UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JIN ZHU,

Plaintiff,

v.

NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT - ESD 171,

Defendant.

NO. 2:15-CV-00183-JLQ

ORDER RE: MOTION FOR ADVERSE TAX CONSEQUENCES, PREJUDGMENT INTEREST, AND ATTORNEYS' FEES AND COSTS

I. Introduction/Summary of the Case

On December 7, 2015, Plaintiff Jin Zhu ("Plaintiff") filed an Amended Complaint alleging several claims against Defendant North Central Educational Service District - ESD 171 ("Defendant" or "ESD 171"): (1) race discrimination in violation of 42 U.S.C. § 1981 based on the failure to hire Plaintiff for the Math-Science Specialist position; (2) race discrimination in violation of 42 U.S.C. § 1981 based on the failure to hire Plaintiff for the Refurbishment Assistant position; (3) retaliation in violation of 42 U.S.C. § 1981 based on the failure to hire Plaintiff for the Math-Science Specialist position; (4) retaliation in violation of 42 U.S.C. § 1981 based on the failure to hire Plaintiff for the Refurbishment Assistant position; (5) retaliation in violation of the Washington Law Against Discrimination (WLAD) based on the failure to hire Plaintiff for the Math-Science position as retaliation for his prior discrimination lawsuit against the Waterville School District; (6) retaliation in violation of the Washington Law Against Discrimination (WLAD) based on the failure to hire Plaintiff for the Refurbishment Assistant position as retaliation for his prior discrimination lawsuit against the Waterville

School District; (7) race discrimination in violation of WLAD based on the failure to hire Plaintiff for the Math-Science Specialist position; (8) race discrimination in violation of WLAD based on the failure to hire Plaintiff for the Refurbishment Assistant position; (9) blacklisting based on ESD 171's alleged communications with other school districts to attempt to influence those school districts to not hire Plaintiff; and (10) violation of the Washington Public Records Act ("PRA"). *See* (ECF No. 19 at 13-19).

On August 22, 2016, the court issued a Memorandum Opinion and Order re: Motions for Summary Judgment. (ECF No. 74). In the Memorandum Opinion, the court dismissed all of Plaintiff's federal claims brought under 42 U.S.C. § 1981, dismissed the WLAD disparate impact claim, dismissed the WLAD retaliation claim based on the Refurbishment Assistant position, and found ESD 171 violated the PRA. (ECF No. 74 at 38). The dismissal of the federal claims left pending only state law claims. ESD 171 did not move to dismiss this action based upon lack of jurisdiction. The court exercised its discretion pursuant to 28 U.S.C. 1367 and retained supplemental jurisdiction of the remaining state law claims in view of the history of the case and the impending trial date.

On September 12, 2016, this matter proceeded to a jury trial on the following state law claims: (1) WLAD retaliation based on the failure to hire Plaintiff for the Math-Science Specialist position; (2) WLAD race discrimination based on the failure to hire Plaintiff for the Math-Science Specialist position; (3) WLAD race discrimination based on the failure to hire Plaintiff for the Refurbishment Assistant position; and (4) the blacklisting claim. At the close of Plaintiff's case-in-chief, ESD 171 orally moved for judgment as a matter of law on all claims. The court dismissed the blacklisting claim and the three WLAD claims were submitted to the jury.

On September 16, 2016, the jury returned a verdict finding for ESD 171 on the WLAD race discrimination claims, but finding for Plaintiff on the WLAD Math-Science Specialist retaliation claim. *See* (ECF No. 114). The jury awarded Plaintiff "$450,000 + legal fees" on the WLAD retaliation claim. (ECF No. 114 at 1).

On September 21, 2016, the court issued an Order re: PRA Penalties, Motion for

Sanctions, Dismissing Blacklisting Claim, Directing Entry of Judgment. (ECF No. 116). The court found the penalty period for the PRA violation totaled 609 days of wrongful withholding. (ECF No. 116 at 4). After addressing the applicable factors, the court set a $2.00 per day penalty. *See* (ECF No. 116 at 5). The total PRA penalty was $1,218.00.

On September 29, 2016, Plaintiff filed a Motion for Adverse Tax Consequences, Prejudgment Interest, and Attorneys' Fees and Costs. (ECF No. 125). Plaintiff's attorneys Matthew Crotty (hereinafter Crotty) and Michael Love (hereinafter Love) submitted a declaration in support of the Motion. (ECF No. 125-1); (ECF No. 125-2); (ECF No. 126). Counsel also submitted declarations from three local attorneys in support of the Motion. (ECF No. 125-3); (ECF No. 125-4); (ECF No. 125-5). Both Crotty and Love submitted supplemental declarations explaining their time recording system. (ECF No. 142-1); (ECF No. 142-2). ESD 171 responded to the Motion. (ECF No. 148). Plaintiff filed a Reply (ECF No. 151) and supplemental declarations from counsel (ECF No. 150-1); (ECF No. 150-2). Counsel for ESD 171 submitted a declaration opposing the Reply. (ECF No. 152). ESD 171 moved for oral argument on Plaintiff's Motion. (ECF No. 139). The court heard oral argument on Plaintiff's Motion (ECF No. 125) on December 7, 2016. On December 8, 2016, Crotty submitted a supplemental declaration addressing issues arising at the December 7, 2016, hearing. (ECF No. 153).

On February 28, 2017, the court certified a question of local law to the Washington State Supreme Court. (ECF No. 158). On November 9, 2017, the Washington State Supreme Court issued a decision finding RCW 49.60.210(1) establishes a cause of action for prospective employees against prospective employers for retaliating against the prospective employee for their protected activity in a different employment. *See Zhu v. North Central Educational Service District-ESD 171*, 189 Wn.2d 607 (2017). The Washington State Supreme Court granted Plaintiff's request for reasonable attorney fees pursuant to Washington State Rules of Appellate Procedure 18.1(a) and RCW 49.60.030(2), but "defer[red] to the district court to determine the appropriate amount of fees." (*Id*. at 623).

On November 15, 2017, Crotty and Love submitted supplemental declarations. (ECF No. 163); (ECF No. 165). Attorney Andrew Biviano, who also represented Plaintiff during the certification to the Washington State Supreme Court, submitted a declaration seeking recovery of his fees, an associate's fees, and a paralegal's fees. (ECF No. 164). On November 27, 2017, counsel for ESD 171 submitted a declaration objecting to some of the newly requested time. (ECF No. 166). On November 30, 2017, Plaintiff submitted a brief and declarations from Crotty and Love in response to the declaration of defense counsel. (ECF No. 167).

On December 27, 2017, the court denied ESD 171's request for additional oral argument. (ECF No. 172). This Order memorializes the court's rulings on the Motion.

II. Discussion

WLAD allows recovery of "the actual damages sustained by the [plaintiff]... together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended." RCW 49.60.030(2).

The PRA states: "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record ... shall be awarded all costs, including reasonable attorney fees, incurred with such legal action." RCW 42.56.550(4).

A. Adverse Tax Consequences

Plaintiff requests an award of $126,401.00 to offset the federal income taxes he claims he will owe on the $450,000 jury verdict. (ECF No. 125 at 2-3). ESD 171 objects to any award to offset tax consequences. (ECF No. 148 at 17-22).

Citing a Tenth Circuit case and a federal district court case, the Washington Supreme Court has held "WLAD allows offsets for additional federal income tax consequences" because "WLAD incorporates remedies authorized by the federal civil rights act and that statute has been interpreted to provide the equitable remedy of offsetting federal income tax consequences of damage awards." *Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 215

(2004) (citing *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984); *E.E.O.C. v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998)). It is not necessary to include a request for an offset of tax consequences in the complaint. *See Hirata v. Evergreen State Limited Partnership No. 5*, 124 Wn. App. 631, 639 (2004). A request to offset adverse tax consequences is analogous to a motion for attorneys' fees by a prevailing plaintiff. (*Id*. at 640).

The Ninth Circuit recently joined other federal circuits and held adverse tax consequences were recoverable under federal law. *See Clemens v. Centurylink Inc.*, 874 F.3d 1113 (9th Cir. 2017). In doing so, the Ninth Circuit stated "we do not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional award to offset tax consequences." (*Id*. at 1117) (quoting *Eshelman v. Agere Systems Inc.*, 554 F.3d 426, 443 (3d Cir. 2009)). "In any case, the party seeking relief will bear the burden of showing an income-tax disparity and justifying any adjustment." *Clemens*, 874 F.3d at 1117; *see also*, *Eshelman*, 554 F.3d at 443.

