

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

COLLEEN STUART, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 23-CV-2021-TC
	)	
CITY OF TOPEKA, KANSAS, et al.,	)	
Defendant.	)	

**Defendant’s Memorandum In Opposition to Awarding Attorney Fees**

Defendant, City of Topeka, Kansas (“COT”) by and through its counsel of record offer its Memorandum in Opposition to Plaintiffs’ Motion for An Award of Attorneys’ Fees [Doc. 128] pursuant to Fed. R. Civ. P. 54(d).

The most critical factor to consider when awarding fees is the success obtained by Plaintiffs, who had a 22% success rate. Three Plaintiffs filed a total of nine causes of action against two Defendants. Only two causes of action survived, providing two of the three Plaintiffs a jury verdict in their favor for nominal back wages and below the statutory limit for compensatory damages. This award fell short of the relief Plaintiffs demanded which included a demand for lost wages, lost retirement and emotional distress. Plaintiffs’ six claims under §1983 against the City and Bryan Wheelers were dismissed. The surviving claim of Title VII failure to promote because of sex also did not survive in whole. Plaintiff Jennifer Cross’s Title VII discrimination claims (2018 and 2022 captain positions) were dismissed on summary judgment.

Plaintiffs’ attorneys are requesting to be reimbursed \$915,162.50 in fees for all their time, even for the failed claims, pre-suit work, administrative work, redundant, block billing and work related to Jennifer Cross’s second unresolved lawsuit, Case No. 24-CV-4092-KHV-BGS. This request is unreasonable. It should be substantially discounted under the Court’s lodestar method to \$303,887.50, and further reduced based on success obtained.

Stuart and Harden filed this lawsuit complaining that they were not promoted in 2021 to a

single Major position, or to Deputy Chief in 2021. Judge Broomes ultimately found there was no discrimination in the Deputy Chief promotion, and he granted dismissal [Doc. 77 at 27]. After filing their lawsuit, Harden accepted an unconditional offer of promotion to Major on February 10, 2023, and Plaintiff Cross was promoted to Captain on the same date [Doc. 48]. At least two Plaintiffs achieved successful promotions after filing suit. It is incongruous that in addition to damages of \$488,930.44 (\$277,871.24 to Stuart and \$211,059.20 to Harden) awarded to Stuart and Harden, Plaintiffs' attorneys are also asking for attorney fees to the tune of almost \$1 million (\$915,162.50) from the City's coffers which are publicly funded.

The request for fees is also objectionable by the sheer fact that at least some of the Jess's bills were not kept contemporaneously, and the bills do not adequately reflect how much time was spent on matters due to vagueness and block billing. Time billed was excessive and duplicative. Defendant has attempted to show in this response and with the color-coded bills (Atts. 4-7 of Vogelsberg Aff., Ex. 1), what is objectionable, excessive, duplicative; let alone inaccurate.

Defendant's counsel also appropriately defended the claims in this case and performed work that parallels that of Plaintiffs' counsel. Defendant's primary team was made up of two attorneys, a support attorney, and one law clerk.<sup>1</sup> From January 1, 2023 through November 7, 2024,<sup>2</sup> Defendant spent \$244,056 in fees and \$1,202.24 in expenses in the defense of this case, roughly \$671,106 (or 74%) less than what Plaintiffs' counsel currently seek. Gragson Aff., attached as Ex. 2.

## ARGUMENT

Defendant will track this Court's analysis from *M.B. v. Howard*, 555 F.Supp.3d 1047 and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) in contesting Plaintiffs' fee application.

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<sup>1</sup> Attorney Amanda Vogelsberg worked in the background and was not predominately involved in the defense; nor was much time billed by her.

<sup>2</sup> November 7, 2024 is the date used because Plaintiffs' records are through that date.

