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MAY 24 2018

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATRINA PERONA, an individual,

Plaintiff-Appellee,

v.

TIME WARNER CABLE, INC., a
corporation; DOES, 1 through 50,
inclusive,

Defendants-Appellants.

No. 16-56897

D.C. No.

5:14-cv-02501-MWF-SP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted April 11, 2018
Pasadena, California

Before: SCHROEDER, CLIFTON, and M. SMITH, Circuit Judges.

Time Warner Cable, Inc. (“Time Warner”) appeals the district court’s judgment, imposed after a seven-day jury trial which resulted in a jury awarding Plaintiff-Appellee Katrina Perona \$160,000. Time Warner also appeals the district

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

court's subsequent order awarding Ms. Perona substantial fees and costs and denying Time Warner's motion for judgment as a matter of law or, alternatively, partial new trial. Our appellate jurisdiction rests on 28 U.S.C. § 1291, and we **AFFIRM.**

Time Warner first contends the jury's verdict was inconsistent and should be set aside because the jury found both that Time Warner did not fail to provide reasonable accommodation and that it failed to engage in the interactive process. But there is no fatal inconsistency. California law is clear that "an employer's failure to properly engage in the process is separate from the failure to reasonably accommodate an employee's disability and gives rise to an independent cause of action." *Swanson v. Morongo Unified Sch. Dist.*, 181 Cal. Rptr. 3d 553, 567 (Ct. App. 2014).

As the district court explained, the relevant time period extended over many months, and while Time Warner originally provided an accommodation, the jury could, and reasonably did, find it did not do so later. *See id.* at 567–68. As we recognized in *Snapp v. United Transportation Union*, No. 15-35410, 2018 WL 2168653, at *4 (9th Cir. May 11, 2018), there can be no liability under the federal Americans with Disabilities Act for a failure to engage in the interactive process when no reasonable accommodation would have been possible. The jury here

specifically identified two reasonable accommodations Time Warner could have provided had the interactive process continued. Time Warner's arguments that Ms. Perona suffered no damages as a matter of law and that the jury's interactive process finding was surplusage fail for the same reason. The district court followed its obligation to reconcile the jury's findings wherever possible. *See Norris v. Sysco Corp.*, 191 F.3d 1043, 1048 (9th Cir. 1999).

Time Warner also contends that the jury verdict is contrary to the evidence because there was evidence there were no part-time morning shifts or open positions available as a result of its Shift Bid system, that Ms. Perona was not eligible for a part-time morning shift, and that Ms. Perona was responsible for the breakdown in the interactive process. The jury also heard evidence that Ms. Perona was amenable to at least attempting to work an afternoon shift, her medical expert would have considered authorizing such work, and that Human Resources Manager Anne Long did no research to see if there were any available accommodations the company could provide. The verdict is not contrary to the evidence.

The district court did not abuse its discretion when it imposed attorneys' fees in the amount of \$964,938. In awarding fees the district court properly considered and applied the factors set out in *Hensley v. Eckerhart*, 461 U.S. 424, 434–36 (1983). The district court took into consideration the fact that Ms. Perona

prevailed on only one of the claims she presented to the jury, but reasonably concluded that Ms. Perona's unsuccessful claims, save for her inadequate rest periods claim, arose out of the same set of circumstances as Ms. Perona's claim for failure to engage in the interactive process. *See id.* at 435.

The district court was also not obligated to apply the United States Attorneys' Office Attorney's Fee Matrix, formerly known as the "*Laffey* matrix." *See Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010) ("We thus cannot fault the district court for declining to use the *Laffey* matrix."). The district court gave adequate reasons for its decision to apply a lodestar multiplier of 1.3 under the circumstances of this case. *See Ketchum v. Moses*, 17 P.3d 735, 741, 744 (Cal. 2001).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

Form fields for case name, v., and 9th Cir. No.

The Clerk is requested to tax the following costs against:

Table with columns for Cost Taxable, REQUESTED, and ALLOWED, with sub-columns for No. of Docs, Pages per Doc, Cost per Page, and TOTAL COST.

* Costs per page: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees cannot be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk