

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

THE STATE OF ARIZONA,
DEPARTMENT OF LAW, CIVIL
RIGHTS DIVISION, and ANGELA
AGUILAR,

Plaintiffs,

vs.

ASARCO, L.L.C., a Delaware limited
liability company,

Defendant.

No. CV 08-441 TUC-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING PLAINTIFF
AGUILAR’S MOTION FOR
ATTORNEYS’ FEES**

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND. 2

II. LEGAL ANALYSIS. 7

A. Authority For Fee Award. 7

B. Aguilar’s Attorneys’ Fee Claim. 8

1. Calculation of the lodestar. 10

2. Adjustments of the lodestar. 16

a. Partial success. 16

b. Reduction for “block billing”. 21

3. Non-taxable costs. 23

III. CONCLUSION. 24

After a hard fought eight-day sexually hostile work environment and retaliation jury trial concerning a female laborer in a copper mine operated by the defendant, ASARCO, L.L.C. (“ASARCO”), the jury returned a verdict in favor of the plaintiff, Angela Aguilar, awarding her \$1.00 in nominal damages and \$868,750.00 in punitive damages. Mindful of the United States Supreme Court’s recent admonition that “[t]he essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection,” *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011), I take up Aguilar’s resisted application for attorneys’ fees and costs striving to achieve more than “rough justice” but less than “auditing perfection.”

I. INTRODUCTION AND BACKGROUND

On March 21, 2008, the Civil Rights Division of the Arizona Department of Law (“ACRD”) filed a Complaint in the Superior Court of the State of Arizona In and For The County of Pima alleging claims of sex discrimination, sexual harassment, and retaliation against defendant ASARCO, under the Arizona Civil Rights Act, ARIZ. REV. STAT. ANN. §§ 41-1463 and 1464. Plaintiff Angela Aguilar, a laborer at a mine operated by ASARCO, intervened in the state court case on the claims of sexual harassment and retaliation.¹ She also asserted claims of hostile work environment sexual harassment and retaliation for complaining about sexual harassment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. Aguilar also alleged that she was constructively discharged from her job at the mine by harassment and retaliation. Both cases were consolidated in state court and then removed to federal court. A jury trial began before

¹ Aguilar also asserted a state law claim of intentional infliction of emotional distress, but voluntarily dismissed that claim.

me, as a visiting judge, on April 4, 2011. After an eight-day trial, the jury found for the plaintiffs on Aguilar's sexual harassment claim, but for ASARCO on Aguilar's claim of retaliation and on her allegations that she had been constructively discharged either as the result of sexual harassment or retaliation. On the plaintiffs' sexual harassment claim, the jury awarded no compensatory damages for past or future emotional distress, and only \$1.00 in nominal damages, but \$868,750.00 in punitive damages. Judgment was entered on April 14, 2011.

ASARCO filed a Renewed Motion For Judgment As A Matter Of Law Or In The Alternative Motion For New Trial and plaintiffs filed a Request For Injunctive And Equitable Relief. I granted that portion of ASARCO's motion reducing the punitive damage's award to the statutory cap of \$300,000, but otherwise denied its motion. *Arizona v. ASARCO, L.L.C.*, ---F. Supp.2d ---, 2011 WL 2836743, at *23 (D. Ariz. July 13, 2011). I also denied ASARCO's request for a new trial. *Id.*, ---F. Supp.2d ---, 2011 WL 2836743, at *29. I granted plaintiffs' Request For Injunctive And Equitable Relief. *Id.*, ---F. Supp.2d ---, 2011 WL 2836743, at *31-32.

On April 26, 2011, plaintiff Aguilar filed her Motion For Attorneys' Fees (docket no. 335).² In her motion, Aguilar requests \$340,402.75 in attorneys' fees and non-

²This case was assigned to me while I was serving as a visiting judge in the District of Arizona. The statute authorizing such assignment provides as follows:

(d) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

28 U.S.C. § 292(d). A related statute provides, *inter alia*, "A justice or judge shall (continued...)"

taxable costs pursuant to 42 U.S.C. § 2000e-5(k). This figure is based, in part, on the following work done on the case by attorneys and legal assistants from its inception through May 31, 2011:

Name	Position	Hours	Rate	Total
Jenne S. Forbes	attorney	898.7	\$300.00	\$269,610.00
Karla Starr	attorney	62.0	\$140.00	\$8,680.00
Amanda Damianakos	attorney	109.3	\$190.00	\$20,767.00
Esmeralda Corella	legal assistant	6.8	\$72.50	\$493.00
Denise Tinsely Bram	legal assistant	170.1	\$125.00	\$21,262.50

²(...continued)

discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned,” and, with certain exceptions not relevant here, “shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned.” 28 U.S.C. § 296. This section further provides:

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. § 296.