### **I. The Award of Attorney’s Fees is Discretionary**

In Title VII cases a district court has discretion to “...allow the prevailing party . . . a reasonable attorney’s fee.” *Fox v. Pittsburg State University*, 258 F.Supp.3d 1243, 1251 (D. Kan. 2017). To obtain attorneys’ fees, plaintiffs must prove two elements before proceeding to the Tenth Circuit’s lodestar analysis: (1) that the plaintiffs were the “prevailing party” in the proceeding; and (2) that the attorney’s fee is “reasonable.” Defendant contests that Plaintiffs were a prevailing party on Cross’ Title VII claims and the six § 1983 pattern and practice claims. Those claims are not reasonably related to the prevailing Title VII claims because Cross’ claims involved different promotional decisions (captain positions opening in 2018 and 2022) and the § 1983 claims were based on a theory of a pattern and practice of failing to promote on the basis of gender. Defendant also contests that the requested fees are reasonable.

#### **A. Plaintiffs Section 1983 claims and Jennifer Cross’s Title VII claims are not related to the surviving Title VII claims**

Claims are related if they are based on a common core of facts or are based on related legal theories for purposes of awarding attorney fees. *Fox*, 258 F.Supp.3d at 1253. Plaintiff Cross’ Title VII claims concerned a different set of facts. Those claims were based on her belief that she was not promoted to a 2018 captain position and a 2022 captain position, and gender discrimination she alleged during her tenure with the police department. These claims were dismissed. The captains positions were not related to the two major positions that Stuart and Harden litigated.

In *Tidwell v. Fort Howard Corp*, 989 F.2d 406, 409, 412-13 (10th Cir. 1993), there was no way to separate the work on the core issues in the Equal Pay Act and Title VII claims because those claims were both based on evidence that Tidwell had substantially similar duties and job circumstances as her male predecessors but was paid less. That is not the case here.

The Plaintiffs asserted claims under 42 U.S.C. § 1983 against Bryan Wheelles and COT for violating their rights to equal protection in failing to promote them because of their sex. The facts

underlying this claim relied on Plaintiffs' allegation that there was a pattern and practice of not promoting women. [Doc. 48 at 18] The claim against Wheelles was dismissed because he was entitled to qualified immunity. [Doc. 77 at 31] The claim against the City was dismissed because Plaintiffs failed to show a *policy or custom* in any form; albeit a statement, written or unwritten policy or practice. As Judge Broomes correctly cited, "a policy or custom includes the following: 1) a 'formal regulation or policy statement,' 2) an informal custom that amounts to widespread and well-settled practice; 3) a decision of an employee with final policymaking authority; 4) ratification by a final policymaker of a subordinate's decision; or 5) 'failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.'" Doc. 77 at 32 (quoting *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010)). Judge Broomes noted that the only surviving claim, --- the major position that Harden and Stuart applied for in 2021--- was not evidence of a pattern and practice sufficient to show a Section 1983 violation. Doc. 77 at 32-33.

Importantly, Judge Broomes also ruled that the Kim Hanika and Donna Eubanks evidence were allegations of favoritism, not discrimination toward females and was "immaterial to the issue in this case." Doc. 77 at 26-7, 33. Further, Plaintiffs' argument that "Captain Monasmith treats females differently than he treats males" was also not sufficient. Doc. 77 at 33, n. 17. The evidence that Plaintiffs used at trial about how the City had an alleged general policy or practice of treating women differently than males *in all other respects* to buttress their Title VII claims, despite Defendant's objections both at trial and in their pretrial briefs, is a separate legal theory and not a claim that should have been litigated since it was not preserved in the Pretrial Order. Doc. 77 at 33, n. 18; Doc. 48 [Pretrial Order] at 11<sup>3</sup>). Thus, any billed time to pursue a pattern and practice

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<sup>3</sup> Plaintiffs' inserted the following into the Pretrial Order, limiting the scope of their claim: "Plaintiffs' experience of gender discrimination and the similar experiences of other female TPD officers, and detailed below, show the TPD's (and Defendant Wheelles') policy, pattern and practice of gender discrimination. Such a policy, pattern and practice

of discrimination concerning not promoting women **and** “in all other respects” treating women differently than men *except* as to Harden and Stuart’s allegations arising after summary judgment should be discounted because they are unrelated to the surviving claim.

Cross’s claims involved a 2018 captain position, which was time barred, and a 2021 captain position. These positions and the promotional considerations themselves are factually distinguishable from the 2021 major promotions because they involve different promotional opportunities, qualifications, and candidates. Even Plaintiffs relied on different evidence. [Docs. 66 at 12-20, 26-81 and 77 at 18-20].

