

I.

Freeman argues that under Title VII, as the prevailing party, she is entitled to an award of attorneys' fees of \$66,932.50 and \$1,695.18 in costs. Freeman's motion is supported by documentation detailing the time spent prosecuting this action and expenses incurred.

Potter contends that Freeman is not entitled to fees under Title VII, but rather is limited to recouping fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). As such, Potter argues that Freeman's recovery should be reduced based on her limited success and that only attorneys' fees directly related to the claim on which Freeman ultimately prevailed are recoverable. Additionally, Potter seeks to have those attributable fees further reduced because the hourly compensation Freeman seeks is excessive, several entries describing the work done are too ambiguous to assess their relation to the claim on which Freeman prevailed, and counsel's efforts were often duplicative, premature, and/or wasteful. Potter also contends that several of Freeman's costs are not recoverable.

II.

Actions to enforce Title VII settlement agreements are Title VII actions. See E.E.O.C. v. Henry Beck Co., 729 F.2d 301, 305 (4th Cir. 1984); Frahm v. U.S., 2005 WL 1528421, at *2 (W.D. Va June 23, 2005) (stating that an action to enforce a Title VII settlement agreement is an action brought under Title VII itself). Section 706(k) of Title VII provides that "in any action proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Civil Rights Act of 1964, § 706(k); 42 U.S.C. § 2000e-5(k). Freeman is the prevailing party in a suit seeking to enforce the provisions of the July 19, 2000 settlement agreement resolving her original Title VII action. Hensley v. Eckerhart,

461 U.S. 424, 433 (1983) (stating “plaintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit”) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978)). Therefore, she is entitled to an award of attorneys’ fees as permitted under Title VII. See id.

Potter’s argument that attorneys’ fees are appropriate under the EAJA, rather than Title VII, lacks merit. Potter contends that because by earlier order the court found that the Postal Reorganization Act, not Title VII, grants federal courts jurisdiction over claims brought against the United States Postal Service (“USPS”) and waives the USPS’s sovereign immunity, attorneys’ fees may be recovered only as permitted under the EAJA’s fee shifting provisions, not Title VII. Though the Postal Reorganization Act’s “sue and be sued” provision provided the waiver of sovereign immunity allowing the suit to proceed against the USPS, Freeman’s cause of action arose under Title VII, and Freeman, as the prevailing party, is entitled to recoup all available remedies under Title VII. See Loeffler v. Frank, 486 U.S. 549, 565 (1988) (stating that although “the Postal Reorganization Act provides the waiver of sovereign immunity. . . Title VII provides the cause of action under which petitioner may recover”); 39 U.S.C. § 1208. As Title VII has its own fee shifting provision, the EAJA does not affect the award of attorneys’ fees in a Title VII action. See E.E.O.C. v. Consolidated Service Systems, 30 F.3d 58, 59 (7th Cir. 1994); see also Huey v. Sullivan, 971 F.2d 1362, 1366 (8th Cir. 1992); see also E.E.O.C. v. Northwest Structural Components, Inc., 897 F.Supp. 249, 251 (M.D. N.C. 1995).

III.

A prevailing plaintiff in a Title VII action ordinarily should be awarded attorneys' fees. Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 417 (1978). To calculate the proper award of attorneys' fees, the district court should "determine a 'lodestar' figure by multiplying the number of reasonable hours expended times a reasonable rate," Daly v. Hill, 790 F.2d 1071, 1077 (4th Cir. 1986), and then subtracting any fees attributable to time spent pursuing unsuccessful, unrelated claims. Hensley, 461 U.S. at 435. From this estimate, the court can make an initial valuation of the attorneys' services. Martin v. Mecklenburg County, 151 Fed. Appx. 275, 283 (4th Cir. 2005). The court may then adjust the lodestar figure up or down based on several other considerations, including: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of this case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and 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. Blum v. Stenson, 465 U.S. 886, 893 (1984) (adopting the twelve factors set out in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)). The court need not independently address each factor because such considerations are usually subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. Hensley, 461 U.S. at 434 n.9.

Freeman submitted an itemized bill of fees totaling \$66,932.50 for 340 total hours of work by three attorneys and one paralegal, billed at a rate of \$200.00 per hour and \$65.00 per

hour, respectively. Potter contends that Freeman's claim for hours is unreasonable because her claim includes a request for reimbursement for hours which were duplicative, wasteful, and were not related to the claim on which Freeman ultimately was successful. Therefore, Potter argues that Freeman's attorneys' fee award should be significantly reduced.

