opening brief. The term "RP" refers to the record of proceedings on attorney's fees and costs held on September 26, 2014. The term "Tr." refers to the transcript of the trial proceedings.

which arrived the same day as a separate letter rejecting Ms. Bright's accommodation requests, identified the basis for Ms. Bright's termination as "at-will" and also stated, in the alternative, that Ms. Bright had engaged in unspecified misconduct. (Tr. vol. 3, pp. 162-165). Her termination came months after the complaints and investigation at issue in this case, but only three weeks after her lawsuit was filed. (*Id.*).

#### **B. Russell's Unlawful Failure to Accommodate**

During the period leading up to and immediately following the filing of Ms. Bright's lawsuit, she had been conferring with Russell about possible accommodations to permit her to return to work after a medical leave of absence. Ms. Bright was suffering from disabling stress and anxiety and carried a diagnosis of Post-Traumatic Stress Disorder stemming from childhood abuse. (Tr. vol. 4, pp. 9-10). Although Ms. Bright is an experienced and confident employee in most situations, her condition made it difficult for her to adapt to unexpected stress and change. In Spring 2012, Russell had seen fit to promote Ms. Bright to become a member of Russell's Human Resources Executive Team. At this time, she also anticipated entering a part-time Executive MBA program with the support of her supervisor and the three business leaders for whom she provided Human Resources support. (Tr. vol. 3, pp. 162-165).

Then, within a five-month period, she was compelled to report an ethics issue regarding a coworker and friend, who then vowed to “take [her] down”; her supervisor was terminated and she was assigned to a new supervisor; she became a subject of an investigation that included inquiring into a past sexual relationship; and she was responsible for traveling to San Francisco and personally notifying more than forty individuals that they would be laid off. Ms. Bright’s health declined precipitously, and her doctors placed her on leave from work to try to get her stress and anxiety under control. (Tr. vol. 4, pp. 19-23).

In November and December 2012, Ms. Bright expressed her desire to return to work and proposed certain potential accommodations. Russell rejected each of Ms. Bright’s proposals without considering whether they would impose an undue hardship and without suggesting or attempting any accommodations. (Tr. vol. 3, pp. 162-165; Exs. 74, 75).

### **C. Russell’s Pretextual Treatment of Bright**

Throughout the period leading up to and during Ms. Bright’s leave, Russell never indicated that Ms. Bright was facing termination or that she did not qualify for an accommodation.(Tr. vol. 3, pp. 162-63). To the contrary, Russell asked about her return-to-work plans and initially conferred with her regarding accommodations. (Tr. vol. 3 pp. 136-53). However, in December 2012, a matter of days after Ms. Bright filed the present lawsuit,

Russell abruptly canceled a planned accommodation meeting, notified her that she would not be accommodated, and terminated her employment. (Tr. vol. 3, pp. 162-63).

When defending its outright refusal to accommodate and its decision to terminate Bright, at trial, Russell consistently relied on allegations of workplace misconduct committed by Bright and others. This behavior was known to Russell in or before July 2012, and the Company refrained from terminating or otherwise disciplining Bright. In fact, Russell executives denied, both in writing and in person, that they intended to terminate Ms. Bright as a result of a concluding investigation. (RP, p. 35).<sup>2</sup> That investigation revealed widespread problems with inappropriate electronic communications, drinking culture, pervasive gossip and lack of confidentiality at Russell, including conduct by every person investigated, by several additional individuals who were subject to a limited review, and by the individuals whose Spring 2012 complaints precipitated the relevant investigation. The complaints and investigation implicated several members of Russell's Executive Committee, its human resources department, and its executive assistants in violation of Russell's ethics rules and expectations. Despite the systemic scope of this issue, only one of those individuals – Ms. Bright – was terminated without a severance from Russell. The other

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<sup>2</sup> For the Court's convenience, the transcript of the oral argument on fees dated September 26, 2014, is included in the Appendix to this brief.

employees who engaged in the same or similar conduct were either retained and/or offered a severance valued at over \$200,000. (RP, pp. 33-34, 57-59). As noted by Judge Schubert, Ms. Bright did not receive the benefit of any monetary separation package at the end of her employment with Russell. (RP pp. 33-34)

Ms. Bright was the only individual in the group who was African-American, the only person who sought disability accommodations, and the only person who had filed a lawsuit against Russell.

#### **D. Bright Files Discrimination Litigation**

Ms. Bright had retained her attorney in August, 2012. (CP 1626). At that time, her case consisted only of claims that Russell was engaging in disparate treatment based on race and that its investigation of her was in retaliation for her outspoken advocacy regarding diversity. (CP 1626). The case became more complex after Ms. Bright's attorney wrote a demand letter to Russell, and Russell's subsequent refusal to accommodate her and decision to discharge her. (CP 1216).

The case was filed on November 22, 2012, alleging race discrimination and retaliation, and amended in February 2013, to add the failure to accommodate claim. (CP 1216, 1626). During the discovery period, Bright conducted seven depositions of potential witnesses, and a large number of informal witness interviews. Bright sought to depose one

potential witness who resided in New Jersey, but was unable to do so, in large part due to the opposition of defense counsel. (CP 1219).

Russell took five depositions, including two days of Bright's treating therapist, Dr. Coryell, and three days of Ms. Bright. (*Id.*). Although defense counsel flew to the out-of-state depositions, Bright's counsel opted to connect by videoconferencing, in order to reduce costs to Bright (and thereby, ultimately, as savings to Russell). Written discovery was extensive and time-consuming. (CP 1216-1219).

The documents produced were voluminous, and required close analysis. Because the case presented many issues of fact and law, Bright's lawyers had to do extensive research and spend many hours preparing for and presenting testimony at trial. The timing, organization, and quantity of documents produced in this case was exceptional and resulted in the correspondingly large number of hours expended on discovery. This was not a situation where broad discovery requests led to voluminous production, or where Plaintiff otherwise contributed to her own inundation in documents. Rather, the allegations attendant to Russell's defense that Bright was a miscreant deserving discharge, and unworthy of accommodation, cast a more broad net than was needed: Russell's production (which ultimately spanned more than 85,000 Bates-numbered pages) was compiled by Russell during the electronic searches that Russell

later used to attempt to justify their failure to accommodate and terminate Ms. Bright.<sup>3</sup>

Despite multiple detailed discovery letters and discovery conferences, Russell produced no supplemental written responses to its 2013 or 2014 discovery responses until after Bright filed a motion to compel in May 2014. More than 13,000 pages of documents and the privilege log requested in February 2013 also were produced only after the discovery cut-off and on the eve of trial. (CP 1216-18).

*Inter alia*, Russell filed a motion for summary judgment, seeking dismissal of the individual named defendant, Russell's General Counsel Brian Golob, and of Bright's race discrimination claim.<sup>4</sup> Given the discovery as of the date of summary judgment, Bright determined that there was insufficient evidence to retain her claims against Brian Golob and agreed to dismiss him. Significantly, documents withheld by Russell until

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<sup>3</sup> The documents compiled in connection with those searches were not produced in chronological order nor by subject matter. As a result, a string of text messages often was interspersed throughout the production, with a message appearing hundreds or thousands of pages away from a message that was sent moments later in response.

<sup>4</sup> The trial court based its dismissal on its novel conclusion, not raised or briefed by either party, that because Bright was on disability leave when she was terminated, she could not prove that she was qualified for her position *at that time*. Bright moved for reconsideration of that ruling, which specifically addressed why the ruling was unjustified, but reconsideration was refused. (CP 1115-17). At the fee hearing, the trial court discussed that ruling, saying: "that didn't mean that there hadn't been discrimination against her; that she hadn't been treated differently than other employees at Russell." (RP pp. 32-33).

eve of trial, if timely produced, would have established the claims against Mr. Golob. (CP 1219-20).<sup>5</sup>

In addition to cross-motions to compel, and for partial summary judgment, there were motions for letters rogatory, motions to change the trial date, a number of discovery motions, and motions *in limine*, one of which was raised, and re-raised throughout the trial, necessitating extensive briefing and related preparation. (CP 1220). Jury instructions and briefing on trial issues also required research and response. *Id.*

#### **E. Contentious Litigation Ensues**

After substantial discovery and a failed mediation, the case proceeded to a jury trial presided over by King County Superior Court Judge Ken Schubert. Trial consumed sixteen days. During the eight weeks prior to trial, including the week on stand-by waiting for assignment of a trial judge, Bright's legal team worked virtually full-time on the case, preventing work on any other matter. The issues presented for trial were complex, and required extensive legal research and analysis. (CP 1220).

*Voir dire* and arguments on motions *in limine* consumed two days of trial. During Plaintiff's case, defense counsel conducted extensive cross-

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<sup>5</sup> In its brief, Russell asserts that "with even a modicum of factual and legal research, Bright's claim against Golob would not have been brought." To the contrary, had Russell lived up to its obligation to produce requested discovery in a timely fashion, the claim against Golob could have gone to the jury with proof that Golob orchestrated the termination of Bright because she had filed suit naming Russell and him personally (CP 1619-20).

examination of Ms. Bright, consuming 8.4 hours over the course of three days, and of Bright's treating therapist, consuming 3.6 hours over the course of two days. (CP 1220). Although Plaintiff purposefully limited examination of adverse witness Golob to his role in the workplace investigation of Bright, over Plaintiff's objection, the court permitted the Russell to introduce Mr. Golob's direct testimony for Defendant's case in the guise of "cross-examination. (CP 1221). This ruling necessitated a trial memorandum on ER 611. (*Id.*)<sup>6</sup> This was not the only legal issue that arose during trial and necessarily increased the time expended by Bright's attorneys. (*Id.*).

Several legal issues were addressed at trial: failure to accommodate, retaliation, and Russell's contention in defense that Bright had committed dischargeable acts that justified denying her accommodation and terminating her. Russell's contention overarched and intertwined Plaintiff's two WLAD claims and consumed enormous discovery and trial time. (CP 1221).

#### **F. Bright is Victorious**

The trial lasted from July 7 through August 1, 2014. On August 1, 2014, the jury ruled in Plaintiff's favor on the failure to accommodate claim and awarded her backpay in the amount of \$375,000.00, and emotional

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<sup>6</sup> In the hearing on fees, the trial court appreciatively commented on the value of such memorandum: "I loved your pocket brief that you had when you showed me that I was wrong on [ER] 611 – or at least arguably wrong on 611. And you know, that was helpful." (RP p. 11).

distress damages in the amount of \$100,000, for a total verdict of \$475,000. (CP 1627).

**G. The Trial Court Exercises Its Discretion and Awards Fees and Costs**

Given the prior discovery disputes, Russell's resistance to disclosing facts that would prove its discriminatory behavior, and its strategy of attacking Bright's reputation and behavior as its defense to any recovery by Bright, on August 7, 2014, Bright served discovery on Russell seeking production of documents related to Russell's expenditures of attorney's fees and costs in this case. (CP 1644). When Russell refused to produce the requested information, on August 26, 2014, Bright filed a Motion to Compel Discovery Regarding Attorney's Fees, which trial court granted on September 11, 2014. (CP 1643-51).<sup>7</sup> *Inter alia*, the trial court's order stated:

Should defendant challenge plaintiff's fees petition on the grounds that plaintiff's time was unnecessary or excessive it will need to produce all of the defendant's counsel's own time records to plaintiff.... Should defendant fail to produce those records ... this Court will infer that defendant's counsel's time records would show a similar or greater amount of time or costs expended....

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<sup>7</sup> Defendant has not appealed that ruling.

(CP 1652-54). Defendant did make such a challenge, but produced no records. Accordingly, the trial court was free to draw the inference forecasted by its order.

Bright submitted lengthy declarations in support of her request for reasonable fees and necessary costs, including a 10-page declaration from counsel verifying computerized time records<sup>8</sup> and expenses, and declarations from two other experienced litigators attesting to the reasonableness of the hourly rates charged and the lodestar fees (CP 1214-1324).

On September 26, 2014, the trial court heard oral argument on fees and costs. As is evident from the 63-page transcript of the proceedings, Judge Schubert had read the written submissions and thoroughly interacted with the oral advocates. He considered all submissions and awarded Plaintiff her lodestar fee and all costs (CP 1625-26, 1629). The gravamen of the trial court's ruling is set forth in transcript:

I think that this is clearly from a common core of facts. I don't think these are discrete severable claims that were unrelated in that nature under the Hensley case. I think they are related legal theories.

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<sup>8</sup> In its brief at p. 9, Russell submits a purported allocation of Bright's attorney's time. It makes no explanation of how it reached such self-serving allocations – that 13 days of trial time addressed only Bright's race claim – and does not acknowledge that the trial court considered and rejected Russell's characterization of plaintiff's attorney's time. (CP 1628).

The evidence as to each of the theories was related to defense's were in large part, I think related – that part of the facts that were trying to paint the plaintiff in an unfavorable light related to whether or not there was truly a need to accommodate her or whether or not she actually had been fired or the decision to fire her had been made in August.

Well, because of that, that necessarily makes all the evidence regarding the decision to fire her relevant to the failure to accommodate. That makes this a common core of facts.

All those facts that we heard now relate to the decision to fire her, which in my view was Russell's only defense to a failure to accommodate; because Russell was otherwise admitting we did not accommodate.

And so that's what brings these facts together, as I see them. So because of that, I don't think there was an obligation to segregate the fees on some kind of claim-by-claim basis. And I don't view them as a series of discrete claims.

(RP pp. 56-58).

As noted by Judge Schubert, Russell's defenses were designed to paint a negative picture of Plaintiff, which necessitated to the introduction of intertwined evidence beyond that strictly related to Ms. Bright's claim for failure to accommodate. At trial, Russell argued allegations of Ms. Bright's workplace misconduct to support the contention that its termination decision alleviated any duty to accommodate. Defendant's counsel repeatedly referenced the following accusations about Ms. Bright: 1) She abused travel privileges and violated the copy travel

expense policy; 2) She consumed alcohol in excess during the workday or in association with workplace functions; 3) She violated expectations of confidentiality and engaged in unprofessional gossip; 4) She engaged in an unreported intimate office relationship; 5) She was unprofessional or was vulgar in her electronic communications; and 6) She undermined an executive to whom she reported. The truth of these assertions is immaterial on appeal, but the defense emphasized these allegations at trial because it was the only plausible excuse available when responding to the failure to accommodate. (RP 33-34).

Not only did Russell know about the salacious allegations concerning Ms. Bright many months before her termination, but it either excused the alleged conduct or dismissed any need for disciplinary action. More directly, Russell tolerated other personnel that engaged in similar or more outrageous alleged misconduct by keeping them employed or offering generous severance packages. As recognized by Judge Schubert, Russell's defensive posture rendered Mr. Bright's alleged misconduct, as well as the alleged misconduct of her peers, to become intermeshed in the trial proceedings. In this manner, regardless of the existence and relative success of Ms. Bright's claims, the trial court would have necessarily considered the evidence as a part of Russell's unsuccessful defense (RP 57-59). Thus the court below properly exercised

its discretion to find that Russell's defense bound all claims together and resulted in a common core of claims that needed no segregation. (*Id.*).

On October 8, 2014, the trial court entered judgment of \$1,021,025.23 in reasonable attorney's fees and costs. (CP 1631-33).<sup>9</sup> As a part of Judge Schubert's exercise of discretion, the trial court denied Bright's request for a multiplier (CP 1629).<sup>10</sup>

On November 7, 2014, Defendant filed its notice of appeal seeking review only of the trial court's October 8, 2014 Order regarding fees and costs. (CP 1634- 36). In its brief, filed April 9, 2015, Russell claims that the trial court was wrong in its findings and thereby abused its discretion. Its appeal is without merit and should be dismissed.

#### **IV. ARGUMENT**

##### **A. Russell's Brief Does Not Satisfy Its Burden of Proof**

###### **1. The Decision of the Trial Court is Legally Sound**

Although this Court no longer accepts motions on the merits, RAP 18.14(e) sets forth the issues presented in a case such as this:

whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion of the trial court or administrative agency.