The court should also consider the Supreme Court’s ruling in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) and *Fox v. Vice*, 563 U.S. 826 (2011) confirming that Section 1988 authorizes an attorney’s fee award in favor of a prevailing defendant upon a finding that the plaintiffs’ action was frivolous, unreasonable or without foundation. Here, Plaintiffs argued that the City had a policy and practice of discrimination in violation of their rights under § 1983, but they failed to defend this claim in response to summary judgment and their claims were dismissed. Cross’s 2018 failure to promote claim was obviously untimely and therefore frivolous.

When a lawsuit involves a mix of frivolous and non-frivolous claims, “a defendant may recover the reasonable attorney’s fees he expended solely because of the frivolous allegations.” *Fox v. Vice*, 563 U.S. 826, 836 (2011); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *cf. CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419 (2016) (employer defendant is not required to obtain a favorable judgment on the merits of the underlying discrimination case to be eligible to recover its attorneys’ fees). Although Defendant is not seeking fees, the fact that Cross’s Title VII claim and Plaintiffs’ unreasonable and groundless §1983 claims did not prevail should

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show that Defendants’ gender discrimination is and was a policy, practice or custom of the Defendants within the meaning of *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978).

be a factor against awarding the full fees requested. Allowing Plaintiffs to recover for their frivolous, unreasonable and groundless §1983 claims, would be unjust and a misreading of what the legislature intended in 42 U.S. C. § 1988 and the similar language in 42 U.S.C. § 2000e-5(k). A full award is contradictory to the reasoning in *Fox*, and supports reduction as argued below.

**B. Plaintiffs Failed to Carry the Burden of Establishing the Reasonableness of Their Fee Request**

Plaintiffs carry the burden to prove and establish the reasonableness of each dollar and each hour, above zero. *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986). Under the *Hensley v. Eckerhart* model, the district court must first determine “the number of hours reasonably expended on the litigation” and also “a reasonable hourly rate.” *Hensley*, 461 U.S. at 433. The court should exclude any hours that were not “reasonably expended.” *Id.* at 434 (citations omitted). The court must assess whether the case was overstaffed and should exclude any “hours that are excessive, redundant, or otherwise unnecessary.” *Id.*

Only two of Plaintiffs’ nine claims survived summary judgment. Four lawyers represented Plaintiffs and had no support staff. The Plaintiffs’ lawyers submitted a total of 1,379.35 “billed” hours through November 7, 2024, itemized as follows:

Lawyer	Hourly Rate	Hours Billed	\$ Amount
Mark Jess	\$850	382.75	325,337.50
Christie Jess	\$600 as lawyer; \$150 as paralegal	523.10	\$285,720.00
Eric Playter	\$760	208	\$158,080.00
Chris Playter	\$550	248 + 17.5 = 265.5	\$140,599.43 + 9,625 = \$150,224.43

Plaintiffs seek attorney fees of \$915,162.50. However, Plaintiffs’ counsel admit that they agreed to take this case on a contingency fee basis.<sup>4</sup> Typically, contingency fee contracts contain a provision about the hourly rate that will be charged if an award of fees is granted, but Plaintiffs’ counsel do not disclose whether that is the case in their contracts with plaintiffs or whether their

<sup>4</sup> E. Playter Aff. ¶20 [Doc. 128-3, p. 7]; C. Playter Aff. ¶11 [Doc. 128-4]; M. Jess Aff. ¶ 11 [Doc.128-1, p.2].

contracts are silent. Plaintiffs also do not provide a copy of the contract(s) for review. Either way, Plaintiffs failure to support their rates by referencing their contracts indicates that counsel would not actually charge Plaintiffs the rates they now seek. Further, Eric Playter admits his rate was adjusted higher in the middle this case on January 1, 2024 to \$750 [Doc.128-3 at ¶22), yet he asks for \$760. Plaintiffs should not be awarded rates that they would not charge their own clients, and none of them attest to charging plaintiffs the actual rates they now seek, let alone any agreement to an increase in those rates.