A. Reasonable Number of Hours

As the prevailing party, Freeman bears the burden of establishing that the number of hours for which she seeks reimbursement is reasonable and does not include any claim for hours which are excessive, redundant, or otherwise unnecessary. See Daly, 790 F.2d at 1079; Rum Creek Coal Sales, Inc. v. Caperton, et al., 31 F.3d 169, 174-75 (4th Cir. 1994). In support of her motion for fees, Freeman provided an itemized accounting of attorney and paralegal time expended totaling 340 hours. Potter argues that a substantial number of the hours for which Freeman seeks reimbursement are unreasonable and should be excluded because Freeman never filed the work product annotated in the description of the time spent working on such product, Freeman seeks reimbursement for duplicative work efforts, and Freeman seeks reimbursement for trial preparation and post-hearing issues which are ambiguous and excessive.

Potter argues that all of Freeman's fees related to an Opposition to Potter's Motion to Dismiss and Freeman's Response to the Amended Motion to Dismiss, Entries 21-27 and 31-38 of Freeman's Exhibit 2 to her First Motion for Attorney Fees and Litigation Expenses, should be dismissed because Freeman never filed such pleadings. Instead of filing an opposition or response to the Potter's pleadings, Freeman filed separate amended complaints. The undersigned believes that time spent researching, preparing, and/or drafting a response to these motions, even in the form of an amended complaint, was not wasteful or duplicative, and should

not be excluded.² See Certain v. Potter, 330 F.Supp. 2d 576, 583-84 (M.D. N.C. 2004) (finding that relevant and reasonable research by experienced and skilled counsel should not be eliminated from the lodestar calculation absent specific evidence of excessive hours expended).

Potter also argues that several entries related to trial preparation and post hearing issues, Entries 102, 125-27, 131, 133, 135, 140, 146, 148, and 150 of Freeman's Exhibit 2 to her First Motion for Attorney Fees and Litigation Expenses, are ambiguous and excessive because Freeman did not delineate the specific amount of time spent on various activities within a larger time period and/or did not adequately explain all work done within a certain time frame. The court finds that Freeman's annotations related to these entries are sufficiently descriptive and related to reasonable trial preparation and post-hearing 'wrap up' to allow recovery. Additionally, the undersigned finds that Freeman's claim for hours spent on such matters are not excessive and time spent preparing for a pending trial is not wasteful and, thus, finds no reason to exclude these hours from Freeman's recovery.

² Potter also argues that because Potter's counsel made similar arguments in the two Motions to Dismiss filed in this case in another, unrelated case, 6:01cv00041, concerning a breach of contract claim, and in that case Freeman's counsel filed a response, but eventually was unsuccessful, Freeman's counsels' work in opposition to the motion in this case was unreasonable. Essentially, Potter argues because Freeman's attorneys lost a similar claim in another unrelated case, any time spent researching or preparing an argument in this case was wasteful. The court finds this argument without merit. Counsel can pursue any reasonable legal basis for relief, and merely the fact that in a previous, unrelated case counsel's pursuit of relief on that basis was unsuccessful does not render subsequent attempts to obtain relief on the same basis, under different circumstances, wasteful.

B. Reasonable Rate

Freeman seeks attorneys' fees of \$200.00 per hour and paralegal fees of \$65.00 per hour. Potter argues that an hourly rate of \$200.00 is not justified and seeks to reduce that rate to \$150.00 per hour. Potter does not contest the paralegal rate of \$65.00 per hour.

In determining the reasonableness of the requested hourly rate, the court must consider the prevailing market rate in the relevant community. Missouri v. Jenkins, 491 U.S. 274, 285 (1989); Rum Creek Coal Sales, Inc., 31 F.3d at 175. This may be established through affidavits reciting the fees of counsel with similar qualifications, information concerning fee awards in similar cases, and/or specific evidence of counsel's billing practice. Spell v. McDaniel, 824 F.2d 1380, 1402 (4th Cir. 1987). Freeman submitted evidence establishing that counsel have been practicing for twenty years and have extensive experience in civil litigation. Additionally, Freeman submitted two affidavits from attorneys practicing in Roanoke, Virginia representing that \$200.00 per hour is a reasonable and fair market rate for attorneys with Freeman's counsel's experience and expertise in this geographic area. Finally, Freeman offers several examples of instances in this circuit of attorneys' fee awards, to attorneys with similar skill and experience, at an hourly rate of approximately \$200.00. Potter offers nothing to refute this evidence. Furthermore, having practiced law in Roanoke for twenty years before his appointment as Magistrate Judge in 2004, the undersigned is well aware of prevailing rates in this area for attorneys with similar experience and expertise, and finds that an hourly rate of \$200.00 is reasonable. See Rum Creek Coal Sales, Inc., 31 F.3d at 179 (finding that the Magistrate Judge's use of his own personal knowledge of the prevailing rates in the relevant locale in determining the reasonableness of the hourly rate was appropriate).