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<sup>9</sup> For the Court's convenience, a copy of Judge Schubert's Order Regarding Plaintiff's Request for an Award of Attorney's Fees and Costs is included in the Appendix to this brief.

<sup>10</sup> No appeal from the trial court's denial of a multiplier was lodged with this Court.

It is clear from Russell's brief that it cannot meet, and has not met, the high burden of establishing that the trial court's order is contrary to established law, unsupported by facts or evidence, or constitutes an abuse of discretion. Abuse of discretion can be shown only where the challenger establishes that the court's order is a) manifestly unreasonable; or b) based on untenable grounds; or c) made for untenable reasons. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009); *Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971));<sup>11</sup> *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); see *Plum Creek Timber Co. v. FPAB*, 99 Wn. App. 579, 993 P.2d 287 (Div. I, 2000).

In order to reverse an attorney fee award, an appellate court must find the trial court **manifestly** abused its discretion. *Pham, supra*, at 538, citing *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). For Russell's appeal to have merit, it must show that the trial court exercised its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, Russell merely alleges that the trial court failed to give its arguments

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<sup>11</sup> The burden of justifying a deviation from the lodestar figure for an attorney fee award is on the party proposing the deviation. *Pham v. Seattle City Light*, 124 Wn. App. 716, 722, 103 P.3d 827 (2004).

against the fee award their proper weight. Such allegations do not rise to a showing of manifest abuse of discretion.

2. The Decision of the Trial Court is Entitled to Deference

The trial court's lodestar calculation is presumptively reasonable and here, Russell has not shown how Judge Schubert was unreasonable in the exercise of his discretion. As the *Pham* court noted: "it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation." *See: Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933 (1983), *Pham*, at 540. A reviewing court will defer to a trial court's determination of what hours reasonably should or should not be included in a lodestar attorney fee calculation when the fee calculation is justified with findings of fact. Russell's brief does not even address these prerequisites. Moreover, Judge Schubert meticulously entered 18 findings of fact, which Russell neither contests nor claims were an abuse of his discretion.

**B. The Trial Court's Order is Founded in Well Settled Law**

1. Bright Was Reasonably Found to be the Prevailing Party

Russell's assertion that Bright's claims did not advance WLAD's purpose is baldly unsubstantiated and wrong. The WLAD policy is not based on parsing out claims, but rather is based on the overall success of the case and the salutary policy of enforcing Washington's Law Against

Discrimination. The WLAD provides that if a plaintiff prevails, she may recover reasonable attorney's fees. *Blair v. WSU*, 108 Wn.2d 558, 571-72, 740 P.2d 1379 (1987). In *Blair*, the Court was faced with a case of first impression in which each party prevailed on discrete discrimination claims. The Court rejected the defense argument, such as posited by Russell here, that the policy considerations should be assessed on a claim-by-claim basis. Rather, the *Blair* Court held that "a party prevails when it succeeds on any significant issue which achieves some benefit the party sought in bringing suit," citing *Hensley*, 461 U.S. at 433; *Id. at 572*.

There can be no question that Bright was the prevailing party in this case. The jury ruled in her favor and awarded substantial damages. *See: Blair, supra*, citing *Anderson v. Gold Seal Vineyard, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1985); *accord: Hensley*. The trial court expressly noted that this case was a win for Bright. (RP p. 58), and held that she was the prevailing party.<sup>12</sup> Accordingly, Bright was entitled to a reasonable fee.

## 2. The Award of Lodestar Fees Is Based on Strong Policy Reasons

In determining what constitutes a reasonable fee award, this court should be mindful that RCW 49.60.030, the attorney's fees provision, is "to

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<sup>12</sup> The trial court said: "I see this trial, candidly, as a win for plaintiffs [sic]. I know that the defense sees this as a – kind of their - they've got a partial victory. But I guess I just don't see it that way when she's walking out of here with 475, which actually is more than the severance agreements that her colleagues were getting. She came out of this better than they did. And so I'm not going to reduce this based on any kind of lack of success quality.

be construed liberally in order to encourage enforcement of the Law Against Discrimination.” *Blair, supra* at 572. *See also*: RCW 49.60.020.<sup>13</sup> As the Washington Supreme Court noted, in bringing an employment discrimination action, a prevailing party acts as a “private attorney general: by enforcing a public policy of substantial importance.” *Allison v. Seattle Housing Authority*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991). The importance of a fully compensatory award of fees in a WLAD case was described in *Perry v. Costco*, 123 Wn. App. 783, 809, 98 P.3d 1264 (Div. I, 2004), where the Court stated that cases advancing civil rights have a public benefit far beyond “pecuniary considerations only.” *Accord: Hume v. American Disposal Co.*, 124 Wn.2d 656, 675, 880 P.2d 988 (1994) (the legislative goal in enacting the fee-shifting provisions of the WLAD was “to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations”).

### 3. The Trial Court’s Decision is Based on Settled Law

Washington Courts have consistently held that attorney’s fees are not to be limited by the amount of the jury verdict. *Steele v. Lundgren*, 96 Wn. App. 773, 784, 982 P.2d 619 (Div. I, 1999); *Martinez v. City of*

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<sup>13</sup> “The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof...”

*Tacoma*, 81 Wn. App. 228, 914 P.2d 86 (Div. II, 1996).<sup>14</sup> The same is true in the federal courts. Interpreting the federal attorney’s fee statute, 29 U.S.C. §1988, the U.S. Supreme Court rejected the argument that fees should be limited according to the extent the outcome of litigation was deemed successful. *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686 (1986). See also: *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9<sup>th</sup> Cir. 1983); *McCann v. Coughlin*, 698 F.2d 112 (2<sup>nd</sup> Cir. 1983).

And when interpreting fee provisions in statutes other than WLAD, such as the Consumer Protection Act, RCW 19.86, Washington courts unequivocally have held that an attorney’s fee award “is not unreasonable merely because it exceeds the damages awarded” in a particular case. *Keyes v. Ballinger*, 31 Wn. App. 286, 297, 640 P.2d 1077 (Div. I, 1982). See also: *St. Paul Ins. Co. v. Updegray*, 33 Wn. App. 653, 654, 656 P.2d 1130 (Div. III, 1983) (court vacated a treble damages award of \$1,000, but sustained the attorney’s fees award of \$5,000 holding “a showing of actual monetary damages [is not] a prerequisite to an award of attorney’s fees...”); *Tallmadge v. Aurora Chrysler Plymouth*,

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<sup>14</sup> In *Martinez*, the court quoted a statement from the United States Supreme Court’s decision in *City of Riverside v. Rivera*: “Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief.” *Martinez v. City of Tacoma*, 81 Wn. App. 228, 236, 914 P.2d 86 (1996).

25 Wn. App. 90, 655 P.2d 1275 (Div. I, 1979) (no damages; fees awarded).

Given the strong policies considerations inherent in WLAD, discrimination cases such as this are *a fortiori* to the foregoing cases. *See e.g.: Martinez, supra.* In *Martinez*, the trial court had rejected the plaintiff's request for \$80,737.00 in attorney's fees and awarded only \$4,000.00 based, *inter alia*, on the jury's limited verdict of \$8,000.00 when plaintiff had requested damages of \$4.3 million.<sup>15</sup> Division Two held that the trial court had committed reversible error:

[W]e must also consider the trial court's statement that he considered [plaintiff's] degree of success obtained as compared to the amount sought" in determining a reasonable fee. While the degree of success might arguably be an appropriate factor in some types of cases not involving the Law Against Discrimination, under the facts of this case the trial court's heavy reliance on this factor was an abuse of discretion.<sup>[16]</sup> First, discrimination is not just a private injury which may be compensated by money damages; the Legislature has declared that discrimination is a matter of state concern, that ... threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. Money damages are an inadequate yardstick for measuring the results of discrimination. *Id.* at 241 (*emphasis added*) (internal citations omitted).

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<sup>15</sup> Russell makes a similar, albeit it erroneous, argument herein. *See:* Br. p. 20.

<sup>13</sup> The term "degree of success" can apply with equal force to a case such as this in which Plaintiff prevails on one WLAD claim but not on another. *See: Hensley v. Eckerhart*, 461 U.S. 424, 434-35, 103 S. Ct. 1933 (1983); *see also: infra*, pp. 28-36.

By prevailing in her case, like Mr. Martinez, Ms. Bright acted as a private attorney general and advanced the policies of the WLAD. The trial court appropriately awarded her a fully compensable fee.<sup>17</sup>

4. Russell Makes No Showing that the Trial Court Deviated from Settled Law

Other than citing *Pham v. City of Seattle* for the proposition that “WLAD’s liberal construction is not without limitation,” Russell’s brief cites no case authority for the assertions made and certainly does not meet its burden of showing that the trial court’s decision deviated from settled law. (Br., pp. 13-15). Ironically, although Russell cites *Pham*, that case supports affirmance by this court of the decision below.

In *Pham*, the Supreme Court held that a reviewing court must defer to a trial court’s determination of what hours reasonably should or should not be included in a lodestar attorney fee calculation if the trial court has justified its fee calculation with findings of fact:

the law requires us to defer to the trial court’s judgment on these issues. The issue before us is not whether we would

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<sup>17</sup> The *Martinez* court cited *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S. Ct. 2686 (1986) for the proposition that “the prevailing party’s attorney should be paid on a basis equivalent to those attorneys being paid by fee paying clients, and this should include compensation for all time reasonably expended on a matter.” It should be noted that defendants in employment litigation are customarily represented by attorneys who present their hourly fee bills monthly and are paid each month “for all time reasonably expended,” while plaintiffs in employment law cases are customarily represented by small firm attorneys who wait years for any fee payments. The goal of a reasonable attorney’s fee award should be to make sure that the playing field is level, at least at the end of the game.

have awarded a different amount, but whether the trial court abused its discretion.

159 Wn.2d 527, 540, 151 P.3d 976 (2007). Here, since Judge Schubert took care to justify his fee award with findings of fact and conclusions of law that comport with his oral ruling on September 26, 2014, his decision is entitled to due deference.

5. The Trial Court's Finding that Rates Are Reasonable Should be Upheld

Russell's assault on the hourly rate of Bright's counsel is also without merit. (Br., p. 11).<sup>18</sup> It is well-settled in Washington law that in employment cases, the trial court is authorized to use the attorney's current rate rather than the historic rates. *Pham v. Seattle City Light*, 124 Wn. App. 716, 726-27, 103 P.3d 827 (Div. I, 2004), *aff'd in pertinent part*, 159 Wn.2d 527, 151 P.3d 979 (2007); *accord: Steele, Id.*

Disingenuously, Russell attacks the current rates, found by the trial court to be reasonable, by asserting that counsel's notification to all of her clients of a mid-year fee increase was "expedient." (Br. p. 11). That, of course, assumes prescience on Bright's attorney's part to know in May what a jury would do in August. Nothing in Russell's submissions refutes the statement in Ms. Lonnquist's supplemental declaration that the rate

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<sup>18</sup> Note that Russell's challenge to counsel's hourly rates here, as it did below, invokes the ruling by Judge Schubert that since Russell failed to produce its fees and time records, as ordered, a negative inference can be drawn.

increase had been prompted by declarations in a prior case from experienced attorneys attesting that her firm's rates were too low (CP 1599). The trial court expressly considered such evidence and approved the current hourly rates (RP, pp. 45-47). Russell's allegation about the fee increase is wholly unsubstantiated, which is why Judge Schubert reasonably exercised discretion and rejected Russell's contentions. The decision of the court below was based on well-settled law and well within its discretion.

**C. The Trial Court's Order is Factual and Supported by the Evidence**

Nowhere in its brief does Russell argue that the trial court's order was not based in fact and/or not supported by the evidence.<sup>19</sup> It is evident from the trial court's oral ruling and from its order awarding fees, the trial court carefully considered the facts and evidence in assessing the reasonableness of Bright's fees and costs. In its appellate brief, Russell makes no showing to the contrary. (Br., pp. 13-20).

**D. Russell Has Not Met Its Burden of Proving Abuse of Discretion**

1. The Order of the Trial Court is not Manifestly Unreasonable

a. Russell's citation to *Pham* is unavailing

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<sup>19</sup> It is Russell, not Bright, that asserts facts not substantiated by the record. *See e.g.* Russell's unsubstantiated and self-serving claim that "Bright's various race-based claims needlessly increased the cost of adjudicating this case by up to 80%" (Br. p. 14). Russell's mathematical manipulations were submitted to, and rejected by, the trial court (CP 1628 ¶¶ 12, 14-15).

Russell asserts that the trial court abused its discretion by failing to discount hours spent on unsuccessful claims, citing both the appellate and Supreme Court decisions in *Pham*. (Br. pp. 15-18). Neither decision is applicable. The trial court in *Pham* denied attorney's fees for work that was truly separate and distinct, described by the Court of Appeals as follows:

The specific tasks for which the court denied compensation were among numerous items criticized by City Light as unnecessary and unproductive. The deductions included 47 hours for preparing an unsuccessful cross motion for summary judgment in federal court; 5 hours for time spent on an amended complaint that was never filed; and 3.3 hours for preparing a motion on the merits in this court. The court reasoned that this time "was not reasonably related to, nor did it cumulatively result in plaintiffs' favorable resolution." The court also made various deductions for time expended postverdict that the court found was "not devoted to issues of relevance that were tried in this litigation." These deductions included 4.3 hours spent on settlement issues, 40 hours devoted to the unsuccessful request for injunctive relief, 15 hours for research related to tax consequences of the verdict, and 35 hours documenting the unsuccessful request for a lodestar multiplier.

124 Wn. App. at 725 (footnotes omitted).

Significantly, the trial court in *Pham* had made such exclusions and this Court held that it had not abused its discretion in doing so. Here, the trial court exercised its discretion and determined that there was no reason to discount the work that directly related to the claim on which Bright prevailed; this case did not involve any ancillary work in federal

court or injunctive relief, as in *Pham*. On review, the Supreme Court upheld the exercise of the trial court's discretion. 159 Wn.2d at 540.

Based on the record below, the trial court entered 18 Findings of Fact, weighed the evidence, and concluded that all of the attorney's work related to a common core of facts.<sup>20</sup> There has been no showing by Russell that the trial court abused its discretion by reaching such conclusion.

b. The Trial Court's Consideration of WLAD as a Unitary Statute Was Appropriate

Struggling to find some reason to overturn the decision, Russell asserts that the trial court's conclusion as to a common core arose from the fact that "successful and unsuccessful claims were both asserted under WLAD." (Br. p. 15). While Judge Schubert made additional findings justifying his conclusion about a common core, consideration of common facts and law is certainly a permissible consideration under *Hensley*.

In *Hensley*, discussing successful and unsuccessful claims, the Supreme Court held that in order to reduce fees based on "unsuccessful claims," the claims must be "distinctly different claims for relief that are

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<sup>20</sup> When exercising his discretion, Judge Schubert wisely recognized that Ms. Bright's disability and failure to accommodate claims were inextricably linked. (RP p. 28: "the failure to accommodate requires that there be a disability"). One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability. Although the legal elements for the claims are not identical, the burden always remained with Plaintiff to prove that she is a person with a disability, her employer knew of her disability and that Russell took action or inaction contrary to its disabled employee.

based on different facts and legal theories.” *Id.* at 435. In that case, plaintiffs had brought a three-count complaint alleging 1) unconstitutional treatment of maximum security patients in violation of the Eighth Amendment, 2) placement of patients without procedural due process in violation of the Fifth Amendment, and 3) failure to compensate patients for their in-patient labor in violation of the Fair Labor Standards Act. Count II was resolved by a consent decree; Count III was mooted when the defendant began paying for the patients’ labors. Thereafter, the plaintiff filed a new complaint with only two counts: Count I from the previous lawsuit and Count II claiming a violation of the 13<sup>th</sup> Amendment. See: *Id.* at 426-27; *Eckerhart v. Hensley*, 475 F.Supp. 908 (D.C. Mo. 1979). These are the types of claims that the Supreme Court was describing as “distinctly different claims for relief that are based on different facts and legal theories.” *Hensley*, 461 U.S. at 435.

The *Bright* case clearly does not involve “distinctly different claims.” It would be inconceivable that Bright’s claims could properly be brought in separate lawsuits – the hallmark of “distinctly different claims.” Her claims were based not on three different statutes or constitutional provisions, as was the case in *Hensley*. Rather they were based on the same provision (RCW 49.60.180) in the same statute (WLAD) subjected to common interpretation and case authority and seeking the same relief

for the same policy reasons (RCW 49.60.010, 030).<sup>21</sup> The Washington Law Against Discrimination, like Title 51, is a unitary statute, seeking a common purpose – the elimination of any and all forms of discrimination. *See: Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999). Claims brought under WLAD are not “distinctly different claims for relief that are based on different facts and legal theories.”

c. The Supreme Court Has Approved Awards of Fees in Similar Unitary Statutes

The decision of the Washington Supreme Court in *Brand*, although not a WLAD case, is particularly instructive on this issue. In the trial court, the *Brand* plaintiff claimed that she was totally disabled in accordance with the Industrial Insurance Act, RCW Title 51. Alternatively, she claimed that injuries to her knee and back were more severe than the Department of Labor & Industries and the Board of Industrial Insurance had found. The jury rejected all but one of her claims and increased the percentage of her injury from category one to category two, resulting in a one-time benefit of \$3,120. Success on her primary claim of total disability would have resulted

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<sup>21</sup> RCW 49.60.010 declares that all types of discrimination “threaten not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.030 declares that the right to be free from discrimination based on a litany of reasons including race and disability “is recognized as and declared to be a civil right.” Note that the language uses the singular “right” – an indivisible concept.

in an award of \$113,583 and additional time loss compensation. Notwithstanding her limited success, the trial court awarded attorney's fees for legal services performed on all the issues before the court. When the Court of Appeals reversed the attorney fee award,<sup>22</sup> plaintiff successfully petitioned the Washington Supreme Court.

In an *en banc* opinion, the Supreme Court held that "Central to the calculation of an attorney fee award ... is the underlying purpose of the statute authorizing the attorney fees. ... Given that attorney fees statutes may serve different purposes, it is important to evaluate the purpose of the specific attorney fees provision and to apply the statute in accordance with that purpose." 139 Wn.2d at 667. The *Brand* Court then identified the purpose of the fee provision as being "to ensure adequate representation for injured workers." *Id.* It continued:

Consistent with the legislative intent ... the [Act] should be given a liberal interpretation. The act is remedial in nature and is to be liberally applied to achieve its purpose....

\* \* \*

Nothing in the language of RCW 51.52.130 suggests that the award of attorney fees is dependent upon a worker's overall success.... Nor is there any evidence that the Legislature intended to limit attorney fees to those attributable to successful claims, or to reduce the award when the worker receives little overall financial relief.

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<sup>22</sup> 91 Wn. App. 280, 959 P.2d 133 (1998).

Like the Industrial Insurance Act (“IIA”), WLAD’s provision authorizing recovery of attorney fees has a broad remedial purpose of enabling injured workers to secure adequate legal representation. Like the IIA, WLAD is “remedial in nature” and must be given a liberal interpretation. Indeed, since the liberal interpretation is expressly written into WLAD rather than relying on judicial interpretation like the IIA, WLAD is *a fortiori* to IIA. And like IIA, nothing in RCW 49.60.030 suggests that the “Legislature intended to limit attorney fee to those attributable to successful claims.”

The *Brand* Court then discussed *Hensley*, noting that the U.S. Supreme Court had contrasted cases in which the plaintiffs bring different claims based on different facts and legal theories with those cases in which the plaintiffs’ claims are related to the extent that counsel’s work on the unsuccessful claims can be deemed to have been “expended in pursuit of the ultimate result achieved.” The *Brand* Court expressly rejected the contention that an award of attorney fees should be limited to Brand’s successful claims, holding that “[a]lternative theories regarding the nature and extent of the worker’s injury cannot be said to be unrelated, inseparable claims. *Id* at 671-73. The same conclusion is warranted here under WLAD. Although the worker’s “injuries” described in *Brand* are physical and economic, rather than emotional and economic, they are all injuries to workers protected by

strong statutory policy. The attorney fee provisions of both IIA and WLAD have the same remedial basis: to ensure adequate representation to eliminate the injury inflicted upon workers by their employers. Consequently, the trial court's decision is well grounded in settled law, and well within its discretion.

d. Reviewing Courts Uniformly Have Upheld Findings of “Common Core”

Washington courts addressing attorney fee awards pursuant to RCW 49.60.030 have held that WLAD cases involve a common core of facts and related legal theories, justifying an award of the lodestar amount without reduction. *See: Blair*, 108 Wn.2d at 572; *Steele*, 96 Wn. App. at 783; and *Cockle v. Caterpillar*, 93 Wn. App. 1081, 978 P.2d 1098 (Div. III, 1999); see also: *Collins v. Clark County*, 155 Wn. App. 48, 45, 80, 231 P.3<sup>rd</sup> 1211 (Div. II, 2010). In *Collins*, although the court allowed an unsuccessful claim reduction for time spent attempting to link the County and the City as employers as a separate and distinct claim against a different defendant, it denied the Defendants request for further reduction for “Plaintiffs’ [unsuccessful] claims of outrage, negligence, constructive discharge, and retaliation.” *Id.* at 82.

In *Blair*, the Defendant “prevailed on a number of issues” (unspecified in the decision), and the court found that “the issues and

evidence [were] so interrelated as to make a division based on successful and unsuccessful claims impossible without being arbitrary.” *Id.* at 571. In *Steele*, the plaintiff brought claims of retaliation, sex discrimination, *quid pro quo* sexual harassment and hostile work environment sexual harassment. The trial court granted the defendant’s motion for summary judgment dismissing all but the hostile work environment claim. The case proceeded to trial on the one remaining claim and resulted in a judgment for plaintiff of \$43,500. The court then awarded lodestar fees (\$257,751) without reduction despite the elimination of some of the claims on summary judgment, because the “verdict for Steele constituted a sufficient degree of success to justify a full award of fees.” *Id.* at 785. In *Cockle*, the plaintiff alleged claims of intentional or reckless infliction of severe emotional distress, negligent infliction of emotional distress, sexual harassment and retaliation. Only the latter two went to trial and the jury found for plaintiff only on retaliation, awarding her \$18,000. She then requested attorney’s fees for the entire action. The court held that her successful retaliation claim and the claims on which she was not successful “were not separable and were so related that no reasonable segregation of time and effort could be made between the claims.”

e. The Trial Court's Order Was Based on Other Considerations as Well

The fact that all of Bright's claims arose under WLAD was not the only reason for the trial court's decision. As expressly stated in the September 26 hearing (see *supra*, p. 5) and in Finding of Fact No. 15, the trial court determined that it was Russell's defense that created a common core of facts:

Much of the evidence and witnesses at trial, even if unrelated to the actual failure to accommodate, related to Defendant's attempt to paint Plaintiff in an unfavorable light. Defendant's sole defense to its failure to accommodate a disabled employee was that Plaintiff's faulty performance and poor character were sufficient reasons for its decision to terminate Plaintiff, and arguably relieved the employer from first offering her a reasonable accommodation.<sup>[23]</sup> This defense intertwined ... the claims.

Russell has not shown, and cannot show, that Judge Schubert's decision is "manifestly unreasonable."

The Supreme Court in *Pham* described why the decision of a trial judge is presumptively reasonable. It said:

it is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation. See *Hensley*, 461 U.S. at 437. That is why the law requires us to defer to the trial court's judgment on these issues. The issue before us is not whether we would have awarded a different amount, but whether the trial court abused its discretion.

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<sup>23</sup> The trial court described Russell's failure to accommodate as: "Go jump. We're not going to do a darn thing for you. In fact, not only are we not going to do anything for you, we're going to fire you." (RP, pp. 38-39).

Here, Judge Schubert's conclusion that Russell's defense of trying to prove that Bright was so poorly behaved, such a workplace miscreant, that it could deny her accommodation and fire her without repercussions, was clearly well grounded in fact. From the outset of this case, Defendant contended that its treatment of Ms. Bright was a lawful exercise of its business judgment to investigate and ultimately to terminate her. *See, e.g.*: Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment, (CP 274):

Given the undisputed facts of Ms. Bright's misconduct, which bear no relation to Ms. Bright's alleged disability, and which proves that Ms. Bright was unfit to work as a HR Director, ... [t]he jury should be allowed to decide whether Ms. Bright was qualified to perform (with or without accommodations) the essential functions of her job.

Thus, Plaintiff had the burden of proving that Ms. Bright's conduct did not justify the way in which Russell treated her from May through December 2013 and intertwined her failure to accommodate and retaliation claims (if she was unfit to work as a HR Director, then her termination could not constitute retaliation and Russell's denial of accommodation would be lawful). Such evidence related to both claims. *See*: Russell's Trial Brief, (CP 1055):

The evidence at trial will show that neither Ms. Bright's alleged disability nor the decision to file a discrimination complaint against Russell in November 2012 were

substantial factors in the decision to terminate her. Ms. Orr made the decision ... based on Ms. Bright's serious workplace misconduct revealed during Russell's spring 2012 investigation.

The bulk of Plaintiff's counsel's work in this case involved disproving or minimizing plaintiff's alleged misconduct – work that directly affected both the failure to accommodate and the retaliation claims, interchangeably. Both claims involved the same relatively short time period, the same major decision makers, the same allegations by defendant regarding job performance, the same comparators (because plaintiff needed to establish that she was qualified for her job, which required showing that other people who engaged in similar actions were still qualified for theirs), the same principal negative employment action, and overlapping damages.

Work on discovering and proving such evidence could not reasonably be segregated. As the court below noted: “All these facts that we heard now relate to the decision to fire her, which in my view was Russell's only defense to a failure to accommodate; because Russell was otherwise admitting ‘we did not accommodate.’ And so that's what brings these facts together. So because of that, I don't think there was an obligation to segregate the fees....” (RP 57-58; CP 1628). The decision of the court below should be affirmed.

2. The Order of the Trial Court is not Based on Untenable Grounds

Russell next argues that the trial court abused its discretion by failing to analyze Bright's success as a whole. A review of the transcript of the hearing and the court's order belies that assertion. *See e.g.* RP p. 58 and Finding of Fact #6. Nonetheless, Russell incorrectly asserts that the trial court did not "evaluate the non-monetary benefit [Bright's] award conferred to the public." (Br. p. 20). The "salutary private attorney general effect" was expressly argued to the trial court during the hearing on fees. (RP p. 51). The court agreed, concluding that "Plaintiff's verdict constitutes significant success in which Plaintiff has served as a private attorney general and has enforced a public policy of substantial importance." (CP 1627, ¶ 6).

3. The Order of the Trial Court was not Made for Untenable Reasons.

As set forth herein, the order of the court below was well-founded on sound and substantiated reasons. It should be affirmed.

**E. Russell Has Shown No Basis to Invalidate the Trial Court's Award of Costs**

Russell's argument against the cost award is premised on its flawed arguments attacking the fee award. Russell fails to substantiate the existence of any manifest abuse of discretion related to the trial court's

award of costs. The costs herein were well documented and properly awarded. *See e.g.* CP 1222, 1313-1319. The trial court properly awarded them. *See*: CP 1629 ¶16.

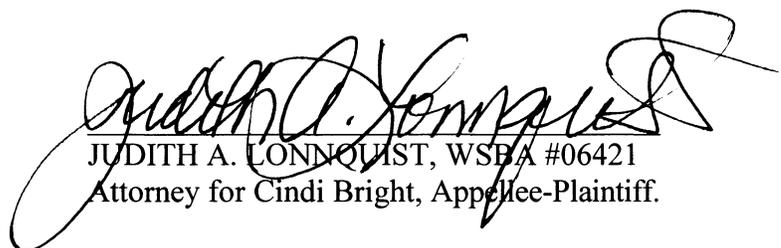
**F. Bright is Entitled to Her Fees on Appeal.**

Pursuant to RAP 18.1(a), Bright requests an award of her fees and costs incurred before this Court. *See: Wheeler v. Cath. Archdiocese of Seattle*, 124 Wn.2d 634, 643, 880 P.2d 29 (1994); *Perry v. Costco*, 123 Wn. App. 783, 809, 98 P.3d 1264 (2004).

**CONCLUSION**

For all of the foregoing reasons, Bright requests that this Court dismiss Russell's appeal, affirm the decision below, and order Russell to pay Bright's fees and costs on appeal.

Respectfully submitted this 23<sup>rd</sup> day of April, 2015.

  
JUDITH A. LONNQUIST, WSPA #06421  
Attorney for Cindi Bright, Appellee-Plaintiff.

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

CINDI BRIGHT

Appellee,

v.

FRANK RUSSELL  
INVESTMENTS,

Appellant

No. 72663-3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24<sup>th</sup> day of April, 2015, I caused to be delivered a true and correct copy of the Brief of Plaintiff-Appellee Cindi Bright and this document by method indicated below and addressed to the following:

Tom A. Lemly  
Steven P. Caplow  
Jennifer C. Berry  
Davis Wright Tremaine  
1201 Third Ave.,  
Suite 2200  
Seattle WA 98101-3045

- VIA REGULAR MAIL  
 VIA CERTIFIED MAIL  
 VIA LEGAL MESSENGER  
 VIA FAX  
 VIA HAND DELIVERY  
 VIA ELECTRONIC MAIL

DATED this 24<sup>th</sup> of April, 2015

  
Ann Holiday

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 APR 24 AM 9:15

# Appendix

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THE HONORABLE KEN SCHUBERT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

CINDI BRIGHT,

Plaintiffs,

v.

FRANK RUSSELL INVESTMENTS and  
BRIAN GOLUB, individually and as its  
agent,

Defendants.

NO. 12-2-37570-4 SEA

ORDER REGARDING PLAINTIFF'S  
REQUEST FOR AN AWARD OF  
ATTORNEY'S FEES AND COSTS

THIS Motion came before the Court upon the Plaintiff's Motion to for an Award of Attorneys' Fees and Costs, and the Court having reviewed the pleadings and files herein, having presided over the trial herein, being otherwise fully advised in the premises, and having considered the following documents:

- 1. Plaintiff's Motion for an Award of Attorney's Fees and Costs;

- 1           2. Declaration of Judith A. Lonnquist in Support of Plaintiff's Motion for an Award of
- 2           Attorney's Fees and Costs, and Exhibits A-I thereto;
- 3           3. Declaration of Jon Howard Rosen in Support of Plaintiff's Application;
- 4           4. Declaration of Scott C. G. Blankenship in Support of Plaintiff's Motion for
- 5           Attorney's Fees and Costs;
- 6           5. Russell's Objection to Plaintiff's Motion for Recover of Attorneys' Fees;
- 7           6. Declaration of Thomas A. Lemly in Support of Russell's Objection to Plaintiff's
- 8           Motion for an Award of Attorneys' Fees and Costs, and Exhibits A-I thereto;
- 9           7. Plaintiff's Reply to Defendant's Objection to Plaintiff's Motion for an Award of
- 10          Attorney's Fees and Costs;
- 11          8. Supplemental Declaration of Judith A. Lonnquist in Support of Plaintiff's Motion for
- 12          an Award of Attorneys' Fees and Costs, and Exhibits J – L thereto.

13           IT IS HEREBY ORDERED that Plaintiff's Motion for an Award of Attorneys' Fees and  
14 Costs is GRANTED as to the lodestar amount and costs, denied as to a multiplier, and partially  
15 granted as to post-trial fees.

