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7
8 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

9 KELLY O’KELL,)

10 Plaintiff,)

11 vs.)

12 DEB HAALAND, in her official capacity)
13 as Secretary of the U.S. Department of the)
Interior,)

14 Defendant.)
15

NO. 2:18-CV-00279-SAB

PLAINTIFF’S MOTION FOR
FEES, COSTS, AND LITIGATION
EXPENSES

Hearing date: 5/25/2022

Without oral argument

16 I. INTRODUCTION

17 On April 12, 2022, this Court awarded Plaintiff \$1,683,321 on her ADEA
18 discrimination and retaliation claims. (ECF Nos. 136, 137) Judgment was entered that
19 day. Under the ADEA Plaintiff is entitled to an award of attorneys’ fees, costs, and
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MOTION FOR FEES, COSTS, LITIGATION
EXPENSES: 1

1 litigation expenses. In the event Defendant opposes this motion or files any post-trial
2 motion, Plaintiff requests that the Court award her reasonable attorney fees and costs
3 related to that additional work.

4 II. ARGUMENT

5 A. THE COURT SHOULD AWARD PLAINTIFF HER ATTORNEYS' FEES.

6 *1. Attorneys' fees are allowed when a plaintiff prevails against a federal 7 employer in an ADEA case.*

8 Courts consistently hold that a “plaintiff, as a successful litigant against
9 the federal government under the ADEA is entitled to reasonable attorneys' fees”
10 under the ADEA. *Klein v. Sec'y of Transp., U.S. Dep't of Transp.*, 807 F. Supp. 1517,
11 1526 (E.D. Wash. 1992)(“Courts addressing the issue of whether attorney's fees and
12 costs are recoverable in an action under [29 U.S.C. § 633a] have consistently awarded
13 fees incurred at the judicial level while refusing to award fees incurred at the
14 administrative level.”); *Krodel v. Young*, 576 F. Supp. 390, 395 (D.D.C. 1983);
15 *Sterling v. Lehman*, 574 F. Supp. 415, 417 (N.D. Cal. 1983)(“Under such statutory
16 guidance, the court hereby finds that an award of attorneys' fees for plaintiff's judicial
17 proceedings is necessary to effectuate the purposes of the ADEA.”); *DeFries v.*
18 *Haarhues*, 488 F. Supp. 1037, 1045 (C.D. Ill. 1980)(“award of reasonable attorneys'
19 fees and costs ‘effectuates the purposes’ of the ADEA”); *Smith v. Off. Of Pers. Mgmt.*,
20 778 F.2d 258, 264 (5th Cir. 1985).

1 Alternatively, the Court has discretion to award attorneys’ fees under the Equal
2 Access to Justice Act (EAJA). 28 U.S.C. § 2412(b); *Poland v. Chertoff*, 494 F.3d
3 1174, 1187 (9th Cir. 2007); *Newmark v. Principi*, 283 F.3d 172, 178 (3d Cir. 2002)
4 (“[T]he EAJA provides for ‘parity’ in the allowance of fees against the government in
5 actions in which, by statute, private party defendants are required to pay fees, and
6 since the ADEA is such a fee-shifting statute, section 2412(b) would apply.”).

7 Since Ms. O’Kell prevailed on her claims she is entitled to attorneys’ fees, costs,
8 and expenses under the ADEA or EAJA.

9 ***2. The time expended by Plaintiff’s counsel is reasonable as are their rates.***