Marla Vogler	legal assistant	21.3	\$100.00	\$2,130.00
David	legal assistant	2.5	\$125.00	\$312.50
Synnestvedt				
TOTAL				\$323,255.00

In addition, Aguilar seeks \$6,240 for 20.80 hours of work done on the fee application by attorney Forbes. The total amount of attorneys' fees sought in Aguilar's application is \$329,495. Aguilar also requests \$10,907.75 for non-taxable costs.

In support of her fee request, Aguilar submits two affidavits from experienced counsel asserting that Aguilar's counsels' rates are within the range of prevailing market rates for legal services in the relevant market. On June 13, 2011, Aguilar filed her Memorandum of Points and Authorities in Support of Motion for Award of Attorneys' Fees and Non-Taxable Costs. On July 25, 2011, ASARCO filed a resistance to Aguilar's attorneys' fees request. ASARCO contends that because Aguilar was only partially successful on her claims, her fee request must be reduced by twenty percent to take this into account. ASARCO also objects to both the reasonableness of the \$300 hourly rate that Aguilar's lead counsel has requested and the reasonableness of numerous time entries. ASARCO argues Aguilar's fee request should be reduced to a maximum of \$206,525.00.³

On August 1, 2011, Aguilar filed a Motion Pursuant To Fed. R. Civ. P. 26(b)(1) For Discovery Of Defendant's Attorneys' Fees Billings, seeking discovery of any and all itemized billing records, reflecting the hourly rates charged and all hours devoted to this

³ ASARCO seeks a \$31,835 reduction for the difference between Aguilar's counsels' current hourly rates and her counsel's historical rates. ASARCO also seeks a \$51,631.25 reduction because Aguilar was partially successful on her claims. Finally, ASARCO requests a \$39,503.75 reduction to account for block billing and excessiveness of the time entries.

action, for all attorneys of the two law firms that represented ASARCO. ASARCO resisted Aguilar's discovery motion, arguing Aguilar's request would unnecessarily prolong the litigation of the attorneys' fees issue. I granted in part and denied in part Aguilar's motion. I granted her motion as to discovery of ASARCO's attorneys' hours expended, finding such information was likely to produce relevant, even substantially helpful, information regarding the reasonableness of the hours claimed by Aguilar's attorneys for various tasks and various claims. However, I denied Aguilar's request for discovery of ASARCO's attorneys' hourly rates, concluding that this information was not likely to prove relevant to the issues before me.

On August 8, 2011, Aguilar filed her reply brief in support of her Motion for Attorneys' Fees. On August 19, 2011, Aguilar filed a Supplemental Reply on Motion for Attorneys' Fees in which she seeks an additional \$10,500.00 in attorneys' fees and non-taxable costs, for a total of \$350,902.75. The additional \$10,500.00 Aguilar seeks is for further services provided after the submission of her Memorandum of Points and Authorities in Support of Motion for Award of Attorneys' Fees and Non-Taxable Costs. On September 13, 2011, Aguilar filed a Second Supplemental Reply on Motion For Attorneys' Fees. In this supplemental reply, filed after Aguilar received ASARCO's billing records, Aguilar points out that ASARCO's counsel expended twice the amount of time on the case than she is seeking in compensation. Aguilar argues this demonstrates the reasonableness of the number of hours she has submitted for compensation as well as the arbitrary nature of the reductions in hours suggested by ASARCO.

On September 14, 2011, oral arguments were held on Aguilar's Motion For Attorneys' Fees. Plaintiff Aguilar was represented by Jenne S. Forbes of Waterfall, Economidis, Caldwell, Hanshaw and Villamana P.C., in Tucson, Arizona. Defendant

ASARCO was represented by Eric B. Johnson of Quarles & Brady L.L.P., in Phoenix, Arizona. The oral arguments were spirited and enlightening.