16           THE COURT FINDS and CONCLUDES as follows:

- 17          1. Ms. Bright retained her attorneys in August, 2012. At that time, her case consisted only
- 18          of claims that Russell was engaging in disparate treatment based on race and that its
- 19          investigation of her was in retaliation for her outspoken advocacy regarding diversity.
- 20          2. This case was filed on November 22, 2012, alleging race discrimination and retaliation,
- 21          and amended in February 2013, to add the failure to accommodate/disability
- 22          discrimination claim. Failure to accommodate is one form of unlawful disability
- 23          discrimination.

- 1 3. Trial began on July 7, 2014. Several legal issues were addressed at trial: failure to  
2 accommodate, retaliation, and Defendant's contention in defense that Plaintiff had  
3 committed dischargeable acts that justified denying her accommodation and terminating  
4 her.
- 5 4. Two claims were submitted to the jury: failure to accommodate and retaliation.
- 6 5. On August 1, 2014, the jury ruled in Plaintiff's favor on her failure to accommodate  
7 claim and awarded her back-pay in the amount of \$375,000.00, and emotional distress  
8 damages in the amount of \$100,000, for a total verdict of \$475,000.
- 9 6. Plaintiff's verdict constitutes significant success in which Plaintiff has served as a  
10 private attorney general and has enforced a public policy of substantial importance.
- 11 7. The Court rejects Defendant's claim that the verdict constitutes a partial victory for  
12 Defendant.
- 13 8. Plaintiff is the prevailing party in this matter.
- 14 9. The representation of Plaintiff by her counsel was of high quality.
- 15 10. The current hourly rates for Plaintiff's attorneys are Judith Lonnquist (\$550), Wendy  
16 Lilliedoll (\$400), Brian Dolman (\$350), and Katherine Cameron (\$250). Defendant's  
17 counsel's current hourly rates for this matter are Thomas Lemley (\$435), Jennifer  
18 Berry (\$235), John Hodges Howell (\$235). Defendant's attorneys and Plaintiff's  
19 attorneys have comparable skill, experience, and quality of work product. Although  
20 Plaintiff's counsel's hourly rates are significantly higher than Defendant's counsel's  
21 hourly rates, this Court finds that Plaintiff's counsel's hourly rates are reasonable  
22 taking into account the potential risk inherent in this case and the quality of counsel's  
23 representation.

1 11. The hourly rate charged by Plaintiff's law firm for its paralegal, Philip Ammons  
2 (\$150), although higher than the hourly rate charged by Defendant's counsel's  
3 paralegal (\$120), is reasonable.

4 12. The hours expended on this case by Plaintiff's attorneys and their paralegal through  
5 trial are appropriate and reasonable.

6 13. The lodestar figure through trial is \$967,417. From that amount, Plaintiff's counsel  
7 reasonably deducted \$27,812.50 for non-billable, duplicative billings or unproductive  
8 work, for a requested lodestar of \$939,604.50.

9 14. Defendant's argument for a reduction based on Plaintiff's alleged lack of success on  
10 one or more claims is not appropriate under the circumstances of this case. Plaintiff's  
11 claims were all based on the Washington Law Against Discrimination with a common  
12 core of facts and related legal theories; Plaintiff's case did not involve discrete and  
13 severable claims from which the Court could or should segregate and reduce the fees.

14 15. Much of the evidence and witnesses at trial, even if unrelated to the actual failure to  
15 accommodate, related to Defendant's attempt to paint Plaintiff in an unfavorable  
16 light. Defendant's sole defense to its failure to accommodate a disabled employee  
17 was that Plaintiff's alleged faulty performance and poor character were sufficient  
18 reasons for its decision to terminate Plaintiff, and which arguably relieved the  
19 employer from first offering her a reasonable accommodation. This defense  
20 intertwined Plaintiff's failure to accommodate and retaliation claims. Because these  
21 two claims are not separate and distinct, Plaintiff's attorneys had no obligation to  
22 segregate their time. These circumstances do not warrant a further reduction of the  
23 lodestar fees.

1 16. Plaintiff's costs of \$51,420.73 are reasonable, appropriate, and do not warrant a  
2 reduction.

3 17. Because plaintiff's counsel's current rates incorporate the potential risk inherent in  
4 this case and the quality of counsel's representation, this Court denies Plaintiff's  
5 request for a multiplier.

6 18. Having reviewed Plaintiff's fee declaration and taking into account the  
7 straightforward issues presented by Plaintiff's motion for an award of fees, this Court  
8 finds that Plaintiff's request for post-trial fees of \$52,935 is not reasonable. This  
9 Court finds that \$30,000 for post-trial fees is reasonable.

10 NOW THEREFORE, the Court makes the following AWARD to Plaintiff:

- 11 1. For attorneys' fees incurred through trial: **\$939,604.50.**  
12 2. For costs and expenses incurred: **\$ 51,420.73**  
13 3. For fees incurred post-trial through 9/26/14: **\$ 30,000.00**

14 Defendant is HEREBY ORDERED to pay Plaintiff a total award of fees and costs in the amount  
15 of **\$1,021,025.23**, plus interest at the statutory rate until paid.

16 Dated this 30th day of September, 2014.

17 [E-signature on following page]

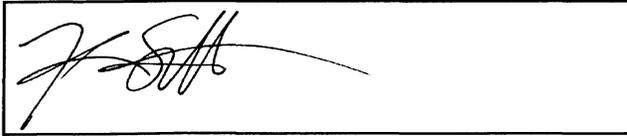
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HONORABLE KEN SCHUBERT  
KING COUNTY SUPERIOR COURT JUDGE

King County Superior Court  
Judicial Electronic Signature Page

Case Number: 12-2-37570-4  
Case Title: BRIGHT VS FRANK RUSSEL CO ET ANO  
Document Title: ORDER RE PLAINTIFF'S FEES AND COSTS  
Signed by: Ken Schubert  
Date: 10/8/2014 2:20:36 PM

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to be 'K Schubert'.

Judge/Commissioner: Ken Schubert

This document is signed in accordance with the provisions in GR 30.  
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Certificate effective date: 7/29/2013 12:37:57 PM  
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O=KCDJA, CN="Ken  
Schubert:rumaiXr44hGoUkM4YYhwmw=="

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----  
4 CINDI BRIGHT, ) No. 12-2-37570-4 SEA

5 Plaintiff, ) (COA No. 72663-3)

6 vs. ) -----

7 FRANK RUSSELL INVESTMENTS and ) MOTION ON ATTORNEY'S

8 BRIAN GOLOB, individually and as ) FEES

9 its agent, )

10 Defendants. )

11 )

12 -----  
13 Transcript of Recorded Proceedings  
14 Before the Honorable Ken Schubert  
September 26, 2014  
-----

15 APPEARANCES:

16 For the Plaintiff:

For the Defendants:

17 Judith A. Lonquist  
18 Brian L. Dolman  
19 Law Offices of Judith Lonquist  
1218 Third Avenue  
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Seattle, WA 98101  
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Thomas A. Lemly  
Jennifer Berry  
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25 TRANSCRIBED BY: Christina Atencio, CCR #2749

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Friday, September 26, 2014

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(Begin recording at 1:38 p.m.)

THE COURT: So let me tell you folks what I've reviewed in anticipation of today's hearing.

I've got plaintiff's motion for fees; declaration of Ms. Lonquist with exhibits attached thereto; and there was some expert declaration I saw; and declaration of Scott Blankenship in support; and the declaration of Mr. Rosen as well, and -- I think that's all you had attached to that one, right?

MS. LONNQUIST: Right.

THE COURT: And then we have defendant's opposition to plaintiff's motion; declaration of Mr. Lemly and a whole bunch of exhibits attached thereto. I think -- let me see -- yeah, that was your only declaration, right?

MR. LEMLY: Yes.

THE COURT: Okay. And then we had the overlength that I believe I granted permission for the overlength, did I not? I believe so.

MS. LONNQUIST: I don't know that you did for the reply brief. But if you didn't, I would so move.

THE COURT: I thought that you asked for it, and I thought that I granted it. But maybe that was just my imagination of what I told --

1 MR. LEMLY: Actually, I remember one request for  
2 overlength on the original brief. I don't remember seeing  
3 anything.

4 THE COURT: For the reply?

5 MR. LEMLY: We don't have any (Inaudible).

6 THE COURT: Well, if not, then I will point my  
7 finger at Ms. Lonquist and say, keep your replies to five  
8 pages unless otherwise permitted. But, yeah, I did  
9 something about an overlength brief, but maybe that was just  
10 from --

11 MS. LONNQUIST: That was the original brief.

12 MR. LEMLY: I think it was the original.

13 THE COURT: The original, okay. So am I missing  
14 anything in all that, folks?

15 MR. LEMLY: I think you have it.

16 THE COURT: I think there's also a declaration that  
17 was --

18 MS. LONNQUIST: I had a supplemental declaration.

19 THE COURT: Yeah, supplemental. Because Lord knows  
20 I need more to review as well. All right.

21 So I've got everything and it's nice to see Ms.  
22 Berry and Mr. Dolman here as well. So your motion, Ms.  
23 Lonquist, if you want to start us off.

24 MS. LONNQUIST: Well, I'm not going to spend a lot  
25 of time, Your Honor, because I think that I've said

1 everything in --

2 THE COURT: I hope so.

3 MS. LONNQUIST: -- the briefings.

4 THE COURT: Yeah.

5 MS. LONNQUIST: But I did want to address something  
6 I didn't have a chance to address, and that is the post  
7 trial work. Russell is opposing the fees I've incurred  
8 saying that all I did was cut and paste things.

9 THE COURT: Well, they didn't say all you did --

10 MS. LONNQUIST: Well --

11 THE COURT: -- but they said that --

12 MS. LONNQUIST: Attorney's fees was cut and paste  
13 from another recently filed brief in a similar case -- which  
14 is simply not true. If you compare the Tupas brief to the  
15 Bright brief, I spent a great deal more time on both  
16 briefings. And, you know, much as they seemed to have  
17 forgotten the defense that they put on in this case, they  
18 seem to forget the motion to compel that occurred in this  
19 case and there was certainly -- was certainly sufficiently  
20 well founded that the Court came up with a very clever  
21 approach, in essence, granting the --

22 THE COURT: Kind of.

23 MS. LONNQUIST: Kind of. But certainly it was -- it  
24 was not frivolous, and it certainly wasn't unwarranted work  
25 for which I believe that we're entitled to recover as well.

1           THE COURT: But this is an area that I would expect  
2 you to be able to brief in your sleep practically. I mean  
3 this is -- you've won certainly many times before, and you  
4 know what the attorney fee standards are; you know  
5 lodestar -- I mean a lot of this is an area that is not new  
6 to you, I would think.

7           MS. LONNQUIST: Well, it's not new. But it requires  
8 each time a petition gets filed, the opposing counsel come  
9 up with some interesting, you know, opposition. And you  
10 can't just cut and paste. The in-depth analysis of Hensley  
11 that we did for Your Honor in this case to really parse out  
12 -- and that's what I'm about to approach.

13           THE COURT: Yeah.

14           MS. LONNQUIST: These are issues that are unique to  
15 each case in some respects. In some respects they're not.

16           In -- the early days of filing fee petitions, I  
17 didn't get the kind of vigorous opposition that has been  
18 evident more recently. I think defense counsel are waking  
19 up to what I think to be an unfortunate circumstance in some  
20 courts of just, you know, cutting to ribbons or cutting  
21 substantial percentages off the fees is -- has become sort  
22 of a short-cut to really doing the kind of analysis of why  
23 plaintiff's attorneys, when they prevail, are entitled to a  
24 fully compensatory fee.

25           And so on this case, unlike the other cases, I spent

1 a lot more care and a lot more research and a lot more  
2 analysis to present what I think is a compelling case for a  
3 fully compensatory fee. And it begins with Hensley because  
4 our statute says, you know, you're entitled to whatever  
5 relief is available under Title VII.

6 Now, Hensley was not a Title VII case; it was a 1988  
7 case involving different kinds of civil rights involving  
8 inmates --

9 THE COURT: Well, they relied on Hensley too.

10 MS. LONNQUIST: They rely on Hensley, but they don't  
11 rely properly on Hensley. Because if you look -- and this  
12 is in the reply brief. If you look at Hensley carefully, it  
13 says, in discrete claims susceptible of being filed in  
14 separate actions. And the federal courts have been a little  
15 sloppy about recognizing that. But our courts have not  
16 been.

17 And every single case involving -- that has gone to  
18 the appellate courts under 49.60, the trial court has found  
19 with affirmance at the appellate court a common core of  
20 facts as long as the claims are brought within the confines  
21 of the Washington law against discrimination.

22 The only exception in current law is the Collins  
23 case. But the Collins case is distinguishable because the  
24 claims that the Court found were unsuccessful were separate  
25 claims. They were not claims arising out of the Washington

1 law against discrimination.

2 But in Cockle, in Steele --

3 THE COURT: What were the plaintiffs? How did  
4 they -- how are they -- do you recall?

5 MS. LONNQUIST: I think it was injunctive relief  
6 arising out of a wage claim. I can't remember.

7 MR. LEMLY: Is that Collins you were asking about?

8 MS. LONNQUIST: Collins.

9 THE COURT: If you would just give me the cite, I'll  
10 look it up real quick.

11 MR. LEMLY: It's 155 Wn.App 48.

12 THE COURT: All right.

13 MS. LONNQUIST: But if you look at Steele, if you  
14 look at -- I cited them in my brief. I don't --

15 THE COURT: Yeah, well, there's a lot.

16 MS. LONNQUIST: The appellate courts -- and it's  
17 appropriately so because, you know, under Hensley, under  
18 1988, the court said: The common core of facts and related  
19 theories of law. It doesn't have to be the same issue of  
20 law. And then they have to be totally distinct claims. It  
21 could be brought in a separate lawsuit.

22 Our courts have looked at that and of course the  
23 federal system is (Inaudible) to our system because under  
24 our system the Washington law against discrimination  
25 mandates a liberal construction and broad relief, more so

1 than Title VII. And the cases I cited in the reply brief,  
2 Martini and --

3 THE COURT: Yeah, I know what you're talking about.

4 MS. LONNQUIST: Marquez (Phonetic).

5 THE COURT: Yeah.

6 MS. LONNQUIST: Our supreme court said look, you  
7 know, the law is mandated. It's to be broadly interpreted.  
8 And if there comes down to a determination as to whether we  
9 should file a federal law or state law, we're required to  
10 file a state law and not federal law where it doesn't  
11 advance the policies of the act.

12 And the policies of the act in Bowers and Blair are  
13 a fully compensatory fee in cases where there is a common  
14 core of facts and similar theories of law.

15 And this, I think, is the gravamen of the Court's  
16 decision, unanimous decision in the Brand case where  
17 although it deals with Title 51, not Title 49, it's the same  
18 sort of broad remedial legislation. And, you know, granted,  
19 there are differences between the scheme under 51 and the  
20 scheme under 49, but the underlying principle is the same.

21 The reason that the courts -- the statute does have  
22 fee shifting is it's the only way to enforce the statute is  
23 to give the attorney's fees so that lawyers, like myself,  
24 will act as private attorneys general and bring the cases to  
25 enforce the law.

1           Now, this is not an insubstantial verdict by any  
2 stretch of the imagination. You know, counsel -- opposing  
3 counsel took the fact that if they bought Dr. Tapia's chart,  
4 and they took her out to age 68 -- or whatever the final  
5 number -- that, you know, she would have gotten \$1.2  
6 million. But really -- that's not what I proposed. And  
7 it's certainly not what I thought was realistic. But I did  
8 want to give the full picture to the jury.

9           You know, they gave her \$475,000. That's among the  
10 highest verdicts I've gotten in an employment discrimination  
11 case for one employee.

12           I've gotten million -- I got a million plus in  
13 Tacoma, but that was for two plaintiffs. So, you know,  
14 \$475,000 is a significant amount of money by any stretch of  
15 the imagination in an employment case. But then you look at  
16 Martinez where Division II said look, you know, we  
17 acknowledge that the real relief that the Court should pay  
18 attention to under 49.60 is not the money. It's the  
19 enforcement of the policies. It does a salutary thing in  
20 enforcing the laws against discrimination.