An award to offset tax consequences is inappropriate where there is "difficulty in determining the proper gross up." *Clemens*, 874 F.3d at 1117; *see also*, *Lane v. Grant County*, No. CV-11-309-RHW, 2013 WL 5306986 at **10-11 (E.D. Wash. September 20, 2013) (declining to award for tax consequences because the tax expert's declaration failed to explain his methodology for arriving at his conclusion); *Argue v. David Davis Enterprises, Inc.*, No. 02-9521, 2009 WL 750197 at **26-27 (E.D. Penn. March 20, 2009) (declining to award an offset for tax consequences because the tax expert's declaration failed to provide a "reliable estimate" of the negative tax consequences because it contained speculation and used the wrong tax year).

ESD 171 argues the fact evidence was not presented to the jury forbids any award. ESD 171's argument is misplaced. The case ESD 171 relies on, *Hanson v. County of Kitsap, Wash.*, No. 13-5388 RJB, 2015 WL 3965829 at *10 (W.D. Wash. June 30, 2015), is not persuasive because the Western District of Washington did not cite or discuss Washington case law which holds such awards are equitable and do not need to be

presented to the jury. *See Hirata* 124 Wn. App. at 639. Accordingly, the court rejects ESD 171's threshold argument.

ESD 171 also argues Plaintiff cannot receive an offset for adverse tax consequences because the jury award did not state what amount was "for economic loss as opposed to general damages." (ECF No. 148 at 18). The court's jury instructions, approved without objection by Plaintiff's counsel, permitted the jury to award damages for, *inter alia*, "[t]he mental and emotional pain and suffering Plaintiff may have experienced in the past and will suffer in the future." (ECF No. 102 at 11). Because the jury did not segregate damages, it is impossible to know what amount the jury awarded for non-economic damages. The jury did not segregate damages for back-pay and front-pay, and the court will not speculate as to the jury's calculations. For these reasons, the court finds it is not appropriate to award an offset for tax consequences.

Even if the segregation of damages were feasible, Plaintiff has not carried his burden to present equitable arguments compelling an award of tax consequences based on the facts of this case. *See Clemens*, 874 F.3d at 1117; *Argue*, 2009 WL 750197 at *27. Additionally, the West declaration was based on the 2016 tax code and has not been supplemented.

B. Prejudgment Interest

Plaintiff argues he should be awarded $17,025.00 in prejudgment interest based on economist West's determination of back pay damages and a 2.401% interest rate. (ECF No. 125 at 3); (ECF No. 125-6 at ¶18). ESD 171 argues Plaintiff did not establish at trial which portion of the jury award was for past wages compared to future wages and the interest accruing on past wages. (ECF No. 148 at 16). For these reasons, ESD 171 asserts the claim for prejudgment interest is unliquidated and cannot be awarded. (ECF No. 148 at 16). In Reply, Plaintiff argues ESD 171 presented no evidence to contest the post-trial West declaration, and the West declaration provides sufficient clarity to make the claim liquidated. (ECF No. 151 at 5).

"Prejudgment interest awards are based on the principle that a defendant 'who

retains money which he ought to pay to another should be charged interest upon it.'" *Hansen v. Rothaus*, 107 Wn.2d 468, 473 (1986) (quoting in part *Prier v. Refrigeration Engineering Co*., 74 Wn.2d 25, 34 (1968)). "[W]hether prejudgment is awardable depends on whether the claim is a liquidated or readily determinable claim, as opposed to an unliquidated claim." (*Id*. at 472). A claim is considered liquidated "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." (*Id*. at 472-73) (quoting *Prier*, 74 Wn.2d at 32). A claim is unliquidated "where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed." *Prier*, 74 Wn.2d at 33.

In the context of WLAD, a claim is unliquidated where the trier of fact is required to determine what amount of back pay is reasonable or is instructed to deduct from damages the plaintiff's failure to mitigate. *See Curtis v. Security Bank of Washington*, 69 Wn. App. 12, 20 (1993); *Pannell v. Food Services of America*, 61 Wn. App. 418, 449 (1991), *disagreed with on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 306-07 (1995). On the other hand, claims are liquidated where the back pay damages are based on the plaintiff/ex-employee's wages at the time of termination. *See Curtis*, 69 Wn. App. at 20; *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 532 (1992), *disagreed with on other grounds by Mackay*, 127 Wn.2d at 306-07.

The court instructed the jury in this matter to "award such sum as you find will reasonably and fairly compensate [Plaintiff] for any damages you determine were caused by the Defendant ESD 171's acts." (ECF No. 102 at 11). The jury was instructed to consider "[t]he reasonable value" of "lost past earnings and fringe benefits" and "lost future earnings and fringe benefits." (ECF No. 102 at 11). The court also instructed the jury to reduce the award of damages "by the amount of the damages resulting from the failure to mitigate." (ECF No. 102 at 11). Because there were a number of discretionary factors for the jury to consider, any amount the jury awarded for back pay cannot be

readily determined. For example, the jury was not asked to indicate if it found a failure to mitigate damages or if so, what amount it reduced from the award. It is unreasonable to speculate or assume what the jury found on these issues.

Because Plaintiff was never an employee of ESD 171, it is unclear what his wages would have been had he been hired. West's declaration states he used the salary for Andrew Hickman (the person hired for the Math-Science Specialist position) as a basis of what Plaintiff's salary would have been. *See* (ECF No. 125-6 at ¶7 and p. 9). However, West does not state whether the salary for the Math-Science Specialist position was fixed or the basis for his assumption that Plaintiff would have received the same salary. It is uncertain Plaintiff would have received the exact same salary as Hickman. For the foregoing reasons, the court finds an award of prejudgment interest is not appropriate.

C. Attorneys' Fees and Lodestar Multiplier

Under Washington law, calculating a reasonable attorney fee begins with determining the lodestar. **First**, the court determines "the reasonable number of hours in securing a successful recovery for the client... exclud[ing] from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims." *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998). The attorney seeking the award "must provide contemporaneous records documenting the hours worked" which "must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work." (*Id.*) (quotation and citation omitted).

Second, the court determines "the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services." (*Id.*). "The attorney's usual fees is not ... conclusively a reasonable fee and other factors may necessitate an adjustment." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597 (1983). The court may consider the attorney's usual billing rate, "the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case." (*Id.*). When multiple

attorneys are involved, the court must calculate each attorney's hourly rate. (*Id*.).

Lastly, the court multiplies "the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result." (*Id*.). The result is the lodestar fee. The lodestar fee may "in rare instances, be adjusted upward or downward in the trial court's discretion." (*Id*.). In assessing the reasonableness of a fee request, a "vital" consideration is the relationship between amount in dispute and the fees requested. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150 (1993). "[T]he party seeking fees bears the burden of proving the reasonableness of the fees." *Mahler*, 135 Wn.2d at 433-34.

1. Hours Claimed

In support of the Motion, Plaintiff's counsel each submitted a declaration with an attached billing statement. *See* (ECF No. 125-1); (ECF No. 125-2). Crotty's declaration provides two billing statements reporting 521.50 hours spent (as of September 22, 2016) and an additional 22.30 hours spent (as of September 29, 2016). (ECF No. 125-1 at 42-60). Attorney Love recorded 338.6 hours as of September 24, 2016. (ECF No. 125-2 at 17-24). Each attorney submitted an updated declaration with the Reply. *See* (ECF No. 150-1); (ECF No. 150-2). Crotty reported an additional 55.50 hours through October 31, 2016. (ECF No. 150-1 at 24-26). Love reported an additional 9 hours through October 31, 2016. *See* (ECF No. 150-2 at 14).

In his November 13, 2017, declaration Crotty reported an additional 140.10 hours spent from December 7, 2016, to November 13, 2017. (ECF No. 163 at ¶5). In his November 13, 2017, declaration Love reported an additional 20.4 hours spent on this matter. (ECF No. 165 at ¶2). Attorney Andrew Biviano submitted a declaration recording 114.35 hours he spent, along with 1.8 hours by an associate, and 9.0 hours by a paralegal, litigating the certification of this matter to the Washington State Supreme Court. (ECF No. 164 at ¶13). Crotty submitted a declaration on November 30, 2017, which claimed an additional 2.7 hours responding to the latest objections of defense counsel. (ECF No. 167-2 at ¶6).

The total amount of time recorded, as of November 30, 2017, was **742.10 hours**

for Crotty, **368.00 hours** for Love, and **114.35** specifically for Biviano (with an additional 10.8 hours spent by his firm).

ESD 171 made numerous objections, both general and specific, to the hours claimed. Those objections are addressed below.

a) General Objections

The Washington Supreme Court has held "[t]he hours reasonably expended must be spent on claims having a common core of facts and related legal theories." *Pham*, 159 Wn.2d at 538 (internal quotation marks and citation omitted). Further, "[t]he court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." (*Id*.). The Supreme Court holds attorneys should not recover for work spent on "distinctly different claims for relief that are based on different facts and legal theories." *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983). Post-trial fees are recoverable under WLAD because they are recoverable under the Civil Rights Act of 1964. *See McGrath v. County of Nevada*, 67 F.3d 248, 253 (9th Cir. 1995); RCW 49.60.030(2) (authorizing recovery of "reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964").

Plaintiff's counsel assert Plaintiff should recover for all hours they spent on this case because all of the claims except the PRA claim are interconnected and based on related legal theories and facts. (ECF No. 151 at 9). ESD 171 argues counsel should not recover for all time in this matter because Plaintiff did not succeed on the majority of his claims and those other claims are unrelated to the successful claims. (ECF No. 148 at 7-9).

Plaintiff's claims can be put into the following categories: (1) federal and state law claims related to the Math-Science Specialist position; (2) federal and state law claims related to the Refurbishment Assistant position; (3) blacklisting claim related to positions Plaintiff applied to at other school districts; and (4) PRA claim concerning the request for ESD 171 programs related to affirmative action. Since Plaintiff prevailed on the WLAD

retaliation claim for the Math-Science Specialist position and PRA claim, there is no dispute Plaintiff is entitled to recover for counsels' time spent on those claims.

Although the parties have often overlooked or failed to separate out the claims in briefing, the federal and state law retaliation and discrimination claims are distinct as demonstrated in the Memorandum Opinion and Order re: Motions for Summary Judgment. *See* (ECF No. 74); *Zhu*, 189 Wn.2d at 611. The 42 U.S.C. § 1981 claims were analyzed on the basis of whether a policy or practice caused the discrimination or retaliation. *See* (ECF No. 74 at 10-14). On the other hand, there was no such policy or practice requirement for WLAD claims. *See* (ECF No. 74 at 15-16). The federal law claims were based on different legal theories and are not directly connected to the state law claims. Similarly, the 42 U.S.C. § 1981 claims required a different factual basis to support those claims than the state law WLAD claims. Evidence of a practice or policy was necessary for the federal law claims, but was immaterial for the WLAD claims. For these reasons, the federal claims are separate and distinct from the successful WLAD retaliation claim.

The Blacklisting claim is also factually and legally distinct from the WLAD retaliation claim. The Blacklisting claim alleged ESD 171 communicated with other potential employers to prevent them from hiring Plaintiff. The facts supporting this claim are independent of the hiring decision for the Math-Science Specialist position and occurred after ESD 171 decided not to hire Plaintiff for that position. Additionally, Plaintiff's successful WLAD retaliation claim did not share any elements with the Blacklisting claim. The claims are both factually and legally distinct from the successful claims.

Plaintiff's WLAD discrimination and retaliation claims based on the Refurbishment Assistant position are a closer call. The Refurbishment Assistant position opened and was filled almost one year after the Math-Science Specialist position. The two positions are factually distinct as there was no interview panel for the Refurbishment Assistant position, and other than Plaintiff, no candidates for the Math-Science Specialist

position applied for the Refurbishment Assistant position. The court dismissed the Refurbishment Assistant retaliation claim on summary judgment, but the race discrimination claim proceeded to the jury.

The race discrimination claim is legally distinct because retaliation required proving the decision to not hire Plaintiff was based on Plaintiff's prior lawsuit, while the race discrimination claim required proving Plaintiff's race was a substantial factor in the decision not to hire Plaintiff for the Refurbishment Assistant position. Because it was based on a different legal theory and different facts from the Math-Science retaliation claim, Plaintiff cannot recover for counsels' time spent on the Refurbishment race discrimination claim.

The Refurbishment Assistant retaliation claim is based on the same legal theory as the successful Math-Science retaliation claim. Additionally, Plaintiff's prior lawsuit against Waterville was relevant to both retaliation claims. For the Refurbishment retaliation claim, Plaintiff had to show a substantial factor in the decision to hire the first person who applied for the job was the fact of Plaintiff's prior lawsuit. For the Math-Science position, Plaintiff had to show a substantial factor in the interview panel's decision to recommend Hickman and the decision to hire Hickman was Plaintiff's prior lawsuit. The interconnectedness of facts and legal theory allows Plaintiff to recover for counsels' time spent on the unsuccessful Refurbishment retaliation claim.

The final attorney fee issue for consideration by the court is Plaintiff's WLAD race discrimination claim based on the Math-Science Specialist position. As discussed above, WLAD race discrimination claims are legally distinct from retaliation claims. However, the Math-Science discrimination claim shares some common facts with the retaliation claim regarding Plaintiff's application and interview for the Math-Science Specialist position, the other individuals who interviewed, and the interview panelists. Given the interconnected facts, Plaintiff's counsel is not categorically barred from recovering on the Math-Science race discrimination claim. However, a reduction to the recoverable hours is appropriate to account for this unsuccessful claim.

The billing documents submitted by Plaintiff's counsel do not segregate time billed on the basis of which claim counsel was working on. *See* (ECF No. 125-1); (ECF No. 125-2); (ECF No. 150-1); (ECF No. 150-2). ESD 171 asserts the court should not segregate fees for unsuccessful claims because it is Plaintiff's counsel's responsibility. (ECF No. 148 at 13). After the December 7, 2016, hearing, Plaintiff's counsel submitted a supplemental declaration with his assessment as to how much time he spent on the federal claims. *See* (ECF No. 153 at 4). Crotty's declaration does not address time spent on the other unsuccessful claims. Plaintiff should not recover attorney fees for most of the unsuccessful claims and there is insufficient evidence to allow the court to segregate work done by claim, an across-the-board reduction to all reported time is appropriate. The court finds a **20% reduction** to all hours is an appropriate reduction to account for the time spent on unsuccessful claims. However, this reduction does not apply to hours spent on certification to the Washington State Supreme Court as that litigation did not involve any of the unsuccessful claims.

ESD 171 also argues the requested attorneys' fees are disproportionate to the amount in controversy and should be reduced. (ECF No. 148 at 11). ESD 171 asserts the over $650,000 sought by Plaintiff's counsel (as of October 2016), in addition to $180,000 counsel can allegedly seek from Plaintiff, is an arrangement "[n]ot many private clients would voluntarily agree to." (ECF No. 148 at 6 n.2). ESD 171 cites the *Hanson* case wherein the court reduced Crotty and Love's total hours by one-third because the court determined they were excessive. *See* (ECF No. 148 at 6); *Hanson*, 2015 WL 3965829 at **4-5. In *Hanson*, the court reduced the number of hours requested by Love, Crotty, and a third attorney because it found they were unreasonable: "[i]n the court's opinion, it is unreasonable to expect the defense to pay for three lawyers for Plaintiff. The case was simply not that complex." (*Id*. at *5). The *Hanson* court's finding is not relevant here because the court was commenting on the inclusion of three attorneys' hours, not the amount of hours spent in comparison to the relief sought. At trial herein, Plaintiff's expert testified Plaintiff had suffered over $1,000,000 in damages. Whether the court looks at

the amount sought or the $450,000 awarded by the jury, the court cannot say the requested fees are ***grossly*** disproportionate to the amount in controversy.

ESD 171 objects to Crotty's supplemental billing records because the document submitted "is a reconstruction of attorney Crotty's billing records." (ECF No. 152 at ¶5). Counsel for ESD 171 states he has requested the original billing records. (ECF No. 152 at ¶5). The table of fees in the letter to Plaintiff appears to have been copied from original billing records. *See* (ECF No. 150-2 at 24-26). The court finds no basis to find the documents submitted to be unreliable or altered.

b) Objections to Specific Entries

ESD 171 argues the billing statements of Plaintiff's counsel contains unnecessary, duplicative, and vague entries. (ECF No. 148 at 13); (ECF No. 149 at ¶¶13-17). The asserted vague entries appear to be a misreading of the entries by defense counsel. For example, ESD 171 argues a November 25, 2015 entry states 1.5 hours spent on "documents and analysis." (ECF No. 149 at ¶16). While the format of the billing statement might be confusing, the entry actually reads "Review email from Mr. Zhu re discovery documents and analysis." (ECF No. 142-1 at 7). It appears all of the alleged "vague" entries can be explained by reading the entry description as starting above the date and time when the description is longer than one line. As such, the court will not make any reductions for alleged vague entries.