II. LEGAL ANALYSIS

A. Authority For Fee Award

Generally, parties to a lawsuit pay their own attorneys' fees "absent explicit statutory authority" to the contrary. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001); see *Fox*, 131 S. Ct. at 2213. Under Title VII, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs[.]" 42 U.S.C. § 2000e-5(k); see *Harris v. Maricopa Cnty. Super. Ct.*, 631 F.3d 963, 975 (9th Cir. 2011). A party prevails either by "obtain[ing] an enforceable judgment . . . or comparable relief through a consent decree or settlement . . . [that] directly benefit[s the plaintiff] at the time of the judgment or settlement." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (internal citations omitted). The Supreme Court has instructed "'that a plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail,'" *Buckhannon*, 532 U.S. at 603-04 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987)), such that the relief "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-12; see *Sanchez v. City of Santa Ana*, 936 F.2d 1027 (9th Cir. 1990) (noting that a plaintiff in a Title VII civil rights suit is a prevailing party and is entitled to an award of attorneys' fees if she "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit.'") (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989)). An award of nominal damages to a plaintiff makes her a prevailing party and

eligible for attorneys' fees. *Farrar*, 506 U.S. at 112-14. Here, because the jury awarded Aguilar \$1.00 in nominal damages, and \$868,750.00 in punitive damages on her sexual harassment claim, she is the prevailing party. Therefore, I turn to the next question, which is the method for calculating what fee award is "reasonable."

B. Aguilar's Attorneys' Fee Claim

Aguilar requests a total of \$350,902.75 in attorneys' fees and non-taxable costs. [T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The starting point in determining attorneys' fees is the lodestar method, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates. *See Hensley*, 461 U.S. at 433; *Fisher v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). The Supreme Court has described the lodestar figure as "the guiding light of our fee-shifting jurisprudence." *Perdue v. Kenny*, 130 S. Ct. 1662, 1672 (2010) (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002)) (quoting in turn *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)).

In discussing the usefulness and the role of the lodestar methodology, the Supreme Court has instructed:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court should exclude from this initial fee calculation hours that were not “reasonably expended.” S.Rep. No. 94-1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. “In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

Hensley, 461 U.S. at 433-34.

As the Ninth Circuit Court of Appeals has explained:

Many factors previously identified by courts as probative on the issue of ‘reasonableness’ of a fee award, *see e.g.*, *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69–70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951, 96 S. Ct. 1726, 48 L. Ed. 2d 195 . . . (1976), are now subsumed within the initial calculation of the lodestar amount. *Blum v. Stenson*, 465 U.S. 886, 898–900, 104 S. Ct. 1541, 79 L. Ed. 2d 891 . . . (1984) (‘the novelty and complexity of the issues,’ ‘the special skill and experience of counsel,’ the ‘quality of the representation,’ and the ‘results obtained’ are subsumed within the lodestar); *Pennsylvania v. Delaware Valley Citizens’ Council*, 478 U.S. 546, 106 S. Ct. 3088, 92 L. Ed. 2d 439 . . . (1986), *rev’d* after rehearing on other grounds, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 . . . (1987) (an attorney’s ‘superior performance’ is subsumed).

Wood v. Sunn, 865 F.2d 982, 991 (9th Cir. 1988). The court of appeals has further explained:

[T]he Supreme Court has recognized that adjustments, both upward and downward to the lodestar amount are sometimes appropriate, albeit in ‘rare’ and ‘exceptional’ cases . . . *Blum*, 465 U.S. at 898–901, 104 S. Ct. 1541 . . . The possibility of adjustments to the lodestar amount necessitates an analysis of various factors that could justify an adjustment. In this circuit, the relevant factors were identified in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). Although several of these factors are now considered to be subsumed within the calculation of the lodestar figure . . ., review of the *Kerr* factors remains the appropriate procedure for considering a request for a fee-award adjustment.

Clark v. City of Los Angeles, 803 F.2d 987, 991 (9th Cir. 1986). The *Kerr* factors, as modified by *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993), are:

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

In re Bluetooth Headset Prods. Liability Lit., ---F.3d---, 2011 WL 3632604, at *13 n.7 (9th Cir. Aug. 19, 2011); see *Morales v. City of San Rafael*, 96 F.3d 359, 364 n.8 (9th Cir. 1996).

I now turn to calculation of the lodestar.