21           THE COURT: Yeah, I'm not as concerned about all  
22 that.

23           MS. LONNQUIST: Okay. What are you concerned about?

24           THE COURT: Well, the 50 percent multiplier that you  
25 want.

1 MS. LONNQUIST: All right.

2 THE COURT: I'm concerned about that. I haven't  
3 actually looked at the time entries on April 30th, May 2nd,  
4 and May 3rd. But there's apparently \$11,000 double billed,  
5 according to Mr. Lemly.

6 MS. LONNQUIST: Yeah, and that's in my declaration.  
7 I took that out.

8 THE COURT: All right. Good. All right. And then  
9 I'm also interested to know about -- and, frankly, I was  
10 shocked at how low Davis' rates are; 435 for Mr. Lemly; and  
11 235 for Ms. Berry; another associate, 235; and then someone  
12 else for 120. My old friends at my old firm would, I think,  
13 be astounded to know that Davis Wright's that inexpensive.  
14 But that is what they are, apparently, on this case.

15 And so when you compare -- you know, the opening  
16 brief is one of the most prestigious firms we had to go up  
17 against, one of the biggest firms, it's, you know, Davis and  
18 Perkins; they're the big guys in town. And their rates are  
19 significantly below yours.

20 MS. LONNQUIST: Well, they don't challenge my rates.  
21 If you look at their proposed order, it says --

22 THE COURT: But they beat you out on as the  
23 multiplier. And I guess that's where I'm getting at --

24 MS. LONNQUIST: They do challenge the multiplier.

25 THE COURT: -- with Collins. And I think Collins, I

1 think, is somewhat instructive on that. You've got a nice  
2 declaration saying your rates are reasonable. And I don't  
3 necessarily have a problem with that. But I think what's  
4 built into your rate, to be candid, is an understanding of  
5 the contingency nature of your representation.

6 MS. LONNQUIST: I, you know, don't disagree with  
7 that. The multiplier is totally within your discretion.  
8 You sat through this trial. You saw the quality of  
9 representation.

10 THE COURT: I thought it was high on both sides. I  
11 thought both sides did an absolutely excellent job. The  
12 briefing was always good. I loved your pocket brief that  
13 you had when you showed me that I was wrong on 6.11 -- or at  
14 least arguably wrong on 6.11. And, you know, that was  
15 helpful. I mean so I appreciate the fact that both sides  
16 were nimble; both sides could give me great citations, give  
17 me good briefing. And that's consistent with the briefing  
18 that I've seen in this motion.

19 I think the \$44,000 for a motion on fees is high. I  
20 will tell you that. But otherwise, I'm not as concerned  
21 about the fees. I'm not as concerned about the issue of  
22 giving a common core of facts and related legal theories.  
23 But I was concerned about asking for 50 percent.

24 MS. LONNQUIST: Okay. Well, let me say that then.

25 THE COURT: Yeah.

1 MS. LONNQUIST: Because, you know, our courts have  
2 said that the assessment -- the risk is a reason to give an  
3 upward adjustment, a multiplier.

4 THE COURT: Can be.

5 MS. LONNQUIST: Yeah. It's one of a panoply of  
6 reasons. And that the Court can't rely on things that have  
7 not been approved. I mean that's Martinez, that if you  
8 overemphasize -- in that case it was the contingency fee.  
9 In another case it was the inability of the plaintiff to  
10 explain their case -- that's Pham. But as long as you stick  
11 to what the courts have approved --

12 THE COURT: Yeah.

13 MS. LONNQUIST: -- and you don't do -- and you enter  
14 appropriate findings of fact and conclusions of law, it's  
15 clearly an exercise of discretion.

16 But one of those factors is the risk factor. And  
17 the -- and the courts have also said that the risk factor is  
18 determined at the outset of the case, not after the case has  
19 been won, so...

20 THE COURT: So that also means it's not after an  
21 amendment was made to your complaint to add the one claim  
22 that you succeeded on.

23 MS. LONNQUIST: Well, --

24 THE COURT: That's March 2013, right? And so I mean  
25 --

1 MS. LONNQUIST: Yeah, but --

2 THE COURT: I think Mr. Lemly is making a good  
3 argument that at the onset of when you took the  
4 representation, the one claim that you actually succeeded on  
5 wasn't even in the equation.

6 MS. LONNQUIST: Oh, but it was in -- it was  
7 contemplated. And if you look at my time records -- here's  
8 that face again. Anytime you want to play poker with me,  
9 Judge...

10 THE COURT: Right.

11 MS. LONNQUIST: It's in my records. If you look at  
12 the third entry -- and this is in my declaration, my  
13 supplemental declaration.

14 THE COURT: Where am I going to find that in the --

15 MS. LONNQUIST: In G, Exhibit G to my declaration.

16 THE COURT: G, that's the thick one, right. So  
17 which entry? I'm sorry.

18 MS. LONNQUIST: Third entry on Page 1.

19 THE COURT: Page 1, third entry.

20 MS. LONNQUIST: September something; 13th, I think  
21 it is.

22 THE COURT: September 3rd, email exchange with  
23 client regarding medical leave.

24 MS. LONNQUIST: That's it. That's when she raised  
25 the issue with me about the disability. And she was having

1 some modicum of difficulty throughout that period of time,  
2 as the evidence in this case shows, about, you know, they're  
3 asking for different things. They're not -- they don't want  
4 to meet with us. They'll meet with me; they'll meet with me  
5 involved so I could help with the interactive process; then  
6 they canceled that meeting and then they denied the  
7 accommodation. All of that was, as you see in my time  
8 records, I was deeply involved with advising the client. So  
9 I suspected that I had a disability claim from the get-go.

10 But until it was actually perfected, I mean that  
11 took some of the risk out of the case because that was a  
12 real definitive no.

13 The what was risky when the case came in the door  
14 was the defense that Mr. Lemly showed me right away. You'll  
15 see meetings with Tom Lemly early in the case that, you  
16 know, this is a woman who was a miscreant. This is a woman  
17 who, you know, was sending out these texts. That made it a  
18 high risk case because if they didn't like Ms. Bright --

19 THE COURT: Yes and no. I think that -- I mean  
20 candidly, I think that was oversold, right. And I think it  
21 came back to bite -- no offense to Mr. Lemly -- but I think  
22 it came back to bite him.

23 MS. LONNQUIST: But I didn't know that when I took  
24 the case.

25 THE COURT: Because you expect this egregious -- you

1 expect absolutely egregious stuff to come out of it based on  
2 what we were hearing. And then it's just kind of a, what,  
3 maybe ten text total that were back and forth regarding all  
4 two different times that things were going on. I mean it  
5 was -- it was -- I mean I know -- I guess at the time that  
6 you were interviewing, you didn't know the full universe by  
7 the time that you were undertaking the representation, you  
8 didn't know the full universe of what kind of correspondence  
9 your client had sent in and on the Russell Index -- or not  
10 Index, but the Russell database, whatever we want to call  
11 that communication thing that they had.

12 MS. LONNQUIST: But I did by the time I filed the  
13 complaint.

14 THE COURT: Okay.

15 MS. LONNQUIST: Because I had met -- Mr. Lemly and I  
16 had met, as you can see from my time records.

17 THE COURT: Yeah.

18 MS. LONNQUIST: We met. He shared those -- many of  
19 those exhibits that came into evidence and, you know, he  
20 kept saying Judith, you know, this is -- you're not going to  
21 win this case, you know, we ought to resolve this case.

22 THE COURT: Well, you should have resolved the case.  
23 I think both sides should have resolved the case a long.  
24 Long, long --

25 MS. LONNQUIST: Well, we -- you know, plaintiff

1 didn't have a choice.

2 THE COURT: A long time ago.

3 MS. LONNQUIST: Anyway.

4 THE COURT: Although he just said he wanted to  
5 resolve it.

6 MS. LONNQUIST: His client didn't want to resolve  
7 it.

8 THE COURT: Ah.

9 MS. LONNQUIST: So, you know, I think that the  
10 Court -- it's certainly within your discretion. I think it  
11 is a risky case. It's obviously a case that was up to high  
12 quality. And the fact that their defense was high quality,  
13 makes it even more important that Ms. Bright have high  
14 quality representation.

15 I know my hourly rate is a high one, but I carefully  
16 apportioned work in this case so that I -- you know, where  
17 possible, lawyers in my firm with lower rates were doing the  
18 work. And you can see --

19 THE COURT: Although their rates were still higher  
20 than Davis'.

21 MS. LONNQUIST: Well, you know, Davis somehow we  
22 didn't get the bills to verify.

23 THE COURT: Well, you're not suggesting that Mr.  
24 Lemly was perjuring himself by what he put in his  
25 declaration, are you?

1 MS. LONNQUIST: I'm skeptical. But I'll tell you  
2 because the grid, you know, that is attached to Mr.  
3 Blankenship's declaration shows that the senior partners of  
4 Davis Wright charge \$758.75.

5 THE COURT: Well, they may have some kind of reduced  
6 fee arrangement with maybe a long-standing client like  
7 Russell. That is the only thing that makes sense to me.  
8 Because I would be shocked if Mr. Lemly, a man of his  
9 experience, is billing clients that come in the door at  
10 \$435. It just -- that was almost my rate as a relatively  
11 new partner when I left my firm, right. I mean that's  
12 just -- that doesn't add up.

13 But by no means do I not think that he's being  
14 honest and candid with the Court when he says this is my  
15 rate for this case. I believe that a hundred percent. I've  
16 got no problem with that.

17 MS. LONNQUIST: All right.

18 THE COURT: But I think they've probably got a  
19 reduced rate arrangement like our firm has with a lot of our  
20 long-standing clients, and that's just something that those  
21 clients can negotiate, and it's to their benefit. But I'm  
22 not going to -- I'm not going to ding him for that. I'm  
23 going to try to understand, okay, on this employment stuff  
24 --

25 MS. LONNQUIST: No. I understand that. And they're

1 not contesting my hourly rate so...

2 THE COURT: No. But I guess where I am not on quite  
3 the same page with you is I think your hourly rate is  
4 appropriate, but I also think it takes into consideration  
5 the contingency nature. I think it takes into consideration  
6 the risk of failure, and I think it takes into consideration  
7 the high quality of your work. I think that's why you're  
8 able to command \$550 an hour. I think without those things,  
9 you wouldn't.

10 I think a lawyer in your field who is doing  
11 plaintiff's work, who doesn't really know what they're  
12 doing, who doesn't do as good quality stuff, is not going to  
13 command anything close to that rate. They'll be lucky to  
14 get \$200 an hour, I think, right.

15 And so the reason why you can get that is because of  
16 your, you know -- don't take -- well, I guess you can take  
17 this the right way if you want; but, you know, because of  
18 who you are. You're someone that has practiced for decades  
19 in this that has a history of success, that has done well --

20 MS. LONNQUIST: Right.

21 THE COURT: -- that does great quality work. I'll  
22 just continue to --

23 MS. LONNQUIST: Thank you.

24 THE COURT: -- compliment you.

25 MS. LONNQUIST: No. Well, Jon Rosen calls me the

1 dean of the employment bar so...

2 THE COURT: But that's why you're \$550 an hour.

3 MS. LONNQUIST: Okay. But --

4 THE COURT: So that's where I think I am on that.

5 MS. LONNQUIST: The risk is an important factor in  
6 another respect -- there's that face again.

7 THE COURT: Yeah. I'm sorry. I'll try not to make  
8 it but...

9 MS. LONNQUIST: Because a defense firm bills on an  
10 hourly basis; they get monthly.

11 THE COURT: Oh, I know you had to advance the cost  
12 of this. I know that's a huge risk.

13 MS. LONNQUIST: Well, it's not just the cost.

14 THE COURT: Yeah.

15 MS. LONNQUIST: I had to keep my doors open. That's  
16 fees. That's not cost. And so, you know, it's easier for a  
17 firm like Davis Wright, when they know they're going to be  
18 paid every month to reduce their fees.

19 THE COURT: Right.

20 MS. LONNQUIST: We don't have that luxury because we  
21 don't get paid unless we win. And so that's -- that's a  
22 risk in and of itself that I don't think is accounted for in  
23 the regular hourly rates that we charge.

24 THE COURT: And I guess one thing that just occurred  
25 to me, that I didn't see in the briefing or any of the cases

1 -- and maybe there's a reason. Maybe the courts aren't  
2 supposed to consider this. But when you win and it's  
3 contingent -- and it's a contingent fee case for you, by  
4 definition, you're going to recover something above your  
5 hourly rate because you're sharing in the award with your  
6 client.

7 MS. LONNQUIST: Well, technically it's the client's  
8 money. And the contingency fee contract requires her to pay  
9 me out of the award that the Court gives. That's how the  
10 courts look at these things.

11 THE COURT: Well, and this -- that's the other thing  
12 that I'm not sure how much -- I didn't see any case that  
13 would discuss this or whether or not you guys really  
14 discussed it. So I'm not trying to create issues. But  
15 there are -- there's -- my understanding is there's two main  
16 ways a contingency fee would work.

17 MS. LONNQUIST: Right.

18 THE COURT: There's one way that says, all right,  
19 you get your award, and I'll get 40 percent of that -- or  
20 whatever it might be if we go to trial. And then if there's  
21 a fee award, either I get that a hundred percent myself --  
22 those are my fees -- or those are lumped into the award of  
23 which I get 40 percent of.

24 And so that's -- those are the two main ways that I  
25 think of -- at least the contingency arrangement.

1           Hopefully, I've done a decent job explaining that.

2                       MS. LONNQUIST: Yes, I understand. Let me tell you  
3           how employment -- most employment contingency fee because --

4                       THE COURT: Yeah.

5                       MS. LONNQUIST: -- it's a fee shifting statute. My  
6           fee arrangement -- and I know a lot of my colleagues have  
7           the same or similar relationship -- we have a contingent --  
8           and this is in my supplementary declaration.

9                       THE COURT: Okay.

10                      MS. LONNQUIST: We have a contingent fee agreement  
11           with our clients that says if we win or settle, we will take  
12           whichever is greater -- not both -- whichever is greater; 40  
13           percent of the aggregate or court awarded fees.

14                      THE COURT: What is the aggregate?

15                      MS. LONNQUIST: The aggregate --

16                      THE COURT: Does that include the court awarded fees  
17           with the --

18                      MS. LONNQUIST: Yeah.

19                      THE COURT: -- award?

20                      MS. LONNQUIST: So in this case you would take the  
21           475.

22                      THE COURT: Right.

23                      MS. LONNQUIST: And whatever the court awards as the  
24           lodestar; put it together.

25                      THE COURT: Yeah.

1 MS. LONNQUIST: And if 40 percent of that is greater  
2 than what the court awards, I get the greater amount.

3 THE COURT: I get you. All right. So yours is  
4 actually kind of the hybrid.

5 MS. LONNQUIST: It's a hybrid, right.

6 THE COURT: And it's the smartest way to do it  
7 because that way you're not penalizing yourself. I mean  
8 you're kind of saying, hey -- yeah. I mean either way, it  
9 works -- in a sense you're kind of covering your bases, is I  
10 guess the better way to say it.

11 MS. LONNQUIST: Yeah, if I have to go to trial.

12 THE COURT: Yeah. That makes sense. Okay.

13 MS. LONNQUIST: Okay. So --

14 THE COURT: What else do you want to tell me before  
15 I hear from Mr. Lemly?

16 MS. LONNQUIST: I think I'm -- I think that's good.

17 THE COURT: Okay. Mr. Lemly, how are you doing?

18 MR. LEMLY: Doing fine. Thank you. How about you,  
19 Your Honor?

20 THE COURT: Not bad. Thanks for waiting.

21 MR. LEMLY: Of course.

22 THE COURT: What do you want to tell me?

23 MR. LEMLY: That's my role. I always wait for the  
24 more (Inaudible) and better -- more highly compensated --

25 MS. LONNQUIST: Careful of the -- may I sit down,

1 Your Honor?

2 THE COURT: Sure. Thank you for asking.

3 MR. LEMLY: -- plaintiff's lawyers. I would be  
4 happy to have Ms. Lonquist's income any day so -- and most  
5 of the other good plaintiff's lawyers.