ESD 171 also objects to "clerical/secretarial" work that is unnecessary for an attorney to perform. *See* (ECF No. 149 at 8-9). Plaintiff's counsel argues there is "no rule that deems such oral and written communication purely secretarial work." (ECF No. 150-1 at 7). Those entries are appropriate for a reduction because procuring a process server and maintaining office electronic files could be performed by a non-attorney at a lower hourly cost. It is unreasonable to compensate that time at attorney rates. The court reduces the hours expended by **2.5 hours** to account for Crotty's time on non-attorney tasks.

ESD 171 also challenges entries relating to travel time. *See* (ECF No. 149 at 9, 13,

15). From April 17, 2016 to April 20, 2016, Crotty stayed in Waterville during depositions in Ephrata, resulting in "about two hours of unnecessary travel" because, ESD 171 asserts, Crotty could have stayed in Ephrata for $100 a night rather than driving at $750 for each of two "unnecessary" trips. (ECF No. 149 at 9). ESD 171 argues this amounts to two hours in allegedly "unnecessary" travel time. Crotty explained he stayed at his client's house to minimize costs and traveled to and from Ephrata with Plaintiff. (ECF No. 150-1 at 8). The court disagrees with ESD 171 and rejects any reduction thereto.

Plaintiff's counsel also billed 2.5 hours for traveling from Spokane to Ephrata, and ESD 171 asserts it is only a 2 hour, 5 minute drive. (ECF No. 149 at 13 n.5, 15 n. 11). The court does not find this alleged discrepancy merits a reduction in hours. Internet estimates do not take into account the traffic on the day in question, or driving conditions.

ESD 171 objects to overlapping time found on both attorneys' billing records. *See* (ECF No. 149 at 10-12). The **first** objection is based on an entry made on June 12, 2016, where Crotty recorded 1.1 hours for "[r]eview Lynch declaration, follow up correspondence to Ms. Lynch re significance of endorsements, review Zhu/Hickman qualification chart." (ECF No. 142-1 at 13). ESD 171 mistakenly connected this entry with the previous entry for 2.7 hours on June 10, 2016: "[c]ontinue to work on MSJ statement of facts." *See* (ECF No. 149 at 10); (ECF No. 142-1 at 13). ESD 171 argues the review of the Lynch declaration "must be considered with attorney Love's time records that he spent a total of 12 hours preparing Ms. Lynch's declaration on June 9, 10, and 11, 2016." (ECF No. 149 at 10). Love reported working on the Lynch declaration on June 9, 2016, through June 12, 2016. (ECF No. 142-2 at 7). It appears Love did the initial work on the declaration and Crotty reviewed it. The court finds no overlapping work.

The **second** overlapping objection is based on a July 29, 2016, entry by Crotty for 2.5 hours to "[p]repare for and appear and attend summary judgment hearing, call to Mr. Zhu re debrief of hearing." (ECF No. 142-1 at 15). ESD 171 mistakenly stated the date of the entry as being July 28, 2016. *See* (ECF No. 149 at 10); (ECF No. 142-1 at 15). ESD

171 asserts this time must be considered with Love's reported 17.5 hours preparing for the summary judgment hearing on July 27, 28, and 29, 2016. *See* (ECF No. 149 at 10); (ECF No. 142-2 at 7). Love argued the summary judgment motions, so it is unlikely Crotty was preparing to argue the motions. Since the entry is grouped with attending the hearing and talking to his client after the hearing, it is difficult to determine how much time was spent on preparations. However, since the hearing itself lasted for nearly 2.5 hours, the court does not find a reduction in time to be warranted. *See* (ECF No. 56).

ESD 171's **third** objection relates to Crotty's recording of 1.0 hours on August 10, 2016, to "[a]ttend mediation, debrief same with Mr. Love." (ECF No. 149 at 10-11); (ECF No. 142-1 at 15). Love reported 7 hours of preparation for mediation on August 9 and 10, 2016, and 4.5 hours for "[a]ttendance at Mediation." (ECF No. 142-2 at 8). The difference in time is unexplained, and counsel did not indicate how long mediation actually lasted. The total amount of time reported by Love is unreasonably high. Accordingly, that time shall be reduced by **4 hours**.

The **fourth** objection is to an August 28, 2016, entry of 1.9 hours to "[a]nalyze Sattler deposition, online research re individuals who allegedly applied for Math and Science job in 2013, correspondence with attorney Love and Mr. Zhu re same." (ECF No. 149 at 11); (ECF No. 142-1 at 16). Love recorded 12.0 hours for reviewing the Sattler deposition on September 1, 3, and 6, 2016. (ECF No. 142-2 at 9). It appears Love did the majority of review of Sattler's deposition and it is unclear how much of the 1.9 block entry Crotty spent reviewing the deposition. However, reviewing Sattler's testimony was not tied to the successful claim since Sattler's testimony was only relevant to the Blacklisting claim, which as discussed *supra*, is not recoverable. The court rejects the **12 hours** claimed by Love and **1 hour** of Crotty's time.

The **fifth** objection relates to a September 6, 2016, entry by Crotty of 2.1 hours spent to "[r]eview Deb Howard report, continue to work on direct and cross examination questions, review WAC re McBride no report misconduct of Hickman." (ECF No. 142-1 at 18). ESD 171 asserts this must be considered in connection with Love's reporting of

2.0 hours on August 26, 2016, to review Howard's report. *See* (ECF No. 149 at 11); (ECF No. 142-2 at 8). It is unclear why both attorneys reviewed the report, although there is nothing inherently unnecessary about both attorneys doing so. The court does not find a reduction to these entries to be appropriate.

The **sixth** objection relates to a September 9, 2016, entry by Crotty for 1.2 hours to "[m]ake edits to McBride adverse direct examination." (ECF No. 149 at 11-12); (ECF No. 142-1 at 18). ESD 171 argues this should be evaluated in light of Love reporting 45.6 hours preparing for the adverse direct examination of McBride, Reister, and Sattler on September 7 through 11, 2016. (ECF No. 149 at 11-12); (ECF No. 142-2 at 9-10). ESD 171 also argues Love's block billing for this entry prevents an individual evaluation of the work spent on each direct examination. (ECF No. 149 at 11-12). Based on the way it is billed, the only appropriate way to segregate Love's time spent is by assuming equal time per witness (approximately 15 hours per direct examination). As previously discussed, Sattler's testimony was separate and unrelated to the Math-Science retaliation claim. Accordingly, the court will reduce Love's entry by **15 hours**. The court finds no basis to reduce Crotty's claim of editing, as editing his colleague's work is reasonable.

The **seventh** objection relates to Crotty reporting 12.1 hours on September 16, 2016 to "[w]ait for verdict, travel to court to respond to jury questions, attend jury delivery of verdict, debrief events with client and his family." (ECF No. 149 at 12); (ECF No. 142-1 at 18). ESD 171 asserts this should be compared with Love's records of 7.0 hours to "[w]ait for jury deliberations and attend court for questions from the jury and for the verdict." (ECF No. 149 at 12); (ECF No. 142-2 at 10). ESD 171 again mistakenly used the wrong entry, as Crotty's entry for September 16, 2016, is for 8.9 hours, and the 12.1 hour entry is from September 15, 2016, and relates to "[o]utline closing argument, prepare same, attend trial, deliver opening statement, debrief events with client and co-counsel." (ECF No. 142-1 at 18). Essentially, the difference is actually Crotty billing 1.9 hours more than Love for the same day. Because Crotty reported debriefing with Plaintiff and his family after the jury returned a verdict, there is a basis to justify Crotty spending

1.9 hours more on the case than Love.

ESD 171 objects to what it characterizes as several instances of "block billing." (ECF No. 149 at 10-12, 18). The alleged block billing constitutes a total of 59.8 hours, of which 5 hours are also alleged to be excessive, and the remaining 54.8 hours are overlapping on both attorneys' billing records (as addressed above). ESD 171 does not appear to argue that block billing is *per se* unrecoverable, and ESD 171 provided no authority supporting a blanket prohibition. However, because the court finds Plaintiff's counsel should not recover for some of the unsuccessful claims, the across-the-board reduction will appropriately account for block billing time spent on successful and unsuccessful claims.