10 “District courts must calculate awards for attorneys’ fees using the ‘lodestar’
11 method, and the amount of the fee must be determined on the facts of each case.”
12 *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n. 4 (9th Cir. 2001); *see also*
13 *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). “The lodestar figure is calculated by
14 multiplying the number of hours the prevailing party reasonably expended on the
15 litigation (as supported by adequate documentation) by a reasonable hourly rate for the
16 region and for the experience of the lawyer.” *Yamada v. Nobel Biocare Holding AG*,
17 825 F.3d 536, 546 (9th Cir. 2016). “The fee applicant bears the burden of establishing
18 entitlement to an award and documenting the appropriate hour’s expended and hourly
19 rates.” *Hensley*, 461 U.S. at 437. Once the lodestar is calculated “the court may adjust
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1 it upward or downward by an appropriate positive or negative multiplier reflecting a
2 host of ‘reasonableness’ factors, ‘including the quality of representation, the benefit
3 obtained for the class, the complexity and novelty of the issues presented, and the risk
4 of nonpayment” and “[o [f those factors, a party's success in the litigation is the ‘most
5 critical.’” *Yamada*, 825 F.3d at 546.

6 The Ninth Circuit requires the trial court to determine an attorneys’ fee award
7 under the factors announced in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th
8 Cir. 1975). *Loring v. City of Scottsdale, Ariz.*, 721 F.2d 274, 275-76 (9th Cir. 1983)
9 (“Although the trial court need not consider all twelve *Kerr* guidelines in every case,
10 the court abuses its discretion by completely disregarding *Kerr*.”) The *Kerr* factors
11 include:

12 (1) the time and labor required, (2) the novelty and difficulty of the
13 questions involved, (3) the skill requisite to perform the legal service
14 properly, (4) the preclusion of other employment by the attorney due to
15 acceptance of the case, (5) the customary fee, (6) whether the fee is fixed
16 or contingent, (7) time limitations imposed by the client or the
17 circumstances, (8) the amount involved and the results obtained, (9) the
18 experience, reputation, and ability of the attorneys, (10) the
19 ‘undesirability’ of the case, (11) the nature and length of the professional
20 relationship with the client, and (12) awards in similar cases. *Kerr*, 526
F.2d at 70.

Regarding *Kerr* factor (1), the hours expended by Mr. Crotty during this case
from client intake to the Judgment’s issuance is 564.70. (Crotty Decl. ¶16) The hours

1 expended by Mr. Love in this case from association to judgment are 547.13. (Love
2 Decl. ¶19)

3 Regarding *Kerr* factors (2) (3) and (9) employment cases litigated in federal
4 court are extremely difficult for plaintiffs to win: available data shows that from 1990
5 – 2017 the “win” rate for workers litigating employment cases in federal court ranged
6 from 1% - 30% and in the rare instance where a plaintiff won the median award was
7 “64,832.00”. (Crotty Decl. ¶12, 13, 14) Further, the last time the Department of Interior
8 was taken to a trial verdict in federal court was in 2002. *Id.* ¶15. Accordingly, litigating
9 plaintiff employment cases in federal court is a risky undertaking that requires skill
10 necessary to prevail.

11 Regarding *Kerr* factor (4), Mr. Crotty had to turn down an hourly defense case
12 to prepare for the November 2021 trial. (Crotty Decl. ¶10) Mr. Love had two separate
13 hourly cases that required him to have his co-counsel take over the lion’s share of the
14 paid hourly work beginning in October of 2021. (Love Decl. ¶18)

15 Regarding *Kerr* factor (5) courts have recognized Mr. Crotty’s \$500/hour rate in
16 approving class action settlements in employment discrimination/benefit cases. (Crotty
17 Decl. ¶9) Mr. Love’s \$550.00/hour rate is reasonable due to his experience 29 years
18 representing both plaintiffs and defendants in civil rights actions coupled with the fact
19 his rate is substantially lower than other attorney fee awards in the Eastern District of

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1 Washington. (Love Decl. ¶4, 9) Attorneys Joseph Barton, Pat Kirby, and Robert Greer
2 further declare that the rates requested by Messrs. Crotty and Love are reasonable, if
3 not on the low end of hourly rates awarded to attorneys of Mr. Crotty and Mr. Love's
4 skill level and experience. (Barton Decl. ¶12-17; Greer Decl. ¶11-15; Kirby Decl. ¶21,
5 23, 26) Taken together, Mr. Crotty and Mr. Love request total fees of \$583,271.50
6 (\$550– Love; \$500 – Crotty) from intake to verdict. The Court should also award
7 Plaintiff's counsel fees expended on preparing this post-trial fee petition from April
8 12, 2022, to the filing of this motion as such fees are recoverable. *Kinney v.*
9 *International Broth. Of Elec. Workers*, 939 F.2d 690, 695 (9th Cir. 1991). Those fees
10 are \$9,950.00 for Mr. Crotty and \$22,500.00 for Mr. Love for total fees of \$615,721.50.
11 (Crotty Decl. ¶16; Love Decl. ¶19 Exhibit C)

12 Regarding *Kerr* factor (6), this was a contingent fee case. (Crotty Decl. ¶10) As
13 such, Messrs. Crotty and Love stood to lose nearly four years of work had the Court
14 not found in Ms. O'Kell's favor.

15 Regarding *Kerr* factors (8)¹ and (12), the results obtained (\$1,683,321.00) was
16 extraordinary as it was (to Plaintiff's counsel's knowledge) the biggest single plaintiff
17 employment discrimination award in the Eastern District of Washington, over
18 \$1,000,000 higher than Defendant's (mid-trial) offer of judgment and \$1,300,000

19 _____
20 ¹ *Kerr* factor (7) does not apply because there were no client imposed time limits.

1 higher than the average federal employment award mean. (Crotty Decl. ¶14-15; Love
2 Decl. ¶17)

3 Regarding *Kerr* factor (10), two other attorneys turned down Ms. O’Kell’s case,
4 presumably because litigating plaintiff employment cases (in federal court) against the
5 federal government is a risky, expensive, and time-consuming undertaking. (Crotty
6 Decl. ¶11; Love Decl. ¶12)

7 Lastly, regarding *Kerr* factor (12), Messrs. Crotty and Love have represented
8 Ms. O’Kell since June 2018 and have yet to be paid. (Crotty Decl. ¶11; Love Decl.
9 ¶19) Accordingly, the Court would be well within its discretion to award Plaintiff’s
10 counsel her entire lodestar.

11 **B. COSTS AND LITIGATION EXPENSES.**

12 The ADEA and EAJA allow a prevailing party to recover costs against the
13 federal government. *Leal v. McHugh*, 731 F.3d 405, 416 (5th Cir. 2013)(“[M]ost courts
14 ... are in agreement that a prevailing plaintiff in a suit brought under the ADEA can be
15 awarded attorney's fees and costs against the federal government attributable to the
16 suit itself.”); *Castillo v. Astrue*, 2009 WL 2469510, at *1 (D. Ariz. Aug. 12, 2009).
17 Costs and litigation expenses include (a) deposition and trial transcripts, (b) expert
18 witness fees, (c) Westlaw fees, (d) binder fees, (e) transportation and lodging expenses,
19 (f) mediation fees; and, (g) the filing fee. *Alflex Corp. v. Underwriters Lab'ys, Inc.*, 914

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1 F.2d 175, 177 n.3 (9th Cir. 1990)(deposition and trial transcript costs recoverable);
2 *Heiar v. Crawford County Wisconsin*, 746 F.2d 1190, 1203 (7th Cir.1984), *cert.*
3 *denied*, 472 U.S. 1027 (1985) (allowing expert witness fees under ADEA as part of
4 attorneys' fees); *Becker v. ARCO Chem. Co.*, 15 F. Supp. 2d 621, 636 (E.D. Pa.
5 1998)(“However, in ADEA cases, the trial court has ‘equitable discretion’ to
6 award fees beyond the statutory amount where the expert's testimony is indispensable
7 to the determination of the case.”)²; *In re Application of Mgdichian*, 312 F. Supp. 2d
8 1250, 1266 (C.D. Cal. 2003)(Westlaw fees recoverable under EAJA); *Matter of Cont'l*
9 *Illinois Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992), *as amended on denial of*
10 *reh'g* (May 22, 1992) (finding that it was clear error not to reimburse class counsel for
11 LEXIS and Westlaw expenses because the “paying, arms' length market” did not
12 subsume these expenses into a lawyer's overhead); *McCall v. State Farm Mut. Auto.*
13 *Ins. Co.*, 2019 WL 2476731, at *3 (D. Nev. June 13, 2019)(binders taxable cost);
14 *Wilbur v. City of Mount Vernon*, 2014 WL 11961980, at *5 (W.D. Wash. Apr. 15,
15 2014)(lodging, meals, postage, telephone, transportation expenses allowed); *Gordon v.*
16 *Virtumundo, Inc.*, 2007 WL 2253296, at *15 (W.D. Wash. Aug. 1, 2007)(“While §

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18 ² Clearly the testimony of Ms. Diamond and Mr. West was indispensable to the
19 determination of this case. (ECF No. 136, p. 11, ¶73; p. 15, ¶74-76)

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1 1920 does not contemplate taxation of mediation fees as statutory ‘costs,’ the Court
2 finds that this is a component of a reasonable attorneys' fee, and therefore is an
3 allowable cost in that respect.”); *Green v. Bank of Am.*, 2012 WL 5032414, at *1 (E.D.
4 Cal. Oct. 17, 2012)(“Filing fees for initiating a lawsuit in district court are ... part of
5 the costs of litigation.”). Based on the above authority, the below-requested costs (or,
6 in the alternative) litigation expenses are reasonable.

7 Those costs include: (a) \$13,077.72 deposition/trial transcript fees; (b)
8 \$35,987.01 expert fees for Erick West and Deborah Diamond; (c) \$10,969.43 Westlaw
9 fees, (d) \$191.79 binder fees, (e) \$2,727.79, transportation, parking and lodging
10 expenses; (f) \$4,243.75 mediation fees, (g) \$400.00 filing fee; (h) \$275.00 service of
11 process fee, (i) \$1,058.76 cost supplies and postage, and (j) \$14,478.00 expert
12 attorneys’ declarations in support of fees and costs petition. (Crotty Decl. ¶18; Love
13 Decl. ¶20)

14 Plaintiff will file a cost bill in conjunction with this brief and in the event the
15 Clerk does not award Plaintiff costs under the auspices of 28 U.S.C. § 1920 then
16 Plaintiff respectfully requests that the Court award those costs as litigation expenses
17 because “case law does permit the recovery of litigation expenses as part of an attorney
18 fee award under certain statutes such as ... the ADEA.” *Jochem v. PolyMedica Corp.*,

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1 2007 WL 9702265, at *3 (S.D. Fla. Dec. 21, 2007) (*citing Herold v. Hajoca Corp.*, 864
2 F.2d 317, 323 (4th Cir. 1988)).

3 Lastly, Plaintiff's seek reimbursement of \$20,180.00 in Research Analyst fees
4 and \$198.00 paid to an office assistant for assembling trial exhibit. (Cook Decl. ¶7; A
5 Crotty Decl. ¶4) Such clerical expenses are recoverable as Ms. Cook and Ms. Crotty's
6 rates are billed out to paying clients. (Crotty Decl. ¶19) *See Griffin & Dickson v. United*
7 *States*, 21 Cl. Ct. 1, 14 (1990) ("The court grants plaintiff's request for research
8 assistance expenses. Further, the court grants the clerical and litigation costs requested
9 by plaintiff."); *Herrington v. Waterstone Mortg. Corp.*, 2018 WL 835146, at *2 (W.D.
10 Wis. Feb. 12, 2018).

11 **III. CONCLUSION**

12 All told, Plaintiff seeks \$615,721.50 in fees; \$103,787.25 in costs and
13 litigation expenses.

14 Dated this April 25, 2022.

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CERTIFICATE OF SERVICE

I certify that I filed the above-captioned document with the Court via the Court’s CM/ECF system which will cause the attorneys who have appeared in this action to be served with this document.

Dated this April 25, 2022.

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