1. Calculation of the lodestar

I must first determine what is a reasonable hourly rate for Aguilar’s counsel. ASARCO contends that the \$300 hourly rate claimed by Aguilar’s lead counsel, Jenne

Forbes, is excessive because that is not the rate Forbes charged at the time the legal services were provided to Aguilar. ASARCO argues Forbes's historical rates should be used in calculating the lodestar amount. Aguilar responds that the rates of Forbes corresponds with the prevailing rates in Arizona for similar lawyers of comparable skill, experience, and reputation. Aguilar further argues that Forbes's current market rate, instead of her historical rates, should be used in calculating the lodestar amount due to the totality of the circumstances and the delay in payment.

In determining whether an hourly rate is reasonable, I must consider the experience, skill, and reputation of the attorney requesting fees. *See Webb v. Ada County*, 285 F.3d 829, 840 & n.6 (9th Cir. 2002). The party seeking an award of fees should submit evidence supporting the rates claimed. *Hensley*, 461 U.S. at 433. As the Supreme Court has explained,

To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Blum v. Stenson, 465 U.S. 886, 895 (1984); *see Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). The determination of a reasonable hourly rate is guided not by the rates actually charged but the rate prevailing in the community for “similar work performed by attorneys of comparable skill, experience, and reputation.” *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 908 (9th Cir. 1995); *see Webb*, 285 F.3d at 840.

On the question of whether current rates or historical rates should be used for calculation of the lodestar, the United States Supreme Court has recognized that “[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary*

pursuant to statutory authority.” *Hensley*, 461 U.S. at 434 (emphasis in original) (internal quotations omitted). However, the Supreme Court has recognized that current rates or an appropriate adjustment for delay in payment may be reasonable. *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989). The Court reasoned, “compensation received several years after the services were rendered . . . is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed.” *Id.* at 283. The Ninth Circuit Court of Appeals has held that a district court may compensate delay in payment in one of two ways: “(1) by applying the attorneys’ current rates to all hours billed during the course of litigation; or (2) by using the attorneys’ historical rates and adding a prime rate enhancement.” *In re Washington Public Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994); *see Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007); *Fischel v. Equitable Life Assur. Soc’y*, 307 F.3d 997, 1010 (9th Cir. 2002); *see also LeBlanc-Sternberg v. Fletcher* 143 F.3d 748, 764 (2d Cir. 1998) (noting that the lodestar should be based on “current rates, rather than historical rates. . .in order to compensate for the delay in payment.”); *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) (“[W]here there is a delay the court should take into account the time value of money and the effects of inflation and generally award compensation at current rates rather than at historic rates”).

Aguilar’s lead counsel, Forbes, has been working since July 2008, over three years, without payment. I find that awarding fees based on Forbes’s current hourly rate appropriately compensates her for the delay in payment. In order to provide Forbes’s counsel with full compensation for the delay in payment and based on the authority cited above, I will employ the current market rate in calculating the lodestar amount. Accordingly, once the current market rate is properly established, I will apply that rate to

all hours billed by Aguilar's counsel to compensate her for the delay in this protracted litigation.

Aguilar has submitted satisfactory evidence of the current prevailing market rate in the community. Aguilar has offered the affidavits of Tod F. Schleier and Armand Salese. Schleier is an "av" rated employment and discrimination law litigator in Phoenix, Arizona, with nearly 30 years of experience. Schleier indicates that "the typical billing rates for such experienced practitioners in the Phoenix metropolitan area range from \$350.00 to \$480.00 per hour and \$175.00 to \$275.00 for less experienced attorneys." Schleier Aff. at ¶ 12, Plaintiff's Ex. 10. He further avers that Forbes's \$300.00 per hour billing rate "is on the low side when compared to the rate charged by other attorneys of similar experience and capabilities, especially where recovery of their fees is entirely contingent on a successful outcome." *Id.* Schleier, a well-respected lawyer in the community, clearly supports Forbes's assertion that the rate she charged is reasonable within this community. Aguilar has buttressed Schleier's opinion with the affidavit of Salese, another "av" rated lawyer with nearly 40 years of experience litigating employment and civil rights cases. Salese avers that lawyers in the Tucson community charge "in the range of \$300.00 to \$450.00 per hour" for employment cases. Salese Aff. at ¶ 7, Plaintiff's Ex. 9. Salese agrees with Schleier that "Ms. Forbes' [sic] hourly rate is fair and reasonable." *Id.* at ¶ 9.