6 THE COURT: Yeah.

7 MR. LEMLY: So let me talk a little bit about why we  
8 believe that a substantial reduction in the lodestar fees  
9 are appropriate in this case. And it's based -- Hensley is  
10 the linchstone of all of the both federal and state cases.  
11 Our state courts refer to it repeatedly as the foundation,  
12 Absher, Brand, Blair, Kastanias.

13 Plaintiff in this case prevail on only one claim,  
14 and I will present an argument to you that this was based on  
15 separate and distinct facts and a separate and distinct  
16 legal theory and that most of the time the plaintiff's  
17 counsel devoted to the case was to lost causes. Most of the  
18 risk -- in fact, almost all of the risk was devoted to the  
19 lost causes. And so she is entitled to fees for only the  
20 one claim that she won.

21 It's I think -- and first let's kind of start with  
22 the notion that -- the sort of implication in some of the  
23 plaintiff's argument that the fee situation is binary; that  
24 if plaintiff wins, she is entitled to recover all fees  
25 because she's furthering the good, carrying forward with the

1 private attorney general concept that is behind the Consumer  
2 Protection Act law against discrimination and the like.

3 And a loss, she does not get paid. But these cases  
4 -- the key cases that we've all been talking about,  
5 beginning with Hensley and there is that there is a  
6 continuum here that on a loss, a plaintiff certainly does  
7 not -- has no entitlement to attorney's fees.

8 If you give undo weight to that notion that we want  
9 to encourage private attorney general actions, I mean even a  
10 losing cause on bringing forward claims of race  
11 discrimination or sex discrimination or a like can shine a  
12 spotlight on these. But we all agree that there's no  
13 potential for attorney's fees in that situation.

14 But what the Hensley case says that if you succeed  
15 on only one or a few of the claims in your case, then the  
16 award is likewise reduced based on that degree of success.

17 So I think we've all gotten past the lodestar  
18 discussion and no substantial -- the fundamental hours worth  
19 that they -- it's not undue duplication or inefficiency or  
20 whatever. We say, however, that the lodestar is  
21 inappropriate and unreasonable as the basis for the fee  
22 award here in light of the results at trial.

23 The Court is as familiar with the counsel on the  
24 discovery process and the course of the trial. And that is  
25 that the vast majority of the evidence presented by both

1 sides related to essentially claims of race discrimination  
2 in the guise of retaliation and in furtherance of her belief  
3 that she had a reasonable belief to be concerned about race  
4 discrimination at Russell.

5 And so what the difficulty -- plaintiff has the  
6 burden of proof to justify her fees. As the Hensley Court  
7 said and there's a very explicit reference at Footnote 12 of  
8 the Hensley case that --

9 THE COURT: Footnote 12. I've got it up on my  
10 computer. Footnote 12.

11 MR. LEMLY: All right. The Court there says --  
12 first it talks about the related and unrelated. I'm going  
13 to go to that in just a moment.

14 THE COURT: Well, Footnote 12 is going to whether or  
15 not counsel has identified in the general subject matter at  
16 the time.

17 MR. LEMLY: Yeah.

18 THE COURT: And I think Ms. Lonquist did that,  
19 didn't she?

20 MR. LEMLY: Well, no. Because what I think -- what  
21 the Court goes on to say there: Subject matter as for  
22 the -- and then they're citing another case with approval.  
23 We would not deal with simply any claim that a district  
24 court used its discretion in awarding unreasonably low  
25 attorney fees in a suit in which plaintiffs are only

1 partially successful if plaintiff's records do not provide a  
2 proper basis for determining how much time was spent on  
3 particular claims.

4 We identified for the Court and the annotated  
5 version of Ms. Lonquist's time records those entries which  
6 reflect work on the accommodation issue, the medical leave  
7 or the like. And those -- if there was more time devoted to  
8 those issues, Ms. Lonquist has failed to identify them  
9 properly in her time records.

10 We've put in the left margin a flag for all time  
11 entries for all lawyers and for the paralegal that clearly  
12 relate -- there's a specific reference -- for example, I  
13 included every deposition or trial examination of Ms. Orr,  
14 even though much of her testimony went to other issues; and  
15 every medical provider who was deposed or examined at trial;  
16 and every other reference to the accommodation issues. And  
17 it is -- it is less than -- it is approximately 10 percent  
18 of counsel's time had those indications as to reference to  
19 the failure to accommodate claim.

20 As the Court knows, the vast majority of what  
21 plaintiff tried to do was to establish that she had been --  
22 first she tried to establish that she had been discriminated  
23 against on the basis of her race, and the Court dismiss that  
24 on summary judgment. So a lot of discovery time, both  
25 documentary and in depositions on that.

1                   And then at trial there was a great deal of  
2 evidence, in essence, was making the same argument. She was  
3 discriminated against on the basis of race; she was  
4 retaliated against because she had advocated on behalf of  
5 minorities because she was an outspoken champion of  
6 diversity at Russell, which is essentially a race case in  
7 another (Inaudible). And plaintiff was not successful on  
8 those.

9                   Those were the claims when Ms. Lonquist and I met  
10 in the fall of 2010 maybe or what -- I guess it would be --

11                   THE COURT: '12.

12                   MR. LEMLY: Fall of 2012.

13                   THE COURT: Yeah.

14                   MR. LEMLY: I said you have -- you're going to have  
15 real difficulty making out a race discrimination claim or  
16 retaliation claim here with Ms. Bright, and she did have  
17 great difficulty with it. She lost.

18                   THE COURT: But how is that not common core of facts  
19 and related legal theories?

20                   MR. LEMLY: So let me turn to that. And this --  
21 this case and all of the reported cases she is unique and  
22 that it involves a failure to accommodate, a failure to  
23 accommodate claim that she won.

24                   THE COURT: Right.

25                   MR. LEMLY: Now, what they lost on are race,

1           retaliation -- and most cases also frequently, someone like  
2           Ms. Bright, would have been able to file a sex  
3           discrimination claim as well. She is -- she is a female;  
4           she could have brought that. And so the vast constellation  
5           of cases that go forward have a combination of race, sex,  
6           sexual harassment and those -- even disability  
7           discrimination if she had gone forward on that claim. She  
8           had elected to drop that.

9                        And those -- these claims right here are all thou  
10           shalt nots. The employer is told thou shalt not treat  
11           employees differently --

12                       THE COURT: Yeah.

13                       MR. LEMLY: -- because of age, race, sex, disability  
14           of the like.

15                       THE COURT: Disability.

16                       MR. LEMLY: Failure to -- yeah, disability. But she  
17           dropped her disability -- she dropped her disability  
18           discrimination claim in the first day of trial.

19                       THE COURT: But the failure to accommodate requires  
20           that there be a disability.

21                       MR. LEMLY: Yes, but failure to accommodate is  
22           unique amongst the claims and the rights established under  
23           the law against discrimination. Because unlike these, which  
24           are thou shalt not -- thou shalt not treat people  
25           differently -- the accommodation requirement says the

1 employer shall do more for a disabled employee. And so it's  
2 a different legal construct, and it's a different  
3 requirement on -- it's basically a plus factor for those who  
4 are disabled here.

5 And so when you look then at the evidence that came  
6 in, in the typical blended case of perhaps race,  
7 retaliation, sex, and sexual harassment, all of those claims  
8 tend to come out of interaction with the employee over a  
9 period of time; bad acts by the employer, which cause harm;  
10 adverse action to the employee.

11 I mean that -- so when you get cases that are the  
12 typical cases which have a constellation of these, there's a  
13 common core of facts. And the legal theory is the employer  
14 is told not to do something; not to treat people differently  
15 because of age, race, sex, or whatever, and does.

16 When you get to an accommodation claim, however, the  
17 question is, as Ms. Lonquist framed it with Ms. Orr when  
18 she cross-examined her and as she argued in her jury  
19 instructions, accommodation says, first -- you're right; you  
20 have to have disability. And she had a disability  
21 discrimination claim in her case at first but she dropped  
22 it.

23 So if Ms. Lonquist and Ms. Bright had proved that  
24 she was treated differently because of her disability, I  
25 would not make this argument because then clearly there

1 would have been bad acts against Ms. Bright because of her  
2 disability and then a failure to accommodate.

3 But what the issues that Ms. Bright and Ms.  
4 Lonquist brought to the jury in this case is that Russell  
5 and Ms. Orr failed to meet the more technical requirements,  
6 which is interactive process and proposing accommodations  
7 and to allow her to work. And she says you didn't do this;  
8 you didn't do that. It's not that we treated her badly.  
9 It's that we didn't engage in that technical process of  
10 examining what can we do to get her to get back to work. We  
11 didn't do those things. That's the plus part that failure  
12 to accommodate involves here.

13 And so that's why when you look at the factual  
14 underpinning for the failure to accommodate claim, that's  
15 why Ms. Lonquist felt I can win this on summary judgment  
16 alone based on the testimony of Ms. Orr; no one else. And  
17 because Ms. Orr admitted she didn't engage in the  
18 interactive process, she didn't propose any accommodations  
19 -- even if Ms. Bright had come forward with a request for  
20 accommodation that was reasonable, in Ms. Orr's view, she  
21 would not have granted that. And so Ms. Lonquist and Ms.  
22 Bright move for summary judgment with that small core of  
23 facts that occur.

24 THE COURT: And you have Ms. Orr saying that she had  
25 already decided to fire her before she went on leave. So

1           that was a question of facts.

2                   MR. LEMLY: And what she said was that she decided  
3 to fire her. But it's the if -- if you put those together.

4                   THE COURT: Right.

5                   MR. LEMLY: If these are related, then Ms. Bright  
6 would have won her retaliation claim; she could have won her  
7 discrimination claim; she could have won a variety of those  
8 thou-shalt-not claims. But the jury found she did not --  
9 was not entitled to prevail on those claims.

10                   So the jury decided that Russell and Ms. Orr had  
11 failed to meet these technical requirements and only that.  
12 And they focused -- there were two telephone conversations,  
13 two or three exchanges of emails and letters in the  
14 accommodation process. Russell gave her medical leave for  
15 three months, and she was paid throughout that time frame.

16                   So the core of facts that relate to the failure to  
17 accommodate was personal interaction between Ms. Orr and Ms.  
18 Bright over the span of about 30 days when first we had a  
19 letter from Ms. -- or Dr. Coryell -- saying I think  
20 accommodation is necessary.

21                   Ms. Bright says I want to discuss accommodation with  
22 you. There are some exchanges of correspondence setting up  
23 the discussions. They ended up, both of them, I think,  
24 feeling uncomfortable seeing one another and decided they  
25 would talk by phone. They talked by phone on two occasions.

1           There's an exchange of two letters. And that is the sum  
2           total of the evidence that came in on the failure to  
3           accommodate claim.

4                     And, for example, Ms. Lonquist argues that the  
5           failure to accommodate was a form of retaliation. But  
6           remember the jury rejected the failure -- the retaliation  
7           claim in this case. So she -- frankly, I don't think I  
8           heard her make the argument. But certainly the jury didn't  
9           buy the argument that there was a connection between the  
10          failure to accommodate and any retaliation against Ms.  
11          Bright because they found for Russell on the retaliation  
12          claim just as you found for Russell on the race  
13          discrimination claim.

14                    So I submit to you that there is not a case. I know  
15          there's not a case under Washington law.

16                    THE COURT: Well, that's the essential element that  
17          led me to dismiss the discrimination claim.

18                    MR. LEMLY: What's that?

19                    THE COURT: There was an essential element that I  
20          found plaintiff couldn't sustain, which is why I dismissed  
21          the discrimination claim. I'm trying to remember what it  
22          was now.

23                    MS. LONQUIST: But she was qualified at the time  
24          she was terminated.

25                    THE COURT: Bingo, right?

1 MR. LEMLY: Right.

2 THE COURT: Because at the time she was terminated,  
3 in my view -- and I'm not trying to re-argue it.

4 MR. LEMLY: Right.

5 THE COURT: Was there in December and the adverse  
6 employment action, that was the adverse employment action.  
7 And there was no evidence, in my view, that she was actually  
8 qualified at that time to perform. But that didn't mean  
9 that there hadn't been discrimination against her; that she  
10 hadn't been treated differently than other employees at  
11 Russell.

12 In fact, it seemed pretty clear -- and I think what  
13 the jury was frustrated by was you hear severance after  
14 severance agreements for hundreds of thousands of dollars of  
15 people that did the exact same darn thing that she did, and  
16 she walks away with nothing. And they get a glowing letter  
17 of recommendation for, you know, an ongoing affair of over a  
18 year, meeting in an apartment across the street from Russell  
19 that we all know was not actually being used for practicing  
20 speeches, you know. I mean that was some of the most  
21 ridiculous testimony I think any of us have ever heard,  
22 right.

23 But so I think that was playing a huge part of what  
24 they did because they go, why should she walk away with  
25 nothing? Everyone else did what she did, got hundreds of

1 thousands of dollars from Russell.

2 And it's because we have that common core of facts  
3 of discussing how others were treated so differently that I  
4 think related to them saying, you know what, they should  
5 have accommodated her disability; they should have treated  
6 her in a sense the way that everyone else is treated.  
7 Everyone else got a golden parachute out of here. And they  
8 just pushed her out the plane and said, I hope you land on  
9 something soft, right? And so I think that's what happened  
10 here, and I think that's why the jury did what they did.

11 And to me that's the problem with your argument.  
12 It's -- technically it's appealing, but I think it ignores  
13 the way that the evidence that we actually heard that paints  
14 the whole picture of what was going on at Russell.

15 MR. LEMLY: But these arguments that you've advanced  
16 were arguments that were -- they were a part of the summary  
17 judgment argument. But if --

18 THE COURT: Well, they were part of the retaliation  
19 claim that we heard about at trial.

20 MR. LEMLY: Right. But she didn't win that  
21 retaliation claim. So if the jury had felt that that --  
22 that she was being retaliated -- that was an argument, you  
23 remember, that Ms. Lonquist made with regard to the race  
24 discrimination; that the failure to grant severance and the  
25 like is a form of retaliation. And you found against that.

1 And clearly the jury rejected that as a form of retaliation  
2 and focused really instead --

3 Russell, at trial said, I think the accommodations  
4 that Ms. Bright is requesting are unreasonable. She is  
5 saying she can work in New York; she is saying she can work  
6 in the Index business. I don't see why she can't work in  
7 the Seattle Human Resources Department.

8 THE COURT: That's why it went much further than  
9 that and not to your client's benefit by saying, I didn't  
10 care what accommodation she wanted. I wasn't going to give  
11 it to her. I decided to fire her, even though there's no  
12 evidence that she decided to fire her in August. She says I  
13 decided to fire her in August. I think that's partially  
14 what sunk your boat.

15 MR. LEMLY: But, again, if the jury had -- because  
16 this was clearly laid out. If the jury said --

17 THE COURT: Right.

18 MR. LEMLY: -- that Russell had taken this action  
19 against her, either because she was an advocate for  
20 minorities or otherwise, then she would have won the  
21 retaliation case and she didn't win that.

22 So I think that basically if you look at the core  
23 facts and the legal issues involved here --

24 THE COURT: Yeah.

25 MR. LEMLY: -- it is appropriate for the Hensley

1 analysis that this is the same -- similar analysis that the  
2 judge did in the Tupas case where the Court reduced the  
3 lodestar amount by 25 percent because she -- Ms. Lonquist  
4 and Tupas prevailed on an accommodation claim, but not on  
5 the other claims in her case.