ESD 171 also objects to several entries by Love it asserts are excessive. *See* (ECF No. 149 at 15-19). The hours recorded relate to preparation for mediation, reviewing exhibits, reports, and depositions, and preparing for direct examinations. The total amount of alleged excessive billing is 118 hours. The court finds reductions appropriate as follows. There are 16 hours directly related to reviewing the deposition of Scott Sattler, exhibits thereto, and preparing his direct examination not part of the 45.6 hours previously reduced. The court will not award any of this time because his testimony only related to the blacklisting claim and was not necessary to the jury verdict. Another 51.6 hours were claimed preparing the direct examinations of McBride, Reister, and Sattler in block billing. This amount is excessive, and includes time for Sattler which is not recoverable. Accordingly, the court reduces those hours by one-half to account for the excessive time and time spent on Sattler, resulting in 25.8 hours for preparation of direct examinations. Of the remaining 50.40 hours, the court will reduce it by one-third to account for excessive time spent, resulting in **33.6 recoverable hours**. In sum, the 118 hours alleged to be excessive are reduced to **59.4 recoverable hours**. ESD 171 also makes objections to three entries on Crotty's supplemental declaration based on alleged block billing totaling 11.9 hours. *See* (ECF No. 152 at ¶6). The court has herein above discussed and ruled on the issue with an across-the-board reduction to account for block

billing and time spent on unsuccessful claims.

ESD 171 objected to the amount of time recorded pursuing the instant Motion, arguing it is an unreasonable amount of time when both attorneys' time are combined. (ECF No. 149 at 12). By the court's count, Crotty recorded 39.9 hours (including 19.9 hours preparing the Motion and **not** counting an 8.5 hour block billing related to both ESD 171's Motion for Judgment as a Matter of Law and the fee petition) and Love recorded 32.5 hours (including the 25.5 hours on the Motion).

ESD 171 argues Love and Crotty reviewing each other's declarations is unreasonable because the drafting attorney was "perfectly capable of reviewing his own declaration." (ECF No. 152 at pp. 3, 6-7). It is not inherently unreasonable to have co-counsel review documents. However, reviewing a declaration in support of a fee request is unreasonable, as each attorney keeps their own billing records and would not be expected to provide meaningful review as they would not be familiar with the other's billing records. Because this was part of a block billing entry including making revision to the Reply brief, the court cannot separate the time spent on the review of co-counsel's declaration.

In total, Plaintiff's counsel reported 72.4 hours pursuing attorneys' fees. This is a large amount of time and resulting money award to counsel for simply preparing the request for fees. The court finds a reduction of one-half the time recorded appropriate for the attorney fees petition. Accordingly, the time spent is reduced from 39.9 for Crotty to **20.0 hours**, and from 32.5 to **16.25 hours** for Love.

Combining the time from the three declarations submitted prior to the December 7, 2016, hearing, Crotty claimed a total of 599.3 hours, which with reductions detailed above is reduced to 575.90. Love claimed a total of 347.6 hours in that same time period, which have been reduced to 241.75 for the reasons set forth above. After determining the reasonable hours spent on the PRA claim, the court will impose an across-the-board reduction to account for block billing and time spent on unsuccessful claims prior to the certification litigation.

In the declaration of counsel filed on November 2, 2016, ESD 171 challenges fees regarding declarations of Spokane attorneys. *See* (ECF No. 152 at ¶¶7-9). This objection will be addressed with the other costs since the fee at issue was charged by attorney Kenneth Kato, not Plaintiff's counsel.

c) PRA Attorneys' Fees

Counsel for ESD 171 separately objects to the number of hours reported by Plaintiff's counsel pursuing the PRA claim. *See* (ECF No. 149 at ¶¶24-32). ESD 171 asserts the hours spent are excessive. The hours reported for the PRA claim are included in the time reported above.

First, ESD 171 objected to what it counted as 4.5 hours by Crotty and 0.6 hours by Love spent in filing the Amended Complaint which added the PRA claim in "seven brief paragraphs." (ECF No. 149 at ¶25). This court's review shows Crotty reported 7.9 hours regarding the PRA claim between November 11, 2015, and December 7, 2015, including some time contained in block billing involving other non-PRA work. The court also finds Love reported 0.7 hours during the same time frame on the PRA claim. *See* (ECF No. 142-1 at 7-8); (ECF No. 142-2 at 5). When considering how the time was spent, the court finds no reduction is necessary. Crotty spent 1.0 hours researching the possible claim, 3.5 hours drafting, editing, and filing the Motion to Amend, and an additional 1.0 hours following up on the Amended Complaint before filing it. *See* (ECF No. 125-1 at 45).

Second, ESD 171 counts 33.1 hours from "billing records potentially involving the PRA claim before the filing of Plaintiff's motion for partial summary judgment." (ECF No. 149 at ¶27). The court reviewed Crotty's entries ESD 171 identified and found two entries on May 11, 2016, (totaling 0.6 hours) unrelated to the PRA claim and only 0.5 hours, instead of 1.0 hours on May 12, 2016, spent on the PRA claim. *See* (ECF No. 142-1 at 12). So, instead of 33.1 hours, the correct total is 32.0 hours spent between May 2, 2016, and May 12, 2016, preparing the PRA portion of the Motion for Partial Summary Judgment.

Next, ESD 171 calculates 67.6 hours "potentially" involving the PRA claim

between the filing of the Motion for Partial Summary Judgment and the filing of the Reply thereto. (ECF No. 149 at ¶28). The court reviewed the calculations ESD 171 made and found a few errors. Crotty did not spend 0.5 hours on June 3, 2016, working on anything related to the PRA claim. (ECF No. 142-1 at 13). The 0.8 hour entry on June 6, 2016, stated Crotty worked on reviewing public records received from Waterville School District; however, it is not clear this related to the PRA claim against ESD 171 as opposed to general information supporting the other claims. (ECF No. 142-1 at 13). The entry on June 9, 2016, suggests Crotty worked only 1.0 hours on the PRA claim, not 1.2 hours as claimed by ESD 171. (ECF No. 142-1 at 13). Crotty spent 1.1 hours on June 12, 2016, working on issues unrelated to the PRA claim. (ECF No. 142-1 at 13). The 0.2 hours on June 14, 2016, were spent reviewing a declaration that did not relate to the PRA claim. (ECF No. 142-1 at 13). By the court's count, the total number of hours potentially spent on the PRA claim in this time period are 64.8 hours.

Lastly, ESD 171 identifies 12.2 hours spent "potentially" involving the PRA claim between the court's Order finding a PRA violation and Plaintiff's memorandum on penalties. (ECF No. 149 at ¶29). The court has reviewed these identified times and makes the following observations. ESD 171 missed 1.0 hours reported by Crotty on August 23, 2016, that included time spent discussing a "PRA expert." (ECF No. 142-1 at 16). ESD 171 identified 2.5 hours on August 25, 2016, and 4.3 hours on August 26, 2016. (ECF No. 149 at ¶29). However, in actuality, 3.4 hours were spent on August 25, 2016, regarding the PRA claim, and 3.8 hours on August 26, 2016, meaning ESD 171 under-calculated the total time spent by 0.4 hours. ESD 171 did not identify 0.4 hours on September 5, 2016, spent on the PRA claim. In total, there were 14.0 hours spent during this timeframe on the PRA claim.

Because many of the entries were block billing with time spent on the other claims, it is impossible to determine with specificity how much time was exclusively spent on the PRA claim. The total time recorded potentially involving the PRA claim is 117.2 hours, including 116.5 hours by Crotty. Crotty's time is unreasonably high for a rather

straightforward claim. Accordingly, the court reduces the time by one-third to account for the excessive amount of time spent. This results in a reduction of 38.33 hours from Crotty's total. The court does not find Love's PRA time claimed to be excessive.

d) Certification to the Washington State Supreme Court

Crotty reported a total of 140.10 hours spent on certification of this matter. (ECF No. 163 at ¶5). Love reported 20.4 hours spent on certification. (ECF No. 165 at ¶2). Crotty explains he brought on an additional attorney, Andrew Biviano, because "I, as a solo practitioner, did not have the capacity to handle all aspects of the research and briefing" to the Washington State Supreme Court. (ECF No. 163 at ¶7). Biviano recorded 114.35 hours spent, along with 1.8 hours by an associate, and 9.0 hours by a paralegal. (ECF No. 164 at ¶13).

ESD 171 objects to some entries on the latest declarations. (ECF No. 166). Defense counsel objects to Crotty recording 2.0 hours to attend and watch oral argument of the post-trial motions before this court on December 7, 2016. (ECF No. 166 at ¶6(a)). Defendant also objects to Crotty spending 30 hours researching and 18 hours reviewing Biviano's work after Crotty's explanation that he could not fully handle the appeal. (ECF No. 166 at ¶6(b)). Defense counsel also objects to Crotty spending 24.8 hours preparing for oral argument, arguing it was unreasonable compared to Biviano who spent 16.5 hours preparing. (ECF No. 166 at ¶6(c)). The final objection is to seven hours Biviano spent and 9.4 hours Crotty spent obtaining *amicus curiae*. (ECF No. 166 at ¶6(d)).