Comparatively, the City was represented by two primary lawyers, one supporting lawyer, and a clerk. Defense counsel utilized support staff but did not bill the City for their legal assistant's time. The City's lawyers and clerk billed 1,425.75 hours through November 7, 2024, which amounted to fees paid of \$244,056. Ex. 2 at ¶12.

Lawyer	Hourly Rate	Hours Billed	\$ Amount
J. Phillip Gragson	\$200	599.2	\$119,840
Kara Eisenhut	\$180	546.9	\$98,442
Amanda Vogelsberg	\$200	78.7	\$15,740
Law Clerk	\$50	200.95	\$10,034

In comparing the amount requested by plaintiffs to the amount billed to the City, plaintiffs seek 74% more in fees than what defense counsel reasonably charged; mostly due to the exorbitant rates. The amount requested is excessive and should be discounted by using more reasonable rates and reducing the duplicative, excessive, administrative and vague time entries if the court is unwilling to reduce the lodestar amount by success obtained.

**i. Plaintiffs' billed hours are replete with redundancy, duplication, block-billing, media contact, administrative tasks, and are excessive.**

As the Tenth Circuit said, "The more lawyers representing a side of the litigation, the greater the likelihood will be for duplication of services." *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983), disapproved on other grounds, *Pennsylvania v. Del. Valley Citizens' Council for Clean Air Act*, 483 U.S. 711 (1987). Neither Plaintiffs' counsel affidavits nor the bills indicate whether

Plaintiffs' bills were reduced for redundancies. The bills are replete with them as shown in Atts. 4-7 attached to Ex. 1 using yellow and green highlighting to distinguish excessive and duplicative billing, and red highlighting or font to demarcate administrative tasks. All the bills submitted contain numerous instances of billing for administrative matters, such as to review deposition transcript charges, filing and organizing. All the bills contain block billing, which makes it hard to ascertain how much time was spent on each activity. *See* Ex. 1.

The bills also charge for pre-lawsuit matters such as preparing the parties' EEOC charge. *See* blue highlighted in Atts. 4-7 of Ex. 1. Plaintiffs filed this lawsuit on January 18, 2023. Other than standard preparation before a lawsuit counsel requested 38.15 hours for pre-suit work such as answering the EEOC, phone calls and meetings to discuss amongst themselves and talk to potential clients. *Id.* These activities are not properly chargeable. "[P]re-suit fees may be awarded under 42 U.S.C. § 1988 only for 'discrete' work 'that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached.'" *Webb v. Bd. of Educ.*, 471 U.S. 234, 243 (1985). Some pre-suit and post-suit time was spent familiarizing themselves with the area of law. This type of time is not compensable. *Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan.*, 157 F.3d 1243, 1253 (10th Cir. 1998). Plaintiffs' counsel hold themselves out as having specialized expertise in civil rights and discrimination suits. Therefore, counsel should be familiar with the legal questions raised and other issues they researched. Such time spent on background research is not compensable. *Kansas Judicial Watch v. Stout*, No. 06-4056-JAR, 2012 WL 1033634, at \*8 (D. Kan. Mar. 27, 2012).

The bills charge unrelated matters such as providing legal work for Jennifer Cross's separate lawsuit styled *Jennifer Cross v. City of Topeka, Kansas*, Case No. 5:24-CV:04092-KHV-BGS. *Id.* at pink highlighting. Plaintiffs' counsel also billed for contacting the media, which was not necessary in their representation on these cases. *Id.* at orange highlighting.

This time should be discounted. These types of charges are not recoverable and should be reduced. See *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074 (10th Cir. 1998), *Dickerson v. City Bank Trust Co.*, 590 F.Supp. 714 (D. Kan. 1984), *Ramos*, 713 F.2d at 553, *Gilmore v. Beveridge*, 2024 WL 1461813 \*4 (April 2024, D. Kan.).