ASARCO challenges many of the fees sought by Aguilar as excessive.⁴ ASARCO identifies several entries as examples. First, ASARCO points to Aguilar's counsels' billing

⁴ASARCO also argues that Aguilar seeks "a windfall in fees and costs" by taking advantage of the fact that ACRD performed a significant amount of work in this litigation. Actually, because ACRD is unable to recover its attorneys' fees, ASARCO benefits by avoiding paying the true costs of this litigation.

records relating to Aguilar's First Supplemental Disclosure Statement. It contends that while Aguilar's counsel billed one and one-half hours for this work that project "could have been done in under ten minutes at the most." Defendant's Br. at 9. ASARCO also challenges the time expended by Aguilar's counsel on her Second Supplemental Disclosure Statement and Third Supplemental Disclosure Statement.⁵ ASARCO further disputes the reasonableness of the 32.3 hours Aguilar's counsel spent in preparing her resistance to ASARCO's motion for leave to amend answer to assert two additional affirmative defenses. Although ASARCO contends that this work could have been performed more efficiently and in a shorter time, the issue is whether the time Aguilar's counsel billed for these services is reasonable. Evaluating the *Kerr* factors, I find the time expended by Aguilar's counsel in preparing and litigating her claims is eminently reasonable. From my review of the record, Aguilar's counsel efficiently prepared the case and expended a reasonable amount of time successfully litigating it. As Aguilar points out in her reply brief, ASARCO's motion to amend raised two highly unusual defenses, the Labor Management Relations Act preemption and a failure to exhaust/arbitrate defense. These defenses required an associate of Forbes to spend a substantial amount of time on research and preparation of Aguilar's response. This extensive work, however, was later used by Aguilar's counsel to prepare her successful motion for partial summary judgment on those defenses in only 9.2 hours. This work was clearly not excessive.

I further find the rate Forbes, as well as the other rates Aguilar's counsel, is charging is reasonable, particularly for such a highly skilled and experienced attorney. Courts are to look to the marketplace as a guide in determining what is a "reasonable"

⁵ Aguilar's counsel billed 1.6 hours for preparing these two supplemental disclosure statements. ASARCO contends this work could have been completed in less than 30 minutes.

attorneys' fee. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989); *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (reasonableness of requested rates is to be determined with reference to rates prevailing in the community for similar services by attorneys of comparable skill, experience, and reputation). Here, Forbes ably and thoroughly litigated Aguilar's case.⁶ She was clearly well prepared for trial and experienced in this type of litigation. I have no doubt that her expertise and experience played a substantial role in the punitive damage award Aguilar received. Thus, I find the requested attorneys' fees are not only

⁶ Aguilar points out that ASARCO's defense team spent 2,384 attorney hours and 1,089 non-attorney hours in defense work here while her attorneys worked 1,047 hours and non-attorneys logged only 193 hours. She also points out that her counsel spent only one third the time, 169 hours, on dispositive motions that ASARCO's counsel spent, 502 hours. Courts have recognized that "the number of hours needed by one side to prepare adequately may differ substantially from that of opposing counsel because the nature of the work on each side may differ dramatically" and because "the case may have far greater precedential value for one side than the other." *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1574 (11th Cir. 1985); see also *Ohio-Sealy Mattress mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 659 (7th Cir. 1985) ("Even apart from potential loss, the task of defending a civil case may require more work than the task of prosecuting. The number of hours spent defending the case may therefore have little relevance to the number of hours reasonably expended by the plaintiff's counsel.") (citations omitted). Here, I find the stark contrast in hours expended on the work relevant in assessing the reasonableness of Aguilar's fee claim. ASARCO mounted a Stalingrad-type defense, battling Aguilar at every turn. Facing such a defense, one would expect Aguilar's counsel to respond in kind. Aguilar's counsel, however, was able to thwart ASARCO's best defensive efforts and aptly prosecute this litigation despite expending less than one-half of the time put forward by the defense. Such a showing demonstrates the reasonableness of Aguilar's fee request. See *City of Riverside v. Rivera*, 477 U.S. 561, 581 n.11 (1986) ("[Defendant] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.") (citation and internal quotation marks omitted). This was an exceptionally hard fought and aggressive defense but a very professional and reasonable one. While on the higher side, I find the defense hours expended to be reasonable as well but compelling evidence that Aguilar's fee request is a real bargain.

extraordinarily reasonable after considering the *Kerr* factors but a real bargain in today's employment discrimination battles. I recently had two cases that were much simpler and trials much shorter and the fee requests substantially greater. Accordingly, I calculate the reasonable lodestar amount for Aguilar's attorneys' fees is \$339,995.