6 I think these -- here we have --

7 THE COURT: But you're wanting me to reduce it by 75  
8 percent.

9 MR. LEMLY: That is a suggestion based on a  
10 review -- again, if you look at the documents, we spent --  
11 the paralegal spent 100,000 -- \$120,000 worth of time going  
12 through 86,000 documents and less than a thousand had any  
13 relationship to the claim on which they've prevailed. So I  
14 mean we think there is a basis, the trial time, likewise in  
15 terms of trial time spent on accommodation was -- was --

16 THE COURT: Okay.

17 MR. LEMLY: And I mean that's why we suggested it.  
18 We certainly think that some reduction -- I just don't see  
19 how even you were saying we're treating her differently.  
20 And remember that the disability, treating her differently  
21 because of her disability was dropped out of the case. She  
22 didn't think it was strong enough to even present to the  
23 jury.

24 So what is the basis for saying that Russell treated  
25 her badly other than race, which you dismissed, or

1 retaliation; which is basically her rattling around, pulling  
2 people's chains and not, you know, causing such an  
3 obstreperous zone of activity within Russell that the  
4 managers wanted to get rid of her.

5 I think reduced to its essence, what she won is a  
6 very limited technical issue which require only limited  
7 evidence.

8 We said some background is appropriate; if the Court  
9 reduces it by 50 percent. The Court has considerable  
10 discretion here to make an assessment of the success at  
11 trial, the claims as they were presented at the outset, and  
12 the success that the plaintiff had. And I submit it cannot  
13 be questioned that plaintiff's -- the primary theory of  
14 plaintiff's case had to do with race discrimination and  
15 retaliation; she did not prevail on. That's where the  
16 dollars are.

17 That's where -- if we go then to this factor of the  
18 Martinez. What is the social good? I think we all agree  
19 that discrimination against people on the basis of race or  
20 sex --

21 THE COURT: Are a failure to accommodate disability.

22 MR. LEMLY: But that is -- that is a different --  
23 that again is a highly technical situation that is -- has  
24 less social value than stopping -- because, again, if she  
25 had won the disability discrimination --

1 THE COURT: Where's the legislature that has made  
2 that statement?

3 MR. LEMLY: What's that?

4 THE COURT: Where's the law that says that I should  
5 not value failure to accommodate as much as we would value  
6 retaliation or race discrimination or sex discrimination?

7 MR. LEMLY: I don't have the law on that. But there  
8 is law in the cases where the -- where the --

9 THE COURT: So that's kind of Lemly on employment  
10 law.

11 MR. LEMLY: No, no, no, no, no. It's not. It's not  
12 that at all, Your Honor. It is in several of the cases  
13 which --

14 THE COURT: And I think -- let me just jump in real  
15 quick --

16 MR. LEMLY: Yeah.

17 THE COURT: -- while you're looking. I think that  
18 your argument would be a decent one if the accommodation  
19 here had failed for some kind of technical reason. And they  
20 were trying to accommodate; they were doing their best. But  
21 they still just didn't quite do it; the ramp wasn't at the  
22 right angle, or whatever it was. But the response was --

23 MS. LONNQUIST: No.

24 THE COURT: Yeah, I know, Ms. Lonquist.

25 The response is -- I was actually going to say, "Go

1 jump. We're not doing a darn thing for you. In fact, not  
2 only are we not going to do anything for you, we're going to  
3 fire you." That was the response.

4 To me that does have sociable to say to an employer  
5 like Russell you can't do that. And so I think that there  
6 is much value to this case, to a company like Russell. I  
7 anticipate that their employment, their HR group has changed  
8 dramatically since hopefully this verdict came out. Maybe  
9 not.

10 MR. LEMLY: Well, you heard at trial that many other  
11 employees had been granted accommodation, and they felt in  
12 this case that an accommodation was unreasonable because of  
13 what she was asking for; for what she said she could do and  
14 what she said she wanted by way of accommodation.

15 THE COURT: And I think the case would have been  
16 very different if they said, okay, we don't think that's  
17 reasonable. How about this? And there was no "how about  
18 this?" That's the problem. That's what I think sunk you  
19 up.

20 But anyhow -- so I hear what you're saying. I think  
21 you've got some decent arguments about -- not so much  
22 whether or not there is -- these claims are unrelated or  
23 whether or not these claims did not come out from the same  
24 core facts. But I think you've got a decent argument about  
25 the rate of success. But I don't view an award of 475 as

1 limited success by itself.

2 But in terms of the claims that were advanced, the  
3 amount of time that were spent on successful versus  
4 unsuccessful claims, I don't know why I can't take that into  
5 account in deciding what's a reasonable fee award even if I  
6 do think that they do stem from the same core facts.

7 But the reason why I think that's important to me is  
8 that if they stem from the same core facts, segregation is  
9 not required in terms of what Ms. Lonquist would have to  
10 prove. But I think that I'm still allowed, under lodestar  
11 analysis and in the 1.5 really, to determine, all right,  
12 how'd they do and how does this relate to that.

13 But on the plus side, when Ms. Lonquist comes back  
14 up for her rebuttal, you know, I think that the rate is a  
15 high rate. And I think it's also interesting to note that  
16 it's higher than other contemporary litigation that I want  
17 to hear from her about that. But I think that there is a  
18 risk here, which might, you know, increase a bit the -- give  
19 a multiplier. So I think we're going to go down a bit, but  
20 I think we're going to come back up a little bit. And we'll  
21 see where we're at.

22 MR. LEMLY: Well, let me speak to the risk part.

23 THE COURT: Yeah.

24 MR. LEMLY: Because, again, remember, we're not  
25 talking about the case as a whole. There was clearly risk

1 on going forward with the race discrimination claim and the  
2 retaliation claim. There's no question about that. I told  
3 her about that from the beginning.

4 THE COURT: Yeah.

5 MR. LEMLY: I was right on that point. The jury  
6 agreed with me on that point. You even agreed with me on  
7 some aspects of that.

8 So, but we submit that there was -- I think you  
9 really need to focus on what did she win. We're talking  
10 under Hensley and the other cases that I flagged at the  
11 beginning of my argument. We're looking at what is the case  
12 that she won.

13 And on the failure to accommodate claim, I submit to  
14 you that there was no substantial risk on that. Basically,  
15 when she comes forward, she says I've been out on medical --

16 THE COURT: I'm sorry. Are you saying there was no  
17 risk on the failure to accommodate?

18 MR. LEMLY: I say there was no substantial risk; not  
19 enough risk to warrant a multiplier because -- because  
20 plaintiff felt that it was so strong that she went forward  
21 with a motion for summary judgment on it. She had very  
22 clear-cut admissions from Ms. Orr that basically proved  
23 these elements right here.

24 THE COURT: So you're saying I should have granted  
25 summary judgment?

1 MR. LEMLY: I would not have been surprised,  
2 frankly, if you had granted summary judgment on that. And  
3 the jury basically took these factors into account and also  
4 said -- and they knew she had been out on leave. She says  
5 she's ready to come back and they don't do anything. I mean  
6 clearly the jury that --

7 THE COURT: Right.

8 MR. LEMLY: That is what I think offended the  
9 jurors, that you got somebody you acknowledge is impaired  
10 enough to be out on medical leave for three months --

11 THE COURT: Yeah.

12 MR. LEMLY: -- and then she comes back and you don't  
13 do anything for her.

14 THE COURT: You don't do anything for her and you  
15 don't give her anything and you gave hundreds of thousands  
16 of dollars to everyone else who was leaving.

17 MR. LEMLY: Right -- although not on an  
18 accommodation basis.

19 THE COURT: Well, not on an accommodation basis, but  
20 I mean to me that was -- yeah.

21 MR. LEMLY: But so I think that aspect of the case  
22 was very strong. Ms. Lonquist knew it as soon as she  
23 took -- certainly as soon as she took that deposition. But  
24 she also knew that from her client as soon as she talked  
25 about -- with her client about what --

1 THE COURT: So --

2 MR. LEMLY: -- happened during --

3 THE COURT: Right.

4 MR. LEMLY: -- the accommodation process. So I  
5 submit that in this case -- remembering again that the  
6 Washington cases and the federal cases all say enhancements  
7 to the lodestar are rare. They're only occasional. They  
8 must have been justified by highly novel cases, new cases  
9 and whatever the --

10 THE COURT: Well, but I mean that relates more to  
11 the quality of the work performance; the quality of the work  
12 performance be so extraordinary that would -- I mean that  
13 would be a rare case to enhance because of the quality of  
14 the work performed, right?

15 MR. LEMLY: The Van Pham case, for example. Van  
16 Pham versus City of Seattle, 159 Wn.2d 527 says, we presume  
17 the lodestar is the reasonable fee. Occasionally a risk  
18 multiplier is warranted. But that is a -- that is a rare  
19 situation. I can even give you the page cite.

20 THE COURT: That would be great. Let me get that.

21 MR. LEMLY: That basically is at 542. It's 159, 527  
22 at 542: While we presume that the lodestar represents a  
23 reasonable fee, occasionally a risk multiplier will be  
24 warranted because the lodestar figure does not adequately  
25 account for the high risk nature of the case.

1           So and, therefore, we decline to rule out contingent  
2 multipliers altogether. Before that, I don't know whether  
3 you read this case more recently --

4           THE COURT: Yeah.

5           MR. LEMLY: -- but the Court discussed at  
6 considerable length a U.S. Supreme Court case, the City of  
7 Burlington versus Dague. And there the Dague said the more  
8 difficult the case is, the more time the lawyer will spend  
9 on it; and, therefore, they'll get more money for that and  
10 the more highly skilled the lawyer will have to be to take  
11 on that difficult case. And, therefore, the Federal Court  
12 said we just don't think contingency for risk is appropriate  
13 because our cases get more hours and require a more skilled  
14 lawyer who has a higher billing rate and, therefore, it's  
15 all sort of captured in the reality --

16           THE COURT: Well, I hear you.

17           MR. LEMLY: -- of what happens with this case.

18           THE COURT: Yeah.

19           MR. LEMLY: And the Washington Supreme Court in Van  
20 Pham clearly was -- was persuaded -- not persuaded as to say  
21 we're never going to grant it; but to say that it's only  
22 going to be occasional.

23           And I think this is not one of those occasional  
24 cases that warrant. Ms. Lonquist has a high billing rate;  
25 her lawyers who work for her have a higher billing rate than

1           ours. And remember these are employees, and so she gets a  
2           profit on each of those associates. She's not paying \$400  
3           an hour to Ms. Lilliedoll.

4           THE COURT: She's also got overhead to pay for,  
5           right?

6           MR. LEMLY: She has -- she has overhead; a lot less  
7           than ours. And I wish I had hers instead of mine. But so  
8           we submit that --

9           THE COURT: Okay.

10          MR. LEMLY: -- a multiplier is not appropriate here.

11          THE COURT: Well, let me hear from Ms. Lonquist.

12          MR. LEMLY: Thanks for your patience.

13          THE COURT: Yeah. No. I appreciate it, Mr. Lemly.

14                 So why are your rates higher for this case than they  
15                 were in the Tupas and the Hernandez case?

16          MS. LONNQUIST: That's also set out in my  
17                 declaration, my supplemental declaration. What happened was  
18                 I got the declarations from John Sheridan, who's the lawyer  
19                 in the Van Pham case and Victoria Breland (Phonetic). Each  
20                 of them said my rates were too low. And so I took that into  
21                 account. And effective in May, I notified my clients that  
22                 my rates were going up. You have a copy of the  
23                 notification.

24          THE COURT: May of --

25          MS. LONNQUIST: This year, before the Bright trial.

1 THE COURT: Hold on. Well, I thought I saw your  
2 rate go up in this case. The G, right? Was that G?

3 MS. LONNQUIST: Yes.

4 THE COURT: In 10/9 of 2012.

5 MS. LONNQUIST: Yeah, that's because -- that's  
6 because the tabs, the computer system doesn't -- you know,  
7 it's because that's the way they calculate it. It's  
8 complicated, and I will not try to explain the tab system.

9 But what our courts say is (Inaudible) cases, Arden  
10 versus Mayfair -- I don't have the cite. But our courts  
11 have traditionally said because unlike defense counsel who  
12 get paid every month, plaintiff's counsel in 49.60 cases  
13 should recover their lodestar fee based on current rates.  
14 That makes up for the interest --

15 THE COURT: Oh.

16 MS. LONNQUIST: -- prejudgment interest that we --  
17 because we didn't get a fee in September of 2012, October of  
18 2012, September and November of 2012, etc.

19 THE COURT: So really these few entries that are  
20 still at 475, they're getting the benefit of that lower  
21 rate, is what you're saying; because there's like maybe 15  
22 entries that are 475 still on your sheet. Those should have  
23 all gone up to 550?

24 MS. LONNQUIST: Right.

25 THE COURT: Retroactively?

1 MS. LONNQUIST: For purposes of this case, yes.

2 THE COURT: Okay.

3 MS. LONNQUIST: And I mean I doubt Mr. Lemly  
4 contests that that's what the current state of the law is.

5 THE COURT: Well, what about Lilliedoll, Dolman, and  
6 Cameron? Did your experts opine at all about their rates?

7 MS. LONNQUIST: Yes. Mr. Blankenship opined about  
8 their rates.

9 THE COURT: And he said the new rates are the ones  
10 that are good?

11 MS. LONNQUIST: Yes.

12 THE COURT: Okay.

13 MS. LONNQUIST: It's in there.

14 THE COURT: And so what you're saying, if you just  
15 had the benefit of Mr. Blankenship's declaration, that those  
16 other fee requests, the rates would be the same?

17 MS. LONNQUIST: Yes, right. And I now understand --  
18 thanks to Mr. Lemly's artwork -- why they didn't settle.  
19 And this is a policy thing I'd like the Court to consider.  
20 Because according to Mr. Lemly, after Carmen Orr's  
21 deposition, it was so clear that he even anticipated that  
22 you would rule in our favor in summary judgment.

23 Well, if it was that clear, why didn't they settle  
24 the case? And I think the reason they didn't settle the  
25 case -- if Mr. Lemly was thinking then what he argued here

1 today -- was because they knew by going to trial, if they --  
2 if they threw enough dirt at the jury, that they might be  
3 able to get us not to win on all of the claims. They could  
4 get you to give them a 50 -- a 75 percent reduction.

5 That is bad policy, Judge. You know, if the case is  
6 so clear to the defendant that -- and they know on one of  
7 the claims, and they know that if they push it to trial and  
8 they concentrate on the other claims, that they might be  
9 able to get a split verdict, then they might be able to get  
10 a 50 percent reduction in the plaintiff's fees, they're  
11 going to push them all to trial.

12 THE COURT: Well, I don't have any settlement  
13 negotiations in front of me.

14 MS. LONNQUIST: No, you don't. But --

15 THE COURT: Which I could have had under 408. I  
16 don't think there's anything that would have prevented you  
17 guys from saying on this date we had offered "X." That  
18 might be enlightening.

19 MS. LONNQUIST: Well, I can represent to you -- and  
20 I can submit a declaration if you want -- that the day that  
21 we argued the case to the verdict, Elliot Cohen came to me  
22 -- standing right over there -- and said the \$50,000 is  
23 still on the table. Will you take it?

24 THE COURT: He said 5-0.

25 MS. LONNQUIST: 5-0. That was what they had offered

1 in mediation. So --

2 THE COURT: And that was inclusive of your fees?

3 MS. LONNQUIST: Yes.

4 THE COURT: Why shouldn't I take that into  
5 consideration in deciding their success at trial?

6 MR. LEMLY: Number one, I never heard that Mr. Cohen  
7 did this, so I don't know that that is valid.

8 THE COURT: But you know about the prior settlement  
9 discussions.

10 MR. LEMLY: The settlement discussions, we had a  
11 demand -- Ms. Lonquist, I don't have the number off the top  
12 of my head -- of -- you may recall it better than I, Ms.  
13 Lonquist. It was 8 or \$900,000 for Ms. Bright and roughly  
14 the same for your attorney's fees, is my recollection of the  
15 last thing we --

16 MS. LONNQUIST: That was when you stood up and said,  
17 have the parties explored settlement, that's what I came up  
18 with.