**ii. Some of the Jess' records were not kept contemporaneously.**

The court should exclude from the initial fee calculation hours that were not “reasonably expended.” *Hensley*, 461 U.S. at 433. As quoted in *Hensley*, “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.” *Id.* (quoting *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original)). In *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224 (10th Cir. 2000), the court emphasized the importance of keeping meticulous time records to prove reasonable fees in Title VII cases. The court reduced the fee request due to inadequate documentation, noting issues with “lumping” together of billing entries, which made it difficult to determine the work performed and to justify the hours claimed. “Counsel for the party claiming the fees has the burden of proving hours ... by submitting meticulous, contemporaneous time records....A district court is justified in reducing the reasonable number of hours if the attorney’s time records are ‘sloppy and imprecise’ and fail to document adequately how he or she utilized large blocks of time.” *Case v. Unif. Sch. Dist. No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998).

The records are replete with the same “lumping” problems seen in *Mallinson*. Part of the reason for this may be that the Jesses did not always keep contemporaneous records. Christie Jess intimated to Gragson and Eisenhut that it took her awhile to prepare their final bills because she had to review their calendars. Eisenhut Aff., at ¶14, attached as Ex. 3. Given that it appears the Jesses may not have always keep contemporaneous records, the district court should totally deny

their attorney fees claimed or significantly discount it. *Anderson v. Sec'y of Health and Human Servs.*, 80 F.3d 1500, 1506 (10th Cir. 2002) (“a district court may totally deny a claim when no contemporaneous records were kept.”); *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995) (approving 35 percent reduction due to lack of contemporaneous records). Defendant requests the court reduce the Jess’s total time by 35% before applying the lodestar calculation.

There were numerous instances of imprecise recordings and block billing here. There were about 61 block billing entries by Mark Jess; 53 entries by Christie Jess; 52 entries by Eric Playter and 26 entries by Chris Playter. Vogelsberg Aff. ¶11, Ex. 1; and color coded time sheets See Ex. 1, Atts. 4-7. There were also several instances in Mark’s records where he referred to himself in the third person and the entries appear to be exactly the same as Christie’s. This kind of record keeping creates imprecise records that make it difficult to determine the accuracy and reasonableness of Plaintiffs’ request. Defendant and this court should not have to wade through imprecise billing to ascertain what is reasonable. Some courts have refused to award fees for this very reason.

**iii. Travel was not charged appropriately, and should be discounted.**

Plaintiffs charged \$49,890.00 for traveling to Topeka from their home offices. Ex. 1 at ¶13. In *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), *disapproved on other grounds by Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711 (1987), travel expenses between offices and the city in which the litigation is conducted is ordinarily not permitted because there is no need to employ counsel from outside the area in most cases. Only in unusual cases is travel permitted. There are attorneys in Kansas and the surrounding Shawnee County area. There is no evidence that Plaintiffs could not find local counsel. Also, none of Plaintiffs’ counsel’s affidavits attest to whether they would have charged their clients for travel under their fee agreements, so the City should not be charged with the same. Further, the Jesses both charged for the same days

of travel even though they are married and practice together, presumably also driving together. The Playters also practice together and charged for the same days of travel. All counsel charged at their full hourly rates even though it is atypical to receive full billable rates for travel. Ex. 1 at ¶12.a. As best as can be ascertained from counsel's block billing, Plaintiffs' counsel charged 69 hours travel at their full hourly rates in the amount of \$49,890. (Ex. 1 at ¶13.) Therefore, the billed time of \$49,890.00 or 69 hours should be discounted from any award.

**iv. Plaintiffs' attorney rates are higher than most local employment attorneys.**

Reasonable fees are to be calculated according to the prevailing market rates in the relevant community for similar services by lawyers of reasonably comparable skills, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886 (1984). Plaintiffs' attorneys' rates are higher than most local employment attorneys of comparable skills, experience and reputation. Mark Jess's rates are twice as high as the typical rates charged locally as evidenced by the affidavits of J. Phillip Gragson (Ex. 2), employment law attorney Jennifer Hill (Ex. 4), civil rights attorney Nicole Revenaugh (Ex. 5), and attorneys David Johnson (Ex. 6) and Lindsay Grantham (Ex. 7).