2. *Adjustments of the lodestar*

I turn next to consider whether any adjustments to the lodestar are required.

a. *Partial success*

ASARCO contends that Aguilar's fee claim should be reduced, because she prevailed on only one of her claims against it. ASARCO believes it is reasonable to reduce Aguilar's fee claim by 20 percent to take into account her limited success in the lawsuit.

As the Supreme Court recently explained:

[W]e have made clear that plaintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes. That "result is what matters," we explained in *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983): A court should compensate the plaintiff for the time his attorney reasonably spent in achieving the favorable outcome, even if "the plaintiff failed to prevail on every contention." *Ibid.* The fee award, of course, should not reimburse the plaintiff for work performed on claims that bore no relation to the grant of relief: Such work "cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Ibid.* (internal quotation marks omitted). But the presence of these unsuccessful claims does not immunize a defendant against paying for the attorney's fees that the plaintiff reasonably incurred in remedying a breach of his civil rights.

Fox, 131 S. Ct. at 2214.

In *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493 (9th Cir. 2000), the plaintiff brought both claims of sex discrimination and retaliation. A jury concluded that the plaintiff failed to establish sex discrimination, but found that the defendant retaliated against her because of her complaints about what she perceived as sex discrimination. The Ninth Circuit Court of Appeals rejected defendant's request that plaintiff's requested attorneys' fees claim be reduced because she failed to prevail on all of her claims. The court of appeals reasoned that, "in order to prevail on her retaliation claims, [plaintiff] had to prove that she reasonably believed that [defendant] was engaged in discriminatory activity." *Id.* at 518. As a result, the court of appeals concluded that the retaliation claim was "inextricably intertwined with her discrimination claims." *Id.* The court of appeals concluded that because the time spent on her discrimination claims contributed to the success of her retaliation claims, she was entitled to be awarded attorneys' fees for hours spent on the unsuccessful discrimination claim. I am presented with a similar situation here. I find that, although Aguilar prevailed on only her sexual discrimination claim against ASARCO, no reduction in fees is warranted. This is because I find that all of Aguilar's claims against ASARCO were inextricably intertwined and involved a common core of facts as well as related legal theories. *Hensley*, 461 U.S. at 435. In the Ninth Circuit, claims are unrelated when the relief sought on the unsuccessful claim "is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) (internal quotations omitted). Here, all of Aguilar's claims were related because they centered on the same facts underlying her sexual harassment claim. Because of the interrelated nature of her claims, the time Aguilar expended on her unsuccessful claims undoubtedly contributed to her success on her sexual harassment claim. Thus, Aguilar's counsels' work bore a

relation to the grant of relief she achieved. As the Ninth Circuit Court of Appeals has recognized, “[e]ven if a specific claim fails, the time spent on that claim may be compensable, in full or in part, if it contributes to the success of other claims.” *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991) (citing *Hensley*, 461 U.S. at 435); see *Passantino*, 212 F.3d at 518; see also *Bogan v. City of Boston*, 489 F.3d 417, 428 (1st Cir. 2007) (noting that where “the successful and unsuccessful claims arose from the same common core of facts or were based on related legal theories,” the “rationale for discounting hours spent on unsuccessful claims does not apply.”).

The fact remains that Aguilar ultimately prevailed and that she obtained “excellent results.” See *Hensley*, 461 U.S. at 435-36. The Supreme Court has maintained that when a plaintiff obtains “excellent results,” a plaintiff should recover for his or her counsel “a fully compensatory fee.” *Id.* I granted Aguilar’s Request For Injunctive And Equitable Relief, ordering:

A. Within thirty (30) days of entry of judgment directed in paragraph 4., below, (“Entry of Judgment”), ASARCO will create a policy, modify its existing policies, or confirm in writing that it has an existing policy that prohibits sexual harassment, including display of pornographic graffiti, as defined by federal and Arizona law, and sets out a procedure for complaining of and investigating allegations of sexual harassment. Specifically, the policy will include, at minimum, the following:

- i. a strong and clear statement that sexual harassment will not be tolerated in the workplace;
- ii. a statement encouraging persons who believe they have experienced sexual harassment at work to complain of sexual harassment and that such complaints may be made to ASARCO Unit Management, ASARCO HR or the Civil Rights