Potter argues that the hourly rate of \$200.00 per hour exceeds the statutory maximum for the recovery of attorneys' fees under the EAJA and plaintiff has failed to establish any "special factors" which would justify a greater award. As noted above, Freeman is entitled to an award of attorneys' fees as allowed under Title VII, not the EAJA. Therefore, the EAJA's hourly rate statutory cap is not applicable to Freeman's recovery.

Based on the foregoing, the undersigned finds that Freeman's claim of 331.9 hours at a rate of \$200.00 per hour and 8.5 hours at a rate of \$65.00 per hour is reasonable, and, as such, results in a lodestar calculation of \$66,932.50 for professional services rendered.

C. Reduction in Lodestar Calculation for Unsuccessful, Unrelated Claims

When unsuccessful claims are not related to successful claims, the court should not grant an award of attorneys' fees for time spent pursuing those unsuccessful claims. Hensley, 461 U.S. at 436. However, when all claims involve a "common core of facts," counsel's time is usually devoted to the pursuit of the litigation as a whole. Id. In such instances, rather than automatically excluding time spent pursuing claims which were ultimately unsuccessful, the court must focus on the overall relief obtained on the claims on which the plaintiff was successful. Id.

Potter argues that because Freeman was successful only on her Title VII claim, all hours which are not directly traceable to work done in furtherance of that claim must be eliminated. However, it is clear that Freeman's claims all were related to the USPS's failure to comply with the terms of the Settlement Agreement and for discrimination related to her complaints regarding that failure. Accordingly, the undersigned finds that Freeman's claims were factually intertwined. Thus, the court cannot exclude any hours as unrelated to Freeman's successful

claims, but instead must consider her overall success. See Hensley, 461 U.S. at 435; see also Brodziak v. Runyon, 145 F.3d 194, 197 (4th Cir. 1998).

D. Reduction in Lodestar Calculation Based on Ultimate Success

The most critical factor in determining the reasonableness of a fee award is the degree of success obtained. Farrar v. Hobby, 506 U.S. 103, 114 (1992). If a plaintiff has only achieved partial success, even when all claims raised were interrelated, non-frivolous, and raised in good faith, the product of calculating the reasonable number of hours expended on the litigation by the reasonable rate may result in an excessive award. Hensley, 461 U.S. at 436. However, a reduction should not be based solely on a mathematical comparison between the number of claims raised and those on which plaintiff ultimately prevailed. Id. at 435 n.11, see also Brodziak, 145 F.3d at 197. If a reduction is appropriate, the court may simply reduce the award to account for the plaintiff's limited success. Hensley, 461 U.S. at 437.

Freeman alleged one breach of contract claim related to the USPS's failure to comply with the terms of the previous Title VII Settlement Agreement and several claims alleging new Title VII violations. As relief, Freeman sought damages of \$1,500,000.00, reinstatement of lost wages and benefits, and specific performance. Potter was granted summary judgment as to all Freeman's new Title VII claims. As to Freeman's breach of contract claim, the court found that the USPS clearly failed to comply with the terms of the Settlement Agreement, and Freeman was entitled to damages of \$14,000.00. However, because the Settlement Agreement provided for the rendering of personal services, specific performance was not an appropriate remedy. Finally, in finding that Freeman was entitled to attorneys' fees, the court noted that the USPS's failure to comply with the court-mediated settlement resulted in wasteful litigation which should be discouraged.

Potter argues that Freeman’s recovery was so diminutive when compared to the damages she sought, any award of attorneys’ fees should be reduced by 50%. Although in instances where a prevailing plaintiff is merely awarded a “technical victory” a substantial reduction to or elimination of attorneys’ fees may be appropriate,³ where a prevailing plaintiff seeks and is awarded significant damages, such a reduction is not appropriate. See Johnson v. Hugo’s Skateaway, 974 F.2d 1408, 1419 (4th Cir. 1992). Here, although Freeman was awarded less monetary damages than she sought, an award of \$14,000.00 is not so insignificant to be labeled merely a technical or de minimis victory. See Farrar, 506 U.S. at 114 (stating that an award of only \$1 in a suit for damages of \$17 million gave the plaintiff nothing more than the knowledge that his rights had been violated in some, unspecific way, thereby establishing that there was no real injury and an award of attorneys’ fees was not appropriate); see also Cantrell v. M & M Chevrolet, Inc., 17 F.3d 1433 (4th Cir. 1994) (finding an award of \$10 merely a technical victory and remanding for reconsideration as to if a reduction of attorneys’ fees was appropriate for that reason).