Plaintiffs' rates are some of the highest in their home states of Missouri according to Plaintiff's own evidence. Both Mark Jess and Eric Playter attached partial but incomplete evidence of *Missouri* attorney rates by location published by Missouri Lawyers Media. The 2023 complete publication (relied on by Jess in Doc. 128-1) states that the median rate for Missouri lawyers overall was \$390 an hour, down slightly from the 2023 rate of \$400. The median rate statewide for partners was \$450, and \$293 for associates in 2023. Although it is now 2024, the rates that Mr. Chris Playter and Mr. Mark Jess seek are some of the highest in the state of Missouri. 2023 Missouri Lawyers Media Billing Rates, attached as Ex. 8.

A 2022 edition of Missouri Lawyers Media was an exhibit in *Gilmore v. Joe Beveridge, et al.*, See Case. 22-CV-02032-HLT-RES, Doc. 189-3. The November 2022 edition states that the

median rate for Kansas City area attorneys was \$425 an hour and for Missouri lawyers was \$400. The median Kansas City partner charged \$488 an hour, and the median Kansas City nonpartner rate was \$325. Doc. 189-3 at 2. The median rate in 2022 for law firm staff was \$150 per hour. Mr. Playter was listed in the 2022 edition as one of the highest Missouri rates, which is evidence that his rates are not reasonable, see Doc. 189-3, attached as Ex. 9 for convenience.

Plaintiffs rely on their own affidavits to justify their rates, and those of three other out-of-area attorneys that work primarily in the Kansas City metropolitan and Missouri areas. Plaintiffs cite Missouri cases, which pull from larger metropolitan areas to determine what rates are reasonable compared to Kansas. Plaintiffs also rely on a trial association publication called *Billings* to show that their rates are reasonable. See Doc. 128-1 and 128-3.

According to the Tenth Circuit and Supreme Court, this court must look at the prevailing rate in the relevant community for similar services by lawyers of reasonably comparable skills, experience and reputation. *Blum v. Stenson*, 465 U.S. 885, 895, n. 11 (1984). This court should not rely on evidence of what Missouri lawyers or larger metropolitan lawyers charge. This court should look at rates in Kansas, and specifically Shawnee County. As Jennifer Hill testified, a reasonable range of rates in Kansas for lawyers with the Jesses and Playters experience is \$300 to \$400. (Ex. 4 at ¶14.) Nicole Revenough, a plaintiff's civil rights attorney in Topeka who has been practicing for 12 years bills \$300 per hour, and her law partner – the infamous civil rights attorney, Pedro Irigonegaray, charges \$500 (based on 50 years of experience). (Ex. 5 at p. 2.) Personal injury attorneys David Johnon and Lindsay Granthan, who hail from large plaintiffs firms in Kansas City and Wichita opine that \$450 is a reasonable rate. (Exs. 6 and 7.)

This court recently approved a rate of \$400 in *Gilmore v. Beveridge*, 22-CV-02032-HLT, 2024 WL 1461813, \*2 (April 4, 2024, D. Kan.) (unpublished), for a 1996 graduate of University of Missouri, Kansas City and practitioner of 25 years with experience representing parties in First

Amendment claims. Judge Holly Teeter found that \$400 is within the published rate of lawyers in the Kansas City area and it was a reasonable rate. Judge Broomes recently approved hourly rates of \$500 for a lead attorney and \$375 for an associate for claims involving disability discrimination and retaliation. The lead attorney practiced law for 17 years in Kansas, Missouri and Illinois and was involved in many jury and bench trials and several appeals. Although that attorney requested a rate of \$625, Judge Broomes found it was not supported by the evidence and \$500 was more reasonable. *Miser v. Freight Logistics, Inc.* 23-1265-JWB (Broomes), 2024 WL 2260803, \*4 (slip copy) (May 17, 2024, D. Kan.) In *Chandhok v. Companion Life Insurance Co.*, 556 F.Supp.3d 1192 (D. NM 2021), an ERISA case outside of this district, \$300 was a reasonable rate.