Division of the Arizona Attorney General's Office ("ACRD");

iii. information about the phone number, website, and physical address of the ACRD;

iv. a process by which a person can internally complain of alleged discrimination and/or retaliation that does not require any complaint to be made in writing, and does not require the employee or candidate to report the alleged discrimination and/or retaliation to the person alleged to have discriminated and/or retaliated against the person;

v. the job title(s) of ASARCO's employee(s) responsible for accepting complaints of discrimination and/or retaliation;

vi. a statement that unlawful discrimination and/or retaliation violates state and federal civil rights laws;

vii. a description of the range of consequences that may be imposed on violators of the sexual harassment policy;

viii. a statement of intent to handle complaints of discrimination, including harassment and retaliation, as confidentially as appropriate under the circumstances;

ix. a statement of assurance of non-retaliation for persons who believe they have been subjected to sexual harassment and for witnesses interviewed during an investigation into allegations of harassment; and

x. a statement of assurance that allegations of sexual harassment will be investigated promptly, fairly, reasonably, and effectively, and that appropriate corrective action will be taken if harassment is found to have occurred.

B. Within one hundred twenty (120) days of Entry of Judgment, all ASARCO Mission Mine complex managers and supervisors, including mill shift supervisors and DCS

supervisors, and any ASARCO HR employees who participate in the investigation of workplace harassment complaints, will attend individualized training by a qualified trainer on issues related to the following:

- i. maintaining a workplace free of unwanted physical and verbal conduct that creates a sexually hostile work environment;
- ii. an employer's legal obligations as they relate to sexual harassment and retaliation under federal and state anti-discrimination laws;
- iii. investigation techniques that emphasize confidentiality; and
- iv. avoiding gender-bias during investigation.

This training will consist of at least four (4) hours of instruction. For purposes of this training, a "qualified trainer" is a person or agency knowledgeable about the legal requirements under state and federal employment laws and who has complaint investigation experience.

C. Within one hundred twenty (120) days of Entry of Judgment, all ASARCO Mission Mine complex employees will attend a one-hour training on preventing employment discrimination, including sexual harassment and retaliation. This training will include information about the implementation of the policies described above. For purposes of this training, a "qualified trainer" is a person or agency which is knowledgeable about the legal requirements under state and federal employment laws.

Arizona v. ASARCO, L.L.C., ---F. Supp. 2d ---, 2011 WL 2836743, at *31-32.

Aguilar obtained such relief in order to stem what I previously characterized as ASARCO's "serial violat[ion] of antidiscrimination laws." *Id.*, ---F. Supp. 2d ---, 2011 WL 2836743, at *22. Because Aguilar obtained "excellent results," I will not reduce her fee award because she did not prevail on all of her claims. *See Hensley*, 461 U.S. at 435-36.

b. Reduction for “block billing”

ASARCO also seeks a reduction because Aguilar’s counsel block billed some of its time rather than itemizing each task individually.⁷ In response, Aguilar argues against such a reduction, contending that the objected to billing entries comply with LRCiv 54.2(e) because those entries reflect work on related tasks.⁸ I am no stranger to the problems

⁷“Block billing” is “the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.” *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945 n. 2 (9th Cir. 2007) (quoting *Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1554 n.15 (10th Cir. 1996)).

⁸Local Rule 54.2(e) states, in relevant part:

(e) Task-Based Itemized Statement of Attorneys’ Fees and Related Non-Taxable Expenses. Unless otherwise ordered, the itemized account of the time expended and expenses incurred shall be in the format described in this Local Rule.

(1) Format. The itemized statement for legal services rendered shall reflect, in chronological order, the following information:

- (A) The date on which the service was performed;
- (B) The time devoted to each individual unrelated task performed on such day;
- (C) A description of the service provided; and
- (D) The identity of the attorney, paralegal, or other person performing such service.