Nonetheless, the court must consider if Freeman’s ultimate success was so limited as to justify some reduction in the award of attorneys’ fees. Freeman sought damages of \$1,500,000.00, reinstatement of lost wages and benefits, and specific performance of the Settlement Agreement, but the court only awarded damages of \$14,000.00 and attorneys’ fees. As such, some reduction due to the Freeman’s limited success is warranted. However, as Freeman’s suit and victory served a public goal of encouraging the USPS and others to abide by

³ In instances where a plaintiff technically prevails, but receives merely an award of nominal damages, in determining if the award of attorneys’ fees should be reduced the court should consider three factors: (1) the difference between the damages alleged and the amount recovered; (2) the significance of the legal issue on which the plaintiff prevailed; and (3) whether the plaintiff’s success served some public goal. Farrar, 506 U.S. at 121-122 (O’Connor, J., concurring).

the terms of their settlement agreements and, as such, discourages further wasteful litigation, the court finds any reduction should be minimal. See Farrar, 506 U.S. at 121-22 (O'Connor, J., concurring) (stating that a plaintiff's "success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client"). Accordingly, the undersigned finds that a 10% fee reduction for professional services rendered is appropriate to account for Freeman's somewhat limited success. As such, the undersigned recommends that Freeman be awarded \$60,239.25 in attorneys' fees.

IV.

Freeman, as a prevailing party under Title VII, 42 U.S.C. § 2000e-5(k), is entitled to reimbursement for all reasonable litigation expenses. See Daly, 790 F.2d at 1083-84 (noting that the district court should review prevailing civil rights plaintiff's expense requests under 42 U.S.C. § 1988, which contemplates reimbursement for all reasonable litigation expenses); see also Trimper v. City of Norfolk, Virginia, 58 F.3d 68, 75 (4th Cir. 1995); Spell v. McDaniel, 852 F.2d 762, 771 (4th Cir. 1988). Freeman's recovery is not limited by Rule 54(d) of the Federal Rules of Civil Procedure.⁴ Daly, 790 F.2d at 1083-84.

Freeman seeks reimbursement for \$1,488.12 in expenses incurred by Freeman personally and \$207.00 advanced by counsel. Potter argues that Freeman's recoverable expenses should not include any expenditures for serving witness subpoenas and witness fee advances.

⁴ Rule 54 provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). However, Rule 54 does not provide the court with "unrestrained discretion" to reimburse the prevailing party, rather the court may only tax those costs authorized by statute. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 444-45 (1987). The costs that may be taxed to the opposing party include the fees of the clerk, docket fees, costs of service of summonses and subpoenas, a reporter's attendance fee for depositions, the costs of a transcript of a deposition, witness fees, a copy of the trial transcript, and necessary printing and copying fees. 28 U.S.C. § 1920.

Additionally, Potter argues for a two-thirds reduction in all expenses associated with the taking of the depositions of Murray, Kassebaum, and Cox. Potter does not challenge Freeman's claim for the following costs: filing fee, \$160; trial transcript, \$93.00; and hearing transcript, \$58.93.

First, Potter argues that fees for the issuance of witness subpoenas, \$24.00, and witness fee advances, \$90.00, should be eliminated because those witnesses never testified. These fees were paid out-of-pocket by Freeman's counsel and are of a nature which would usually be charged to the client and, therefore, are fully recoverable. Spell, 852 F.2d at 771. Moreover, the court finds that serving witnesses with subpoenas and compensating such witnesses for their readiness to testify at trial is a reasonable litigation expense. See Haroco, Inc. v. American Nat. Bank and Trust Co. of Chicago, 38 F.3d 1429, 1442 (7th Cir. 1994) (finding that the serving of subpoenas and payment of witness fees for deposition witnesses, whose depositions were never taken, were recoverable under 28 U.S.C. § 1920).

Second, Potter argues that any fees associated with the depositions of Murray, Kassebaum, and Cox should be reduced by two-thirds because Cox's deposition testimony was duplicative of testimony he gave during an earlier evidentiary hearing and all three provided deposition testimony addressing claims on which Freeman was not ultimately successful. Potter has not provided any evidence to substantiate his claim that the testimony provided by Cox at his deposition was entirely duplicative of his earlier testimony at an evidentiary hearing. Moreover, given that the nature of such proceedings allow for the introduction of markedly different testimony, there is no justification to eliminate any costs associated with Cox's subsequent deposition on that basis. Further, as noted above, Freeman's breach of contract claim and Title VII claims involved a common core of facts. As such, discovery related to these matters is clearly related to the litigation and, thus, also is fully recoverable. Accordingly, the undersigned

recommends that Freeman be awarded \$1,695.18 for expenses incurred by Freeman personally and advanced by counsel during the course of the instant litigation.

V.

For the reason stated above, Freeman is entitled to an award of attorneys' fees and costs. Accordingly, it is **RECOMMENDED** that the Freeman's motion for attorneys' fees and litigation expenses be granted in the total amount of \$61,934.43.

The clerk is directed to immediately transmit the record in this case to the Honorable William L. Osteen, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusions of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

Entered this 13th day of September, 2006.

/s/ Michael F. Urbanski
United States Magistrate Judge