19 THE COURT: Yeah.

20 MS. LONNQUIST: But in mediation I think we were at  
21 350 and they were at 50.

22 THE COURT: At 50. And your 350 included your fees?

23 MS. LONNQUIST: At that point, yeah.

24 THE COURT: And that's what the mediators would  
25 always tell me. The first thing to do is get rid of your

1 fees, which I always found very annoying. Okay.

2 MR. LEMLY: So I don't -- I don't remember your  
3 being at 350 on that, but I --

4 MS. LONNQUIST: Well, I may have misspoken. I  
5 can -- I've got records. As a matter of fact, I'm having --  
6 I have a phone call into the mediator later today to --

7 THE COURT: Well, that's going to -- but I do think  
8 it's important to kind of take that into consideration. I  
9 don't think under 408 there's any reason why I can't.

10 This isn't -- you know, this doesn't have anything  
11 to do with liability. It has to do with the reasonableness  
12 of fees, and I think this bears on that question.

13 MS. LONNQUIST: Are you going to take this under  
14 advisement?

15 THE COURT: Well, I was planning on ruling from the  
16 bench.

17 MS. LONNQUIST: Okay. All right. Because if you  
18 take it under advisement, I'll submit a declaration.

19 THE COURT: All the more reason why I'll rule from  
20 the bench.

21 MS. LONNQUIST: Okay. So let me -- this is my few  
22 moments.

23 THE COURT: Yeah.

24 MS. LONNQUIST: So, you know, and I think the Court  
25 really put your finger right on it when you say Mr. Lemly

1 argues this is a technical violation. There is nothing  
2 technical about this violation. This wasn't an attempt -- a  
3 failed attempt. This was an outright refusal. This was a  
4 bad act. This was one of those thou-shalt-not acts. Thou  
5 shalt not refuse to accommodate a qualified person.

6 And they struggled mightily all through this case to  
7 demonstrate that she wasn't qualified because she was such a  
8 mystery. That's what -- that's the glue that holds this  
9 case together. And so, you know, I don't -- I don't know  
10 there should be any reduction in the lodestar because the  
11 case does arise out of a common core of facts. It has a  
12 very salutary private attorney general effect on the  
13 development of the law.

14 I agree with you. I think Russell probably has  
15 changed a lot of its policies. And if they haven't, they  
16 should. And so really the only issue that is in contention  
17 here is the multiplier and the Court certainly has the  
18 discretion to deny the multiplier.

19 Judge Halpert in Tupas did do an arbitrary cut of 25  
20 percent. I've got that on appeal.

21 THE COURT: She just reduced it by 25 percent?

22 MS. LONNQUIST: Yeah, and the costs too which is  
23 clearly inappropriate. But I mean --

24 THE COURT: Wasn't there a cost issue in this -- I  
25 thought there was a cost issue that you had -- that they

1 weren't documented. Did you document them in the reply?

2 MS. LONNQUIST: Everything.

3 MR. LEMLY: We suggested that the costs were  
4 likewise mainly related to the race and retaliation of  
5 (Inaudible) and not to the accommodation and therefore  
6 should be reduced in the same percentage.

7 MS. LONNQUIST: You know, Mr. Lemly makes -- made  
8 the argument that most of the discovery in this case was on  
9 race. Well, there's no substantiation for that. What kind  
10 of discovery would we have had to do to determine that there  
11 was race discrimination; particularly when the case was --  
12 that claim was dismissed. So it wasn't. The bulk of the  
13 discovery -- and he claims Ms. Orr had very little to do  
14 with accommodation. Her whole deposition was on the  
15 accommodation process.

16 THE COURT: Yeah.

17 MS. LONNQUIST: The rest of the discovery that  
18 wasn't on accommodation was on this bogus defense that they  
19 came up with that somehow she was such a bad actor that they  
20 didn't need to accommodate her; that she was such a bad  
21 actor that they had to fire her. That was a common thread  
22 throughout the whole case.

23 And so we had to depose Mr. Golob. We had to depose  
24 Eden Rennie, who brought it all to a head. I mean how can  
25 that be -- how is anything about Eden Rennie on race? How

1 is trying to get the Costas Chrysostomou -- see, I can say  
2 it right now -- here and testify has anything to do with  
3 race? No. It had to do with the climate of --

4 THE COURT: Yeah.

5 MS. LONNQUIST: -- what was happening, as the Court  
6 said. So what you do with the multiplier is your  
7 discretion. But we really think that on the record in this  
8 case, particularly in light of what Mr. Lemly has said here  
9 today, that there's a common core of facts. There are  
10 similar theories and the lodestar should be awarded. And I  
11 have a proposed order. Counsel has seen it so...

12 THE COURT: And that has factual findings?

13 MS. LONNQUIST: It doesn't. I left blank.

14 THE COURT: We need some.

15 MS. LONNQUIST: Okay. Yes, you do.

16 THE COURT: Because I need factual findings about  
17 the reasonableness of your fees, any factual findings --  
18 there needs to be a host of factual findings.

19 So even though I'm going to rule from the bench,  
20 what I'd like to do is have -- and Davis can submit their  
21 own as well, even though they may not be happy with what I'm  
22 about to say. Both parties can submit them.

23 MR. LEMLY: Can I speak just very briefly for about  
24 two minutes, Your Honor?

25 MS. LONNQUIST: Uh-huh, we've heard that before.

1 THE COURT: Ms. Lonquist.

2 MS. LONNQUIST: I'm sorry. That two minutes always  
3 gets me, Your Honor.

4 THE COURT: No. It's usually --

5 MS. LONNQUIST: Two questions; two minutes.

6 THE COURT: It's usually I only have two questions.  
7 But Mr. Lemly is not unique in not always being accurate in  
8 that prediction so...

9 MR. LEMLY: My wife says the same thing about my  
10 time, when I'm going to come home. So all of the evidence  
11 for Eden Rennie and Golob and Costas and whatever, you know,  
12 go basically to the concept of comparators. It clearly all  
13 goes to the race and retaliation -- we're treating her, Ms.  
14 Bright, differently than we did these other people. That's  
15 why we deposed -- those had nothing to do with accommodation  
16 on that.

17 The second thing is Ms. Bright, I -- has alluded to  
18 what Russell's theory was. And obviously she doesn't know  
19 anything about it. But let me just reject that.

20 Russell's theory was we do not want to settle a case  
21 where an employee has brought claims of race discrimination  
22 and retaliation based on support from minorities. That has  
23 a high moral sting, and that's why Russell did not want to  
24 settle this case.

25 THE COURT: And that's probably why they'll appeal.

1 MR. LEMLY: Pardon?

2 THE COURT: And it's probably why they'll appeal.

3 MR. LEMLY: You know, maybe; maybe not. We will  
4 see. But they --

5 THE COURT: Yeah.

6 MR. LEMLY: But they prevailed on these claims.  
7 They see the failure to accommodate, if that was all that  
8 was involved in this case, Russell clearly would have  
9 settled this case long ago because they see that as a  
10 different order of magnitude in terms of social stigma, the  
11 gravamen of --

12 THE COURT: Yeah.

13 MR. LEMLY: -- that kind of claim. And so it was  
14 not -- no one ever thought this would be a way to reduce  
15 attorney's fees.

16 It strictly had to do with this woman has brought  
17 claims of race discrimination and retaliation against us.  
18 We don't think we retaliated against her. We don't think we  
19 treated her differently because of her race. And therefore  
20 we're not willing to settle that case. And that is the only  
21 reason this case went forward to trial, so.

22 THE COURT: Okay.

23 MR. LEMLY: Thank you very much, Your Honor. I  
24 don't think I was much more than two minutes.

25 THE COURT: No. I think for -- I was about to say

1 for you that was actually really pretty accurate, but don't  
2 take that the wrong away.

3 MR. LEMLY: All right.

4 THE COURT: Okay. Well, you know, this is one of  
5 those situations where there's kind of pluses and minuses  
6 for both sides on this.

7 It's interesting that the Chung -- or Van Pham  
8 versus City of Seattle case favorably cites the Bowers case,  
9 which as most Washington State Supreme cases. And the part  
10 there is that I find interesting is to the extent, if any,  
11 that the hourly rate underlying the lodestar fee,  
12 comprehensive allowance for the contingent nature of the  
13 availability fees, no further adjustment duplicating that  
14 allowance should be made, and that's in relationship to the  
15 risk factor.

16 So what that's saying is if I find -- which I do --  
17 that Ms. Lonquist's \$550 rate doesn't, in part, incorporate  
18 the contingent nature of her case, then I cannot take into  
19 account in a multiplier fashion any additional risk above  
20 that. That seems to be what Bowers says. And I fear that  
21 it would be an error for me to multiply on that. So I just  
22 wanted to kind of address that first. I'm sorry. That was  
23 a little bit out of order.

24 Here's -- I think that this is clearly from a common  
25 core of facts. I don't think these were discrete severable

1 claims that were unrelated in that nature under the Hensley  
2 case. I think that these are related legal theories.

3 The evidence as to each of the theories was related  
4 to defense's were in large part, I think, related -- I think  
5 Ms. Lonquist has got a good argument -- that part of the  
6 facts that were trying to paint the plaintiff in an  
7 unfavorable light related to whether or not there was truly  
8 a need to accommodate her or whether or not she actually had  
9 been fired or the decision to fire her had been made in  
10 August. And that's -- that was why I didn't grant  
11 plaintiff's summary judgment on their failure to  
12 accommodate, was because I said there's an issue of fact as  
13 to whether or not the decision to fire her had been made in  
14 August.

15 Well, because of that, that necessarily makes all  
16 the evidence regarding the decision to fire her relevant to  
17 the failure to accommodate. That makes this a common core  
18 of facts.

19 So the texts that she sent deal with the decision to  
20 fire her; the relationship, the one-night stand that she  
21 apparently had relates to the decision to fire her. All  
22 those facts that we heard now relate to the decision to fire  
23 her, which in my view was Russell's only defense to a  
24 failure to accommodate; because Russell was otherwise  
25 admitting we did not accommodate.

1           And so that's what brings these facts together, as I  
2 see them. So because of that, I don't think there was an  
3 obligation to segregate the fees on some kind of  
4 claim-by-claim basis. And I don't view them as a series of  
5 discrete claims.

6           And I'm also -- I think that the hourly rate of Ms.  
7 Lonquist and her colleagues were appropriate. I think the  
8 two declarations regarding -- from what I don't think is in  
9 dispute -- are experts and certainly people with significant  
10 knowledge about that -- and I found them helpful -- go to  
11 support that and not sure they're represented in the -- or  
12 referenced in the factual findings. So I think those hourly  
13 rates are appropriate.

14           I don't think that there should be a reduction for  
15 any kind of lack of success because I do think it's  
16 important to take into consideration how little that they  
17 were being offered from the other side, how -- because that  
18 goes to well, geez, if you're only going to -- if you settle  
19 and you get \$50,000; and then you win and you get 475 plus  
20 your fees, that's just a tremendous difference. Even if  
21 their last offer was 350, without -- which included fees,  
22 they did better than they were hoping to by settling, by  
23 far.

24           And I see this trial, candidly, as a win for  
25 plaintiffs. I know that defense sees this as a -- kind of

1           their -- they've got a partial victory. But I guess I just  
2           don't see it that way when she's walking out of here with  
3           475, which actually is more than the severance agreements  
4           that her colleagues were getting. She came out of this  
5           better than they did.

6                       And so I'm not going to reduce this based on any  
7           kind of lack of success quality. And, again, as I said, the  
8           contingency fee incorporates the quality of service. I  
9           think Mr. Lemly had good arguments there, that she spent  
10          more time on things that she thought she was getting paid  
11          for that time. So I'm not going to give any multiplier at  
12          all. And so I just don't think one is warranted by  
13          either -- by either of the factors that I would normally  
14          look at in terms of the risk or the -- I'm sorry -- the  
15          nature of success or the quality of work performed.

16                      And so I think on balance, the nature of success  
17          ends up being about a wash. They won. The other side won  
18          on some claims. She succeeded. But the nature of the  
19          success was not so the contingent nature. I just -- anyhow,  
20          I think that that ends up being a wash for both sides. And  
21          the quality of work is what I would expect from someone  
22          that's 550 an hour.

23                      I do have some issues with the motion for fees  
24          itself. I personally am looking at that, was struck at how  
25          much time Ms. Lonquist was spending researching the issues

1 herself. And I think that personally that's time that  
2 someone with a much lower billable rate should be able to  
3 do. And someone with Ms. Lonquist's experience shouldn't  
4 need to spend the time that she did doing that legal  
5 research as well.

6 So we've got a reduction of the \$11,000 or so in  
7 duplicate fees. I want that to be reflected. And then I'm  
8 going to reduce the -- what did they end up being -- the  
9 request for the motion for fees?

10 MS. LONQUIST: The post trial fee --

11 THE COURT: It was 40 something at some point.

12 MS. LONQUIST: It was \$52,935.

13 THE COURT: All right. I'm going to reduce that  
14 down to \$30,000. And I know these can be expensive motions  
15 to bring. But honestly, I think even \$30,000 is a bit  
16 generous. I think 30,000 is reflective of what would be  
17 appropriate, considering who should have spent the time on  
18 research; the fact that similar briefs have been filed. I  
19 don't believe this is purely a cut-and-paste job; I agree  
20 with that. But certainly a lot of the cases relate to each  
21 other, right? You don't have to start from scratch.

22 MS. LONQUIST: True.

23 THE COURT: As we would say at my old firm, why  
24 reinvent the wheel, right? So I don't think the wheel was  
25 reinvented on this. I think the wheels were used from other

1 cars to further drive that horrible analogy into the ground.

2 So that's where I come out on that. And I think the  
3 cost, there's no reason to reduce the cost either. You  
4 know, frankly, when you throw tens of thousands of pages at  
5 someone, someone is going to have to review them, and you  
6 don't know what part of the case it's going to help. Even  
7 though only a thousand or so ended up being, you know, trial  
8 related, you've still got to review them. And, presumably,  
9 defense counsel reviewed them before producing them as well  
10 to make sure they're relevant and to make sure there wasn't  
11 a privilege issue.

12 So both sides are spending time reviewing those  
13 documents. So I think that the fees for the paralegal in  
14 that instance were appropriate. And if there's specific --  
15 and I don't think that there was specific costs that were  
16 being called out. So otherwise, I'm awarding the cost. But  
17 there's need to be a significant number of additional  
18 findings in terms of the reasonableness of fees and the  
19 things that I've gone through to explain --

20 MS. LONNQUIST: All right.

21 THE COURT: -- why I'm coming out with what I'm  
22 coming out. So really we should be looking at a fee award  
23 in that \$900,000 range when all the math is done.

24 MS. LONNQUIST: Okay.

25 THE COURT: Okay.

1 MS. LONNQUIST: Yep. Thank you, Judge. And when do  
2 you want --

3 THE COURT: So well argued as always from you guys.  
4 What was it, Ms. Lonquist?

5 MS. LONNQUIST: When do you like the -- when would  
6 you like the findings of fact?

7 THE COURT: Up to you. It's your money.

8 MS. LONNQUIST: It's my money, yes. Okay.

9 THE COURT: You're not getting free judgment  
10 interest so you know when you --

11 MS. LONNQUIST: Yeah, okay. I got it. Thank you.

12 THE COURT: All right, everybody. Nice to see you  
13 all again.

14 MR. LEMLY: All right.

15 THE COURT: And you have a fantastic weekend.

16 (End recording at 2:57 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 )ss  
COUNTY OF SNOHOMISH )

I, the undersigned Washington Certified Court Reporter, hereby certify that the foregoing transcript of the audio recording was transcribed under my direction;

That the transcript of the audio recording is a full, true and correct transcript to the best of my ability; that I am neither attorney for nor a relative or employee of any of the parties to the action or any attorney or counsel employed by the parties hereto nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of February, 2015.

\S\CHRISTINA ATENCIO

\_\_\_\_\_  
Washington Certified Court Reporter No. 2749

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