Plaintiff argues it was reasonable to obtain another attorney to assist in the certification litigation because of the financial stakes involved. (ECF No. 167 at 2). Plaintiff asserts the court should defer to counsel's determination of reasonable and necessary time. *See* (ECF No. 167 at 3) (citing *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). Plaintiff argues Crotty should be allowed to recover for his time at the hearing because ESD 171 brought two attorneys to the December 7, 2016, hearing despite only one presenting argument. (ECF No. 167 at 3). Plaintiff also argues

the time spent on research for the certification brief was reasonable and necessary because of the novelty of the issue and having only a response brief to present Plaintiff's argument. (ECF No. 167 at 4). Similarly, Plaintiff argues the differing times preparing for oral argument were reasonable because Biviano and Crotty were addressing different issues. (ECF No. 167 at 4). Last, Plaintiff argues counsel should recover for time spent soliciting *amicus curiae* because a reasonable attorney would do the same and ESD 171 did not present any authority prohibiting such recovery. (ECF No. 167 at 4-5).

Although neither Washington nor the Ninth Circuit have spoken on the issue, several courts hold a prevailing party cannot recover for time spent soliciting *amici*. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (holding "[t]he district court should not award plaintiffs any attorney's fees or expenses for work done in connection with supporting amicus briefs"); *Bishop v. Smith*, 112 F. Supp. 3d 1231, 1245-46 (N.D. Okla. 2015) (holding "brainstorming potential amici, strategizing regarding potential amici, coordinating potential amici, soliciting potential amici, [and] drafting/editing an amicus brief" are not compensable); *Patino v. Birken Mfg. Co.*, No. CV054016120S, 2009 WL 2872836 at *5 (Conn. Super. Ct. August 6, 2009) (reducing attorneys' recoverable hours for time spent "consulting with amicus curiae"). The court has not been presented with contrary authority by Plaintiff.

The court concurs with the reasoning of the Eleventh Circuit and will strike the time spent soliciting *amicus curiae*. ESD 171 miscalculated the hours spent on *amicus curiae* by Biviano. Biviano actually recorded 12 hours spent on matter relating to *amicus curiae* with five hours reviewing *amicus* briefs and filing a response thereto on August 22, 2017. *See* (ECF No. 164-1 at 4). Additionally, associate attorney Hayward spent 0.8 hours reviewing a brief responding to the *amicus* brief. *See* (ECF No. 164-1 at 4). For Crotty, the court reviewed and found 17.7 hours spent on matter relating to *amicus*, including reviewing briefs and orders relating to *amicus*, communicating with *amicus*, and communicating with his client about *amicus*. Because of his block billing, an unknown amount of Crotty's 16.9 hours was spent on other matters. However, as all time

related to *amicus* is unrecoverable, the court strikes 18.6 hours from Crotty's time, along with 12.0 hours from Biviano's time and 0.8 hours from Hayward's time.

The court does not look to the actions of defense counsel in determining whether it was reasonable for Crotty to attend the December 7, 2016, hearing when he did not present any argument. Given the important issues heard at that hearing, including the instant Motion and Defendant's post-trial motion for judgment as a matter of law, the court does not find his attendance was unreasonable.

Lastly, the court addresses the issue of adding a third attorney and the amount of time reported by Crotty and Biviano. The court accepts Crotty's reasoning for bringing on Biviano due to Crotty being unable to handle the certification to the Washington State Supreme Court on his own. However, this reasoning does not adequately explain why Crotty spent nearly as much time litigating the certification as Biviano nor justify awarding both attorneys all time requested. Given the extensive work briefing the same issues before this court, the court cannot find the amount of time reported reasonable, even allowing counsel time to update research. If Crotty could not handle the certification litigation, the reasonable outcome would be to turn all or almost all of the work over to another attorney, not split hours and create multiplication of billable hours. Accordingly, the court reduces the objected to time in half (but not including the time already stricken as related to *amicus*). Contrary to defense counsel's calculations, the court has found Crotty reported 43.9 hours spent researching and drafting the response brief, and an additional 10.4 hours spent reviewing and editing Biviano's work. This work was in addition to Biviano spending 64.45 hours researching, drafting, and editing the brief. Since ESD 171 only objected to Crotty's time, the court reduces his time in half, resulting in a reduction of 27.15 hours.

The court does not reduce Crotty's time spent preparing for oral argument. While ESD 171 argues the time should be reduced to that of Biviano based on the "same work" the court observes the two attorneys were doing the same **type** of work, but were preparing for different arguments. It would be inappropriate for the court to hold Biviano

and Crotty to the same preparation time when those attorneys were involved in different arguments and have their own preparation process. ESD 171 presented no authority or argument suggesting what a reasonable amount of time for all attorneys should be.

With the above reductions, the total certification time awarded from December 7, 2016, to the date of this Order is 94.35 hours for Crotty, 20.4 hours for Love, and 102.35 hours for Biviano (along with 1.0 hours for an associate at his firm and 9.0 hours by a paralegal).

e) Summary

The reduction of 38.33 hours from Crotty's time on the PRA claim results in a total of 537.57 hours until December 7, 2016. Applying a 20% across-the-board reduction to account for the block billing and time spent on unsuccessful claims results in a total of 430.06 hours for Crotty and 193.40 hours for Love. When added to the time spent on the certification litigation, the total amount of reasonable hours spent are: 524.41 hours for Crotty, 213.80 hours for Love, 102.35 hours for Biviano, 1.0 hours for associate attorney Dan Hayward, and 9.0 hours for paralegal Leslie Swift. Those are the reasonable hours spent for the purposes of the lodestar analysis.

2. Hourly Rate

Plaintiff's counsel asserts Crotty's hourly rate of $350.00 is reasonable and Love's hourly rate of $400.00 is reasonable. (ECF No. 125 at 5). To support their claim, Plaintiff's counsel submitted declarations from three Spokane-based attorneys who all assert the hourly rates charged are reasonable. *See* (ECF No. 125-3 at ¶14); (ECF No. 125-4 at ¶10) (opining only to Crotty's hourly rate); (ECF No. 125-5 at ¶10) (opining only to Love's hourly rate). Biviano requests a rate of $350.00 for himself, $175.00 for associate attorney Dan Hayward, and $125.00 for paralegal Leslie Swift. (ECF No. 164 at ¶13).

ESD 171 asserts the proposed hourly rate should be reduced to $250.00 per hour for Crotty and $325.00 per hour for Love. (ECF No. 148 at 13). ESD 171 did not object to Biviano's requested rate. ESD 171 cites to other cases in this district in support of its

proposed rates. *See* (ECF No. 148 at 10-11). ESD 171 also cites a case where Crotty represented defendants and stated his hourly rate in that case was $200.00. (ECF No. 148 at 6).

The fact Crotty's hourly rate for a government defense case is lower than his rate for plaintiff's work on a contingent fee basis is immaterial. There are legitimate reasons why an attorney would charge a lower rate for government defense work where he is guaranteed being paid for his time spent.

In *Weigand v. Cheung*, No. 2:14-CV-00278-SAB, (ECF No. 116 at 9), Crotty and Love represented defendants in a Fair Debt Collection Practices Act case and opposed hourly rates of $250 and $325 sought by opposing counsel. ESD 171 argues this shows the requested rates in the instant matter are unreasonable and not commensurate with the local market. (ECF No. 149 at ¶7). The *Weigand* case does not support a lower hourly rate in the instant matter. Judge Bastian rejected Crotty's arguments and found the rates of $250 and $325 were "reasonable and comparable to the prevailing rate for the Spokane market." *Weigland*, (ECF No. 121 at 3). The fact Crotty argued on behalf of his client for a lower hourly rate in a debt collection case does not make his request in the instant matter *per se* unreasonable.

ESD 171 argues the distinctions Crotty made regarding the attorneys' fees in *Hanson* also demonstrate the unreasonableness of Crotty and Love's requested rates in this matter. In *Hanson*, Crotty and Love represented a plaintiff in an employment discrimination lawsuit against the United States military. Crotty was awarded $350 as a reasonably hourly rate for his work in *Hanson*. 2015 WL 3965829 at *4. Crotty argued *Hanson* was "qualitatively different" than *Weigand*, given the extensive discovery, four summary judgment motions, and two trials in *Hanson*. *See* (ECF No. 129-4 at 3-4).

