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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY BRYAN, TIM HANCOCK,
JEFF MORALES, IGNACIO TORRES, and
CREG QUIROZ,

Plaintiffs,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

No. C 01-01730 WHA

Consolidated with:

No. C 02-02601

**ORDER ADOPTING IN PART
SPECIAL MASTER'S REPORT
AND DENYING PLAINTIFFS'
SUPPLEMENTAL REQUEST FOR
ATTORNEY'S FEES**

AND CONSOLIDATED ACTION.

INTRODUCTION

In this action under California's Fair Housing and Employment Act, plaintiffs have been granted attorney's fees for prosecution of this action. Parties were unable to agree as to the amount of attorney's fees and were referred to a special master. Plaintiffs now move to adopt the special master's report, while defendants make objections regarding the items for which plaintiffs should receive attorney's fees. The special master erred in determining the amount of fees to which plaintiffs' counsel is entitled for the prior action. Plaintiffs should not have been awarded a lodestar multiplier of 1.5, and the special master erred in determining the amount of attorney's fees to be awarded to attorney John J. Mavredakis. The special master's findings with regard to fees-for-fees were correct. Accordingly, plaintiffs' motion to adopt the special

1 master's report is **GRANTED IN PART AND DENIED IN PART**. The special master's fee will be
2 apportioned equally between plaintiffs and defendant. Plaintiffs' request for supplemental
3 attorney's fees for the period between the hearing before the special master through the present
4 is **DENIED**.

5 **STATEMENT**

6 The details of this action have been recited in other orders on motions in this action.
7 This action was originally filed on May 3, 2001, on behalf of several plaintiffs. It is a follow-on
8 to a separate, earlier-filed action that dealt with similar claims, the EEOC/Hogya action. In that
9 action, the EEOC sued defendant UPS, alleging that the vision protocol UPS used to screen out
10 drivers who could not see well enough to safely operate commercial vehicles was
11 discriminatory. Several private individuals intervened. Those plaintiffs were monocular
12 individuals who alleged that UPS discriminated against them because they were not allowed to
13 work as full-time package-delivery truck drivers.

14 A bench trial was held in the EEOC/Hogya action on claims by those plaintiffs who had
15 not passed the vision protocol. The Court held that two of four plaintiffs were disabled but
16 otherwise unqualified and that another plaintiff was not disabled. The Court also enjoined UPS
17 from using its vision protocol because it unfairly discriminated against monocular job
18 candidates. Both sides appealed, and the Ninth Circuit reversed the finding that two plaintiffs
19 were disabled and remanded to determine whether UPS perceived that the claimants were
20 substantially limited in the activity of seeing. *EEOC v. UPS*, 306 F.3d 795, 796 (2002). The
21 decision also upheld the UPS' use of the vision protocol as a valid, safety-based standard. *Ibid.*
22 On remand this Court held that none of those employees in the EEOC/Hogya action were
23 disabled and addressed the claims under FEHA. Final judgment in that action was entered for
24 UPS.

25 Plaintiffs Hancock and Quiroz brought their claims under FEHA, and their action was
26 stayed pending the first appeal. After trial in the EEOC/Hogya action, plaintiffs filed a motion
27 for partial summary judgment on the issue of disability, which was granted. This court certified
28 the issue of disability under FEHA for interlocutory appeal. That appeal was considered

1 together with the second appeal in the EEOC/Hogya action. The grant of partial summary
2 judgment on Hancock and Quiroz's claims was upheld; final judgment for UPS in the
3 EEOC/Hogya action was upheld as well. *EEOC v. UPS*, 424 F.3d 1060 (2006).

4 Although Hancock and Quiroz were held to be disabled, they were eligible for jobs with
5 UPS because they had passed the vision protocol. After the appeal, Hancock and Quiroz settled
6 with UPS for \$75,000 for their back pay claims.