(2) Description of Services Rendered. The party seeking an award of fees must adequately describe the services rendered so that the reasonableness of the charge can be evaluated. In describing such services, however, counsel should be sensitive to matters giving rise to issues associated with the attorney-

(continued...)

created by the block billing style of record keeping. I have repeatedly recognized a court's authority to reduce fee claims across-the-board by some percentage for "block billing." *See Dorr v. Weber*, 741 F. Supp.2d 1022, 1036-37 (N.D. Iowa 2010) (concluding that a ten percent reduction was warranted for block billing); *Ideal Instruments, Inc. v. Rivard Instruments, Inc.* 245 F.R.D. 381, 390 (N.D. Iowa 2007) (reducing fee claim in part for block billing); *Rural Water Sys. No. 1 v. City of Sioux Center, Iowa*, 38 F. Supp. 2d 1057, 1066 (N.D. Iowa 1999) (recognizing authority to reduce fee claim for inadequate record keeping including block billing but finding no reduction for poor record keeping was warranted); *Houghton v. Sipco, Inc.*, 828 F. Supp. 631, 643-44 (S.D. Iowa 1993) (imposing a fifteen percent reduction for inadequate documentation including block billing), *vacated on other grounds*, 38 F.3d 953 (8th Cir. 1994). In attorneys' fees matters, trial courts have been instructed to utilize their own knowledge relating to various aspects of the lodestar. "The trial judge should weigh the hours claimed against his [or her] knowledge, experience and expertise of the time required to complete similar activities." *Gilbert v. City of Little Rock, Ark.*, 867 F.2d 1063, 1066 (8th Cir.); *accord Saxton v. Secretary, DHHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) ("Trial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests," citing cases); *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir.

⁸(...continued)

client privilege and attorney work-product doctrine, but must nevertheless furnish an adequate nonprivileged description of the services in question. If the time descriptions are incomplete, or if such descriptions fail to adequately describe the service rendered, the court may reduce the award accordingly.

LRCiv 54.2(e)

1984) (“The Court . . . may bring to bear its knowledge and experience concerning . . . the time demands of the particular case.”). Here, I have used my prior knowledge and experience in litigating hundreds of Title VII cases, as both a lawyer and a judge. From my review of the entries ASARCO has identified as being block billed, none of those entries are so flawed as to give me any fear that the claim has been intentionally “padded” or “doctored.” To the contrary, I am able to ascertain that none of the hours objected to by ASARCO are duplicative. Therefore, after a careful review of the time records for Aguilar’s attorneys, I am left with a firm and abiding conviction that the challenged entries are detailed enough for me to find the hours billed to be completely reasonable. Consequently, I conclude no reduction for block billing is warranted here.

3. *Non-taxable costs*

Finally, Aguilar seeks non-taxable costs in the amount of \$10,907.75. It is well established that attorneys’ fees include reasonable out-of-pocket litigation expenses that could normally be charged to the fee paying client. *See Harris v. Marhoefer*, 24 F.3d 16, 19–20 (9th Cir. 1994); *see also Williams v. ConAgra Poultry Co.*, 113 Fed. App’x 725, 728 (8th Cir. 2004). “The rationale for this rule is that attorney’s fees include expenses that are ‘incidental and necessary’ to the representation, provided they are ‘reasonable.’” *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2nd Cir. 1987) (citing *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979)). As with attorneys’ fees, an applicant seeking reimbursement of costs has the burden of providing sufficient detail to support its request for reimbursement of costs. *Hensley*, 461 U.S. at 437, 103 S. Ct. 1933. The requested expenses must be reasonable. *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005). Aguilar has provided itemized billing statements for these costs, which I find reasonable. Accordingly, I award Aguilar non-taxable costs in the amount of \$10,907.75.

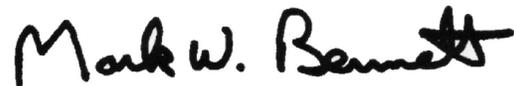
III. CONCLUSION

This case was zealously litigated and extremely well tried to the jury by all counsel. The lawyers on both sides were exceptionally well prepared, highly skilled and very efficient in their craft of trying jury trials and exceptionally professional and courteous to each other, the jury and me. They set the platinum standard for trial lawyers in a hard fought but well tried high stakes civil litigation. The lawyers repeatedly demonstrated that they could be super zealous and super reasonable at the same time - a hire wire balancing act many trial lawyers are unable to achieve.

For the reasons previously discussed, plaintiff Aguilar's Motion for Award of Attorneys' Fees is granted, and I award plaintiff Aguilar attorneys' fees in the sum of \$339,995.00 and non-taxable costs in the sum of \$10,907.75, for a total award of \$350,902.75.

IT IS SO ORDERED.

DATED this 29th day of September, 2011.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA
VISITING JUDGE