ESD 171 also cites two other cases from this district to show Crotty and Love's rates should be reduced. *See* (ECF No. 148 at 10-11). One case is not comparable to this matter because the court reduced the attorneys' hourly rates based on the fact their client prevailed by default judgment, not through protracted litigation and trial. *See Elf-Man,*

LLC v. C.G. Chinque Albright, No. 13-CV-00115-TOR, 2014 WL 5543845 (E.D. Wash. October 31, 2014). In the other case, the party seeking attorneys' fees did not present any evidence with its request to establish the reasonableness of the hourly rates sought. *See Equal Employment Opportunity Commission v. Global Horizons, Inc.*, No. CV-11-3045-EFS, 2015 WL 10987074 at *6 (E.D. Wash. September 24, 2015). Additionally, neither of these cases involved attorneys' fees sought for employment discrimination cases. For these reasons, ESD 171 has not shown the rates sought by counsel are unreasonable. The court finds the reasonable lodestar hourly rate to be **$350** for Crotty, **$400** for Love, **$350** for Biviano, **$175** for Hayward, and **$125** for Swift.

3. Multiplier

Plaintiff's counsel asserts a 1.5 multiplier on the attorneys' fee award is warranted based on the risky nature of Plaintiff's claims, counsel having to decline other representation, and the success at trial. (ECF No. 125 at 8-10).

ESD 171 opposes any multiplier, arguing this matter is not an exceptional case warranting upward adjustment of attorneys' fees. (ECF No. 148 at 14). ESD 171 also notes the fact 10 other attorneys declined to take Plaintiff's case fails to justify the financial windfall Plaintiff's counsel would receive with a multiplier. (ECF No. 148 at 13-14).

After calculating a lodestar figure, a court "may consider an adjustment based on additional factors under two broad categories: the contingent nature of success, and the quality of work performed." *224 Westlake, LLC v. Engstrom Prop., LLC*, 169 Wn. App. 700, 735 (2012) (quotation and citation omitted)."[O]ccasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case." *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 542 (2007); *see also*, *Xieng v. Peoples Nat'l Bank of Washington*, 63 Wn. App. 572, 587 (1991) (a contingency adjustment "should be reserved for exceptional cases where the need and justification are readily apparent"). However, "to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent

nature of the availability of fees, no further adjustment duplicating that allowance should be made." *Bowers*, 100 Wn.2d at 599.

A multiplier is not warranted in this matter. Plaintiff's counsel's hourly rate already takes into account the contingent nature of the case. This is not a "rare" or "exceptional" case justifying a multiplier. Granting a multiplier on top of the large amount of attorneys' fees requested would result in a financial windfall for counsel. That is not an appropriate an outcome.

D. Costs and Litigation Expenses

Plaintiff's counsel submitted an expense report with the instant Motion detailing $31,958.21 in costs they seek to recover. (ECF No. 125 at 10-11); (ECF No. 125-1 at ¶22 & Ex. D); (ECF No. 125-2 at 25). In the Reply, Plaintiff's counsel asserts they incurred an additional $1,246.00 in post-verdict costs and litigation expenses. (ECF No. 151 at 11); (ECF 150-1 at ¶32 & Ex. D).

In the October 25, 2016, declaration of counsel, ESD 171 objected to several of the costs and expenses requested by Plaintiff's counsel. *See* (ECF No. 149 at ¶¶18-23). Those objections are set forth below.

Costs recoverable specifically under WLAD are those "reasonable and necessary in the preparation and trial of the case, including statutory costs and litigation expenses such as transportation costs, copying costs, supplies, equipment and lodging." *Blaney*, 151 Wn.2d at 217 (quotation marks and citation omitted). Statutory costs include: (1) filing fees; (2) fees for service of process; (3) notary fees; (4) reasonable expenses "incurred in obtaining reports and records, which are admitted into evidence at trial"; (5) witness fees; and (6) to the "extent that the court ... finds it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial." RCW 4.84.010.

Plaintiff's counsel filed a copy of a Visa credit card statement showing a charge of $2,520.64. (ECF No. 125-1 at 69). The statement covers purchases between June 26, 2015, and July 26, 2015. (ECF No. 125-1 at 69). As ESD 171 points out, there was no

explanation for this purchase and it does not appear to be accounted for in Crotty's summary of the costs and expenses. Because it is unexplained, the court rejects Plaintiff's claim for that alleged expense.

Plaintiff's costs include $425 paid to Jonas Cox Consulting. (ECF No. 125-1 at 80). ESD 171 objects to this charge because there "was no indication as to how the work of Mr. Jonas proved to be reasonably necessary to the results obtained." (ECF No. 149 at ¶20). Jonas Cox was a consulting educational expert who was not called as a witness in this matter. *See* (ECF No. 125-1 at ¶22); (ECF No. 150-1 at ¶24). While there is no categorical rule for or against consulting expert fees under WLAD, Plaintiff must demonstrate the fee was reasonable and necessary. Without any explanation from Plaintiff as to its necessity, this cost cannot be awarded.

Plaintiff seeks to recover $2,076.00 for Westlaw research fees. (ECF No. 125-1 at 10, 62-63). The bill states each entry was for research related to this case, but does not specify the issue researched or the time spent. (ECF No. 125-1 at 63-62). Plaintiff cites a case from the Eastern District of California making a generalized statement about the types of costs awarded in district courts throughout the Ninth Circuit. *See Destefano v. Zynga, Inc.*, 2016 WL 537946 at *22 (N.D. Cal. February 11, 2016). However, the *Destefano* case does not speak to WLAD or the costs recoverable under WLAD.

ESD 171 opposes this fee, arguing it "should be considered as overhead such as law book purchased by law firms." (ECF No. 148 at 18). ESD 171 relies on federal case law in support of its argument. *See* (ECF No. 148 at 19). ESD 171 also cites to the *Hanson* case wherein the Western District of Washington denied an award of Westlaw fees to Crotty and Love based on the "apparently rounded off expense" not being tied "to the necessities" of the case nor any "accounting for time used on Westlaw research." *Hanson*, 2015 WL 3965829 at *8. The court in *Hanson* was considering costs allowable under both WLAD and federal law. (*Id.*).

The Westlaw bill is limited to time spent researching for this case, however, there are no details which would allow the court to meaningfully review the claimed time and

determine if it is both reasonable and necessary to the case. Undoubtedly, some of that fee was reasonable and necessary, justifying some recovery. Accordingly, the court is reducing the Westlaw fee because it was insufficiently demonstrated to be reasonable and necessary. The court reduces the Westlaw fee in half to $1,038.00.

Plaintiff claims $355.00 in "Contract Trial-Prep Fees," citing two invoices from Best Law. *See* (ECF No. 125-1 at 11, 81-82). Those entries state they are for: "Jackie: Office Depot and binder prep" for $105.00 and paralegal fees totaling $250.00. (ECF No. 125-1 at 81-82). ESD 171 objects to these fees as having no documentation. (ECF No. 149 at ¶21). ESD 171separately objected to the paralegal fees, apparently not realizing those fees are part of the "Contract Trial-Prep Fees." *See* (ECF No. 149 at ¶22). ESD 171 argues the paralegal fees do not provide any background, educational, or experience of the paralegal or connect the paralegal's work as being reasonably necessary to the results obtained. (ECF No. 149 at ¶22).

Paralegal fees are not categorically barred from recovery. *See Johnson v. State, Dept. of Transp.*, 177 Wn. App. 684, 690, 699 (2013). Plaintiff's counsel explained the paralegal fees were "for Harmony Merrel who did online research, downloaded screen shots of McBride's Twitter posts, and wrote a declaration attesting to their authenticity of those screenshots" so if McBride testified "he could not recognize those Twitter posts then the work Ms. Merrill [sic] did would have been used to address that issue" either through her declaration or rebuttal testimony. (ECF No. 150-1 at ¶24). As counsel acknowledges, the paralegal's time was precautionary and was never used at trial. It was not necessary in the trial of this case because McBride acknowledged the Twitter posts were his. The court will not award the $250.00 in paralegal fees. Plaintiff will be awarded the $105.00 for paying to have the trial binders prepared. Paying $35.00 per hour is inexpensive compared to the attorneys preparing binders themselves.

Plaintiff also seeks reimbursement of $39.07 for trial binders purchased. *See* (ECF No. 125-1 at 12, 87). ESD 171 objects to awarding trial supplies, citing the *Hanson* opinion wherein the court did not award such costs. *See* (ECF No. 148 at 19-20); *Hanson*,

2015 WL 3965829 at *9. Notwithstanding the *Hanson* court's decision, trial binders fall within the Washington Supreme Court's allowance for litigation expenses. *See Blaney*, 151 Wn.2d at 216-17. The court rejects ESD 171's objections to this fee.