7 An order dated September 20, 2006, granted attorney's fees to plaintiffs for the claims
8 brought by Hancock and Quiroz because they were considered prevailing parties under FEHA.
9 No attorney's fees were awarded for the EEOC/Hogya action. Parties were directed to meet
10 and confer regarding the amounts of attorney's fees to be awarded. They were unable to resolve
11 the matter themselves, so they agreed on a special master, William A. Quinby. He was
12 appointed by the Court on February 15, 2007. The special master asked for submissions from
13 the parties and held hearings, eventually culminating in the report at issue. In his report, he
14 ultimately determined that plaintiffs were entitled to recover \$1,001,188.14 in attorney's fees.
15 An order dated July 24, 2007, allowed parties to either file objections to the report or file
16 motions to adopt it. Plaintiffs filed a motion to adopt the report, while defendants filed
17 objections. Plaintiffs also filed a supplemental application for attorney's fees. A briefing
18 schedule was set regarding these motions and a hearing was held on September 20, 2007.

19 ANALYSIS

20 Under Rule 53(g)(3), all objections to a special master's findings of fact must be decided
21 de novo, unless the parties otherwise stipulate. Parties did not so stipulate. All objections to
22 the special master's conclusions of law must be reviewed de novo. Fed. R. Civ. P. 53(g)(4).

23 1. DEFENDANT'S OBJECTIONS.

24 Defendant objects to the special master's report for several reasons. *First*, it contends
25 that plaintiffs are not entitled to a lodestar multiplier to compensate for the risk involved in
26 taking on the case. *Second*, it argues that plaintiffs here cannot recover attorney's fees in the
27 EEOC/Hogya action. *Third*, UPS argues that John Mavredakis is not entitled to fees because he
28 could not properly account for his time. *Fourth*, UPS objects to the special master's

1 determination that plaintiffs are entitled to recover “fees-for-fees,” *i.e.*, attorney’s fees in
2 pursuing attorney’s fees from the original action.

3 **B. Lodestar Multiplier.**

4 UPS objects to the special master’s award of a lodestar multiplier of 1.5 to plaintiffs for
5 their total fees amount. First, the special master determined that “a ruling of significant
6 precedential value was secured, and the monetary recoveries [by Hancock and Quiroz] were
7 sufficient” to justify such a multiplier (Report 4). He then awarded a multiplier of 1.5 because
8 of the “contingent risk” on the merits of the case up to September 20, 2006, the point at which
9 this Court determined that plaintiffs were prevailing parties (*ibid.*).

10 Generally, there is a presumption that lodestar amounts are sufficient and adjustments to
11 the lodestar figure are appropriate only in exceptional cases. *Oviatt By & Through Waugh v.*
12 *Pearce*, 954 F.2d 1470, 1482 (9th Cir. 1992). Here, plaintiffs argue that they obtained a
13 precedential Ninth Circuit opinion holding that monocular individuals are disabled in the major
14 life activity of working under FEHA. *See EEOC v. UPS*, 424 F.3d 1060, 1071 (9th Cir. 2006).
15 Defendant contends that the appeal was ultimately unsuccessful, and moreover, UPS was never
16 required to change any of its policies as a result of this or the EEOC/Hogya litigation. Thus,
17 according to defendant, the action did not secure a significant public benefit. The action
18 benefitted only Hancock and Quiroz.

19 In determining the amount of fees, a court may consider the degree of success that the
20 plaintiffs achieved, particularly where the plaintiffs are considered successful on only part of
21 their claims. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The amount of monetary
22 recovery achieved can be a factor in determining whether to increase or decrease a lodestar
23 figure. *See Navarro v. General Nutrition Corp.*, 2005 WL 2333803, *18 (N.D. Cal. 2005)
24 (Armstrong, J.). Here, plaintiffs settled this action for only \$75,000 in back pay claims. UPS
25 changed none of its policies because of the settlement, and plaintiffs’ status at the company did
26 not change either because they had already passed the vision protocol. One effect of the
27 multiplier would be to mushroom the overall award out of any reasonable proportion to the
28 modest recovery in this case. Accordingly, the special master’s award of a lodestar multiplier of

1 1.5 was unwarranted. Plaintiffs' motion to adopt the special master's report is **DENIED** as to the
2 lodestar multiplier. No multiplier will be applied to the lodestar.

3 **C. Work Done for the EEOC/Hogya Action.**

4 Defendant contends that plaintiffs should not be able to recover any attorney's fees at all
5 for work done in pursuit of the prior unsuccessful EEOC/Hogya action because plaintiffs were
6 not prevailing parties. Specifically, UPS argues that the Rosen firm only should receive
7 \$184,642.20 in fees incurred on the merits of this action. It disagrees with the special master's
8 conclusion that some of the work done in the prior action was necessary in this action.
9 Regarding this issue, the special master's report determined (Report 3):

10 I concluded that some of that work was appropriate or necessary
11 to the successful prosecution of the Hancock and Quiroz claims
12 and formed my own conclusions regarding billing reductions. In
13 general, I concluded that on a percentage basis, the total lodestar
14 should be reduced by approximately \$1,528,234.80, a number that
15 is lower than requested by Plaintiffs' counsel and higher than that
16 suggested by UPS. I accepted the "discrete billing reductions"
17 proposed by Plaintiff's counsel, and adjusted the "project-based
18 billing reductions", generally downward, to reflect my conclusion
19 that there was a common core of facts and legal theories and that
20 a percentage of certain of the overall efforts of counsel were
21 appropriate or necessary to the successful prosecution of the
22 Hancock and Quiroz claims.

23 Here, both actions concerned whether or not monocular individuals could be considered
24 disabled in the area of work and the validity of UPS' vision protocol for drivers.

25 If work in a first, unsuccessful action was not necessary to win a second action, fees for
26 the first action should not be awarded. *Carroll v. Import Motors, Inc.*, 33 Cal. App. 4th 1429,
27 1438–39 (1995). Here, plaintiffs contend that even though they were unsuccessful in the first
28 action, research and projects they performed were necessary to obtain settlement in the second
29 action. Defendants contend that since this Court and the Ninth Circuit upheld UPS vision
30 protocol, none of the fees incurred in the first action should be recoverable here. This is not the
31 same thing as finding that the prior action had no bearing on the claims of Quiroz and Hancock.

32 A closer look at the special master's report shows that the majority of the Rosen firm's
33 fees were incurred on Hancock and Quiroz's claims. The special master recommended
34 approximately \$11,000 in fees for the Rosen firm for the EEOC/Hogya action. The records

1 show that the Rosen firm did a small amount of work on the later stages of EEOC/Hogya action.
2 The projects were listed as “consultation and assistance with the EEOC/Hogya trial” and
3 “interim attorney’s fees demand and settlement” in that action. The Rosen firms’ lodestar for
4 these two projects was reduced by 70% and 80% respectively (Report Exh. D). Such reduction
5 seems reasonable given the relatively small amount of time expended by the Rosen firm in
6 pursuit of the first action.

7 **C. Fees to John J. Mavredakis.**

8 UPS objects to fees awarded to John J. Mavredakis for two reasons. First, the majority
9 of the fees were incurred in the EEOC/Hogya action. Second, a portion of those fees were not
10 based on contemporaneous time records.

11 The bulk of the fees awarded by the special master came from the merits of the Hogya
12 action, with \$216,609.50 coming from the Hogya action, and an additional \$113,010 coming
13 from the Quiroz action. Because Mr. Mavredakis lost his time records, the special master did
14 not make a project-by-project determination of which tasks were related to this action. To
15 arrive at the amount of attorney’s fees incurred in the Hogya action, the special master reduced
16 Mavredakis’ original lodestar fee by 70% across the board. This order feels that this reduction
17 was not enough in light of the circumstances. Undoubtedly, most of those projects had little to
18 do with this action. Moreover, attorney Mavredakis tried the Hogya action before the
19 undersigned, thus the Court is well aware of the work done, mostly by EEOC counsel and some
20 by Mr. Mavredakis. In view of this, a greater reduction to the lodestar is in order here.

21 UPS objects to the award of fees to attorney John Mavredakis based on his reconstructed
22 records. The special master awarded Mavredakis \$110,580 without the multiplier for the time
23 period up to June 2001. At that point, his computer crashed, so he was unable to produce
24 contemporaneous time records for this fee application. The special master determined the
25 following (Report 4):

26 On the issue of whether the use of reconstructed time records by
27 Mr. Mavredakis for a portion of his claim should preclude the
28 recovery of any fees, I concluded that it should not. The
computer crash was accidental, the time period involved was
relatively small in the total scheme of things, the reconstruction
was reasonably and conservatively done, and the amount of fees

1 associated with the reconstruction was deleted as a part of discrete
2 billing reductions.

3 Defendant contends that this finding was in error because Mavredakis' loss of the billing
4 records was his own fault because he failed to back up his hard drive or print out
5 contemporaneous hard copies of the records. He also did not take reasonable steps to recover
6 the data from his computer. According to defendants, a reasonably prudent attorney would take
7 these actions, particularly where they knew they would be making a fees application.
8 Moreover, when UPS asked Mavredakis for the underlying records he had used to reconstruct
9 his time, he refused to turn them over on the grounds of privilege.

10 Defendant contends that because Mavredakis did not take adequate steps to safeguard
11 his data, he should receive no fees for any work done in this action. This position seems a bit
12 harsh. California courts have approved fee applications based on reconstructed data where the
13 attorney accidentally lost his or her records. *See Fergus v. Songer*, 150 Cal. App. 4th 552,
14 568–59 (May 3, 2007) (upholding a jury verdict award of attorney's fees where the attorney had
15 lost the records, but created a reconstructed report based on materials from his files which he
16 made available to the court). The mere fact that Mavredakis lost his records does not
17 completely bar his recovering attorney's fees. Of more concern is his refusal to turn over the
18 materials on which his reconstruction was based to defendant. The law is clear that the party
19 seeking fees and costs has the burden to document the hours expended. *ComputerXpress, Inc.*
20 *v. Jackson*, 93 Cal. App. 4th 993, 1020 (2001). At the hearing, counsel argued that portions of
21 those records were privileged. The burden was on plaintiffs, however, to redact any privileged
22 portions and turn the records over to defendant.

23 In sum, the work done by Mavredakis for the first action was not of great value to
24 securing a settlement in *this* action. Additionally, Mavredakis' refusal to turn over the
25 underlying records was unfair. Accordingly, a reduction to the lodestar fee by 90% is
26 appropriate here. The Law Offices of John J. Mavredakis will receive \$71,913.33 in fees for
27 the merits of the Hogle action.
28

1 **D. Fees-for-Fees.**

2 Finally, UPS objects to plaintiffs' being awarded fees-for-fees, or attorney's fees
3 awarded for going through the meet-and-confer and special-master process. Defendant
4 contends that plaintiffs ask for fees expended in arguing for fees from the unsuccessful action to
5 which plaintiffs were never entitled. Here, however, this order has determined that plaintiffs
6 were entitled to recover at least a portion of fees from Hogya action. Accordingly, this finding
7 by the special master is free from error, and plaintiffs' motion to adopt the special master's
8 report as to fees-for-fees is **GRANTED**.

9 **2. PLAINTIFFS' SUPPLEMENTAL REQUESTS.**

10 Plaintiffs ask the Court to address two questions: (1) the apportionment of the special
11 master's fee; and (2) the dates on which interest should begin accruing on the fees award.
12 Plaintiffs have also filed a supplemental request for attorney's fees for bringing this motion to
13 adopt the special master's report and opposing defendant's objections.

14 As to the special master's fees, the special master made no recommendation in his report
15 regarding how his fees were to be allocated. This Court, however, will take into account the
16 reasonableness of parties' respective positions. Here, there were several significant issues to
17 consider in determining the amount of attorney's fees. Plaintiffs' request has been reduced
18 drastically from what they originally asked. Plaintiffs simply should not have expected to
19 recover as much as they had asked for with regard to fees from the prior EEOC/Hogya
20 litigation, and Mavredakis should not have expected to recover so much in fees where his
21 computer crashed and he was unwilling to turn over what records he had to defendant. On the
22 other hand, UPS's contention that the actions were unrelated was unsupportable, as was its
23 contention that attorney Mavredakis should get nothing at all in fees for this action. Still, the
24 burden was on plaintiffs to produce Mavredakis' records, and UPS was the prevailing party in
25 the EEOC/Hogya action. The issues here were certainly hard fought by both sides, but neither
26 side took positions that were *per se* unreasonable. Accordingly, this order will apportion the
27 special master's fees equally among the parties. Plaintiffs have already paid half of the special
28

1 master's invoiced fees. Their request that defendants reimburse them for that amount is

2 **DENIED.**

3 The special master also did not address the question of when interest should begin to
4 accrue on the award of attorney's fees. UPS has not objected to an award of interest, but it does
5 dispute the date on which interest begin to accrue. Because there were a number of close,
6 hotly-contested issues with regard to attorney's fees, interest should accrue from the date of the
7 special master's report, June 20, 2007.

8 Finally, plaintiffs ask for supplemental fees for bringing this motion and opposing
9 defendant's objections. The request covers fees incurred from June 20, 2007, through the date
10 of this hearing. As an initial matter, plaintiffs put far too much stock in the Court's allowing
11 them to bring this request. Hearing the request and granting it are two entirely different matters.
12 It is manifestly unfair to force defendants to decide between not voicing potentially legitimate
13 objections to plaintiffs' fee applications and being punished for those objections. *See Serrano*
14 *v. Unruh*, 32 Cal. 3d 621, 638 (1982). Here, defendants will not be required to pay the costs of
15 plaintiffs' bringing this motion. Accordingly, plaintiffs' supplemental application for fees is

16 **DENIED.**

17 **CONCLUSION**

18 For all of the above-stated reasons, plaintiffs' motion to adopt the special master report
19 is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs' request to apportion the special
20 master's to defendant is **DENIED**; the special master's fee shall be apportioned equally among
21 plaintiffs and defendants. Plaintiff's share will be deducted from its total recovery. Plaintiffs'
22 supplemental request for attorney's fees is **DENIED**. Defendants shall pay attorney's fees in the
23 amount of \$395,016.60 to Rosen, Bien & Asaro LLP, less the Rosen firm's pro rata share of the
24 fee recoupment. Defendants shall pay attorney's fees in the amount of \$186,798 to the Law
25 Offices of John J. Mavredakis, less his pro rata share of the fee recoupment.* Defendants shall

26
27 * By an order dated September 20, 2006, this Court determined that UPS was entitled to recoup
28 \$299,000 in attorney's fees paid to plaintiffs' counsel as a preliminary payment made in June 2002. The amount
was paid to plaintiffs' attorneys contingent on a finding that Hoya was a prevailing party in the first action.
The special master's report states that John Mavredakis' pro rata share of that amount is \$258,596.99, and the

1 also pay interest accrued on those amounts from July 20, 2007, to the present, at the rate
2 provided in 28 U.S.C. 1961.

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4 **IT IS SO ORDERED.**

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6 Dated: September 28, 2007.



7 WILLIAM ALSUP
8 UNITED STATES DISTRICT JUDGE

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United States District Court
For the Northern District of California

Rosen firm's share is \$40,403.00. In addition, Mavredakis was sanctioned in the amount of \$25,000 for failing to dismiss Bryan and Torres' claims after discovering that they had not exhausted their remedies.