Defendant believes that reasonable local rates for attorneys with similar experience in civil rights law range from \$300-\$450 based on counsels' experience and the evidence enclosed. The rates should be adjusted based on evidence showing that rates in this area of practice and this area of Kansas are substantially lower than what counsel is requesting. Chris Playter's rate should be \$250. Mr. Playter has twelve years of experience practicing law, much like Kara Eisenhut, who second chaired defense for the Defendant, whose rate was only \$180. A reasonable rate for Chris Playter is \$250. Christie Jess's rate should be \$300, as she was not lead counsel on this matter and about half of her time was spent on matters that an associate would typically perform, but she has more years of experience than Chris Playter. Eric Playter's rate should be \$300 and Mark Jess's rate should be \$450 based on their experience, years in practice, and work performed on this case. Comparatively, Defendant paid Phillip Gragson \$200 per hour. Mr. Gragson has been practicing law as long as Mr. Jess, and has tried numerous cases (270), litigated a class action tobacco lawsuit, taken over 150 depositions, and defended cases on appeal before the Tenth Circuit and Kansas Supreme Court. When he represents employees, he charges \$350 per hour. (Ex. 2.) It would be inequitable to demand the City pay Plaintiffs' associate level counsel double that of what it paid

Kara Eisenhut, and four times the rate of what it paid its lead counsel, let alone the evidence does not support Plaintiffs' counsel's rates.

**v. The fee should be adjusted downward because Plaintiffs were not successful on the overall relief requested.**

The "most critical factor" for the court to consider is the success obtained. *Hensley*, 461 U.S. 436. If a plaintiff only achieved partial or limited success, "the product hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* This is true even where the plaintiffs' claims are interrelated, nonfrivolous, and raised in good faith. *Id.* "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." *Id.*

The Supreme Court found that:

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. **That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.**

Bold added. *Id.* In *Hensley*, the court opined that had the respondents prevailed on only one of their six general claims, a fee award based on the claimed hours would have been excessive. In *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996), the court reduced the lodestar by twenty percent because the monetary damages awarded fell far short of the amount sought, despite the plaintiffs being considered prevailing parties for their Title VII claims.

Plaintiffs brought nine claims: three Title VII claims, three Section 1983 claims against the City and three against Bryan Wheelers. Only two Title VII claims were successful. Consequently, Plaintiffs' success rate was only twenty-two percent. In accordance with *Berry* and *Hensley*, Plaintiffs' attorney fees should be reduced by seventy-eight percent.

**C. The *Hensley* Lodestar and reduction due to low overall success obtained.**

Defendant contends the proper hourly rates and total reduced hours billed are as follows:

<b>Attorney</b>	<b>Reduced Billed</b>	<b>Reduced Rate</b>	<b>Reduced Amount</b>
Mark J.	302.55	\$450	\$136,147.50
Christie J.	290.1 lawyer 58.4 paralegal	\$300/\$150	\$95,790 <sup>5</sup>
Chris P.	212.1	\$250	\$53,025
Eric P.	128.3	\$300	\$38,490
<b>Total</b>	<b>991.45</b>		<b>\$332,212.50</b>

This reduces Plaintiffs' fees to \$332,212.50. Subtracting the 69 hours of travel by respective attorney and rate, further reduces the total to: \$303,887.50. (Ex. 1 at ¶19.) The most critical factor for this court to review is the success obtained. Because Plaintiffs' success rate was only 22%, they should only be awarded 22% of \$303,887.50 or **\$66,855.25**. This is fair given the success rate, the Plaintiffs' attorneys will take a contingency fee, Harden and Cross received promotions, and Stuart and Harden were awarded damages.

**CONCLUSION**

For the foregoing reasons, Plaintiffs' motion for attorney fees should be denied or significantly reduced because the fees are unreasonable, duplicative, excessive and unfair.

Respectfully submitted by:

/s/ J. Phillip Gragson, #16103  
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<sup>5</sup> This amount is inclusive of the hours that Christie billed at a paralegal rate of \$150 per hour for trial prep (27.4 hours x \$150=\$4,110.00) and attending trial (31.00 hours x \$150 = \$4650.00).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was filed and served electronically via cm/ecf on this 12th day of December, 2024 to:

Mark A. Jess, MO #37946  
Christie Jess, MO #44919  
mark.jess@employeeightslawfirm.com  
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&

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/s/ J. Phillip Gragson  
J. Phillip Gragson