ESD 171 also objects to the request to recover $684.72 for vehicle mileage on counsel's trips from Spokane to Waterville, Waterville to Ephrata, and Waterville to Spokane. (ECF No. 125-1 at 11). ESD 171 cites *Hanson* and argues travel is not something normally billed to a fee-paying client. (ECF No. 148 at 19-20); *Hanson*, 2015 WL 3965829 at *9. Plaintiff's counsel cites federal case law in support of their request for travel expenses. *See* (ECF No. 151 at 10-11) (quoting *Destefano*, 2016 WL 537946 at *22). While it appears the travel was to attend depositions, the court has trouble finding it reasonable to award mileage to Plaintiff's counsel. Mileage is not a reasonable cost an attorney would ordinarily charge a client. Accordingly, the court rejects Plaintiff's request to recover counsel's mileage claims.

Plaintiff seeks $514.31 in copying fees and $128.00 in printer fees. *See* (ECF No. 125-1 at 11, 64, 81). ESD 171 objects to these fees, citing *Hanson* and a case out of the Second Circuit Court of Appeals. *See* (ECF No. 148 at 20); *Hanson*, 2015 WL 3965829 at *9; *U.S. for Use and Benefit of Evergreen Pipeline Const. Co., Inc. v. Merritt Meridian Const. Corp.*, 95 F.3d 153 (2d. Cir. 1996). It appears ESD 171 is arguing Plaintiff's counsel failed to itemize or show the necessity for each copying charge. While the Washington Supreme Court allows recovery of copying costs, such costs must be shown to be "reasonable and necessary in the preparation and trial of the case." *See Blaney*, 151 Wn.2d at 216-17. Without any explanation for what each of the copying costs specifically pertain to, the court cannot find they are all reasonable and necessary. The court reduces the printer and copying fees by one-half, allowing recovery of $257.15 in copying fees, and $64.00 in printer fees.

In the most recent declaration from defense counsel, ESD 171 objects to the request for $1,000.00 to cover the fee attorney Kenneth Kato charged to provide a declaration in support of Crotty's request for attorney's fees. (ECF No. 152 at ¶¶7-8);

(ECF No. 150-1 at 28); (ECF No. 125-4). Plaintiff argues compensation for "special fee counsel on a fee petition" is recoverable, citing Ninth Circuit case law addressing federal law. *See* (ECF No. 151 at 11); *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1544 (9th Cir. 1992), *vacated in part on other grounds on denial of rehearing by Davis v. City and County of San Francisco*, 984 F.2d 345 (9th Cir. 1993).

Even if *Davis* were controlling on WLAD claims, it is distinguishable. In *Davis*, the Ninth Circuit affirmed attorneys' fees awarded when the prevailing party hired a special attorney to pursue the fee award. (*Id*.). There was no discussion of fees charged by an attorney who simply provides a declaration in support of a fee petition. The court rejects the Kato charge as being necessary under WLAD case law because Plaintiff's counsel had declarations from two other attorneys who provided overlapping information. Of relevance, Plaintiff's counsel does not assert either of the other two attorneys (Maurer or Dunn) charged for providing their declarations. For these reasons, the court does not award the claim of $1,000.00 to cover the cost of attorney Kato providing a declaration in support of the fee petition.

ESD 171 argues the Kenneth Kato declaration is duplicative of the declarations of Michael Mauer and Robert Dunn, and is not "reasonably necessary to the results obtained." (ECF No. 152 at ¶¶7-8). ESD 171 makes the same argument for Dunn's declaration. (ECF No. 152 at ¶9). While unnecessary to the jury verdict, the declarations of local attorneys to support the hourly rate and reasonableness of fees is necessary for Plaintiff's counsel to meet their burden to obtain attorneys' fees. *See Mahler*, 135 Wn.2d at 433-34. There is some overlap, as Dunn evaluated both Crotty and Love's attorneys' fees, while Kato and Mauer evaluated just one attorney's fees. It could be said Kato and Mauer's declarations were redundant to the information provided in Dunn's declaration. However, the court does not find obtaining three declarations to be unreasonable.

Although not briefed by the parties, the court takes this opportunity to address the deposition transcript fees. In order to be recoverable, the deposition transcript must have been used at trial and be found by the court to be necessary to achieve the successful

result. *See* RCW 4.84.010(7). At trial, the following witnesses' depositions were introduced: ESD 171 Superintendent Richard McBride; Bridgeport Superintendent Scott Sattler; Suzanne Reister; and Plaintiff. While Plaintiff's deposition was used by defense counsel in cross-examination, it was not used nor was necessary for Plaintiff's counsel. Accordingly, the court denies recovery for the cost claimed for the copy of Plaintiff's deposition transcript. Sattler's testimony related to the blacklisting claim and was not connected to the success on the retaliation claim. The court finds his deposition transcript fee is unrecoverable. Additionally, Reister's deposition was only used to attempt to impeach her regarding testimony about the Refurbishment Assistant position. Accordingly, the court finds it was not necessary to achieve the successful result on the Math-Science Specialist retaliation claim. Superintendent McBride's deposition was used to attempt to impeach him regarding facts pertinent to the Math-Science Specialist position and Plaintiff's complaint regarding Hickman's qualifications. Those facts were directly at issue as part of the retaliation claim which Plaintiff prevailed upon. The court finds the McBride deposition was necessary to achieve the successful jury verdict on the WLAD retaliation claim based on the Math-Science Specialist position.

III. Conclusion

The court makes the following findings regarding attorneys' fees. The court finds the reasonable hours expended by Crotty is **524.41**, and his reasonable hourly rate is **$350.00**. The resulting fee award is **$183,543.50**. The court finds Love's reasonable hours is **213.80** and his reasonable hourly rate **$400.00**. Love's fee award is **$85,520.00**. The court finds Biviano's reasonable hours is **102.35** and his reasonable hourly rate **$350.00**. The fee award for Biviano is **$32,822.50**. The court finds Hayward's reasonable hours is **1.0** and his reasonable hourly rate is **$175.00**. The fee award for Hayward's work is **$175.00**. The court finds paralegal Swift's reasonable hours is **9.0** and her reasonable hourly rate is **$125.00**. The fee award for Swift's work is **$1,125.00**.

The court finds the following costs shall **not** be awarded for the reasons set forth herein: (1) $2,520.64 Visa bill; (2) $425.00 to Jonas Cox for consulting; (3) $684.72 in

vehicle mileage; (4) $1,000.00 to Kenneth Kato; and (5) $250.00 in paralegal fees.

The court awards Plaintiff **$23,059.22** in costs based on the following: (1) $1,030.00 in Westlaw fees; (2) $257.15 in copying costs; (3) $64.00 in printer costs; (4) $8,192.50 in expert witness fees to West Economics; (5) $10,762.50 in expert witness fees to Christine Lynch; (6) $54.00 in mailing costs; (7) $957.00 in mediation fees; (8) $39.07 in binder costs; and (9) $1,703.00 in trial transcript costs.

IT IS HEREBY ORDERED:

1. The Motion for Adverse Tax Consequences, Prejudgment Interest, and Attorneys' Fees and Costs (ECF No. 125) is **GRANTED IN PART AND DENIED IN PART** as set forth herein.
2. Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial (ECF No. 136), which was reserved in part pending the Washington State Supreme Court's ruling on the certified question, is **DENIED IN FULL** based on *Zhu v. North Central Educational Service District-ESD 171*, 189 Wn.2d 607 (2017).
3. Plaintiff's request to be awarded adverse tax consequences is **DENIED**.
4. The Clerk is directed to enter an Amended Judgment against the Defendant North Central Educational Service District - ESD 171in favor of Plaintiff in the total amount of $777,463.22 composed of the following:

Original Judgment (ECF 117)----------	$451,218.00
Attorney Fees----------	$303,186.00
Costs Awarded Herein----------	$ 23,059.22
	$777,363.22

Interest on the Amended Judgment shall run from September 21, 2016, the date of entry of the original Judgment.

5. The Clerk is also directed to assess and tax the Proposed Bill of Costs (ECF No. 128) for the following items which have not been awarded herein: (1) the filing fee; (2) fees for service of process and subpoenas; (3) witness trial attendance fees; and (4) the deposition transcription costs for the Richard

McBride deposition taken April 19, 2016. **No other deposition transcript costs shall be awarded**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and Amended Judgment, furnish copies to counsel, and close this file.

Dated February 15, 2018.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE