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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Plaintiff,

and

SEAN REILLY,

Plaintiff-Intervenor,

v.

COTTONWOOD FINANCIAL  
WASHINGTON, LLC, and COTTONWOOD  
FINANCIAL, LTD.,

Defendants.

NO. CV-09-5073-EFS

**ORDER ENTERING RULINGS REGARDING  
CONCILIATION, INJUNCTION, AND  
ATTORNEYS FEES**

Following the Court's December 2011 bench ruling in Plaintiff EEOC and Plaintiff-Intervenor Sean Reilly's favor on their Americans with Disabilities Act (ADA) wrongful-discharge claim, the Court allowed the parties to brief what an appropriate injunction, if any, would entail, and the issue of conciliation under 42 U.S.C. § 2000e-5(b). ECF No. [266](#). Then on December 22, 2011, Mr. Reilly filed a Motion for Award of Reasonable Attorneys' Fees and Non-Taxable Costs, ECF No. [284](#), and Conditional Motion to Order Defendants to Disclose Hourly Rates and Time Worked, ECF No. [290](#). After considering the parties' briefs, submitted evidence, and relevant authority, the Court is fully informed. For the

1 reasons discussed below, the Court finds the EEOC satisfied its  
2 conciliation obligation, enters the specified injunction, and awards  
3 attorneys fees to Mr. Reilly's counsel.

4 **A. Conciliation**

5 After the EEOC's investigation confirms reasonable cause to believe  
6 that a charge of discrimination is factually supported, the EEOC has a  
7 statutory responsibility to "endeavor to eliminate any such alleged  
8 unlawful employment practice by informal methods of conference,  
9 conciliation, and persuasion" before filing a lawsuit. 42 U.S.C. §  
10 2000e-5(b). The EEOC fulfills this statutory conciliation duty by 1)  
11 presenting the employer with reasonable cause for its belief that an  
12 unlawful employment practice occurred, 2) offering the employer an  
13 opportunity to achieve voluntary compliance, and 3) responding to the  
14 employer's participation in the conciliation process in a reasonable and  
15 flexible manner. *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th  
16 Cir. 1981).

17 This statutory conciliation responsibility is a jurisdictional  
18 requirement: "Congress' waiver of sovereign immunity under Title VII  
19 does not extend to suits to enforce settlement agreements entered into  
20 without genuine investigation, reasonable cause determination, and  
21 conciliation efforts by the EEOC." *Munoz v. Mabus*, 630 F.3d 856, 860  
22 (9th Cir. 2010). Accordingly, failure to conciliate is a defense that  
23 is best raised as a Rule 12(b)(1) motion. *EEOC v. Pierce Packing Co.*,  
24 669 F.2d 605, 608 (9th Cir. 1982) ("Genuine investigation, reasonable  
25 cause determination and conciliation are jurisdictional conditions  
26 precedent to suit by the EEOC which are conspicuously absent here.");  
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1 See also *EEOC v. Bruno's Restaurant*, 13 F.3d 285, 287 (9th Cir. 1993)  
2 (discussing conciliation).

3 Here, Defendants Cottonwood Financial Washington, LLC and  
4 Cottonwood Financial, Ltd. (collectively, "Cottonwood") filed neither a  
5 dismissal motion nor summary-judgment motion raising their failure to  
6 conciliate defense. Rather, they waited until trial to present this  
7 defense. The evidence produced at trial establishes that the EEOC  
8 satisfied its conciliation obligation. The EEOC sent Cottonwood a  
9 written charge of discrimination, interviewed Sean and Peggy Reilly and  
10 all of the pertinent Cottonwood supervisors, advised Cottonwood in  
11 writing of its preliminary findings, and then issued a letter of  
12 determination (LOD) that Cottonwood had discriminated against Mr.  
13 Reilly. Following the LOD, EEOC continued to exchange correspondence  
14 with Cottonwood. Notwithstanding participation by Cottonwood's counsel  
15 in many of the interviews, Cottonwood advised the EEOC that it did not  
16 believe there were facts to support the EEOC's finding. Because the  
17 EEOC was aware that Cottonwood possessed the facts upon which EEOC based  
18 its determination, the EEOC was not required to conduct further  
19 interviews or settlement discussions before filing this lawsuit. Also,  
20 during the investigative and conciliation phases, Cottonwood did not  
21 advise the EEOC that Mr. Reilly was terminated solely because he used  
22 the word "fuck" on the deviation report, which was Cottonwood's argument  
23 at trial. Accordingly, during the investigative and conciliation  
24 phases, the EEOC reasonably understood that Cottonwood fired Mr. Reilly  
25 for a variety of performance-related reasons within days of suffering a  
26 bipolar incident. In summary, the Court finds the EEOC fulfilled its  
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1 conciliation obligation by providing Cottonwood with a "fair  
2 opportunity" "to address the issues subsequently raised in the  
3 litigation." 45C Am. Jur. 2d Job. Discrimination 2002 (Nov. 2011); see  
4 also 8 Emp. Coord., Employment Practices 95:50 (Mar. 2012) ("[S]ome  
5 'minimal dialogue' (on the telephone before suit, and after a reasonable  
6 cause finding) with a union charged with discrimination has been found  
7 to satisfy this requirement.").

## 8 **B. Injunction**

9 Based on the trial testimony and evidence, an injunction is  
10 necessary. After considering the parties' initial proposals,  
11 Cottonwood's current EEO policy, and the parties' responses to the  
12 Court's tentative injunction, ECF No. [295](#), the Court finds the  
13 injunction detailed below is narrowly tailored to remedy Defendants'  
14 deficient ADA policies and practices as they relate to discharging an  
15 individual who is regarded as disabled. Because of Cottonwood's  
16 deficient ADA policies and practices, Mr. Reilly's supervisors  
17 terminated any meaningful conversation with either Mr. Reilly or his  
18 mother relating to what impact Mr. Reilly's bipolar hypo-manic episode  
19 at the end of January 2007 had on his ability to work. Despite his  
20 managers and Human Resources' awareness of his bipolar disorder and his  
21 managers' knowledge of his recent hypo-manic episode, Mr. Reilly's  
22 employment was terminated when he wrote "fuck" on an internal document  
23 to express his frustration with the computer equipment. The injunction  
24 set forth below ensures that 1) Cottonwood's employees are aware of  
25 their employment rights under the ADA and 2) Cottonwood's managers and  
26 Human Resources know the requirements that the ADA imposes on them.

1 Given the consistent turnover experienced by Cottonwood in management  
2 and employees, the Court finds a three-year training requirement is  
3 necessary. The specifics of the injunction are set forth below.

#### 4 **C. Attorneys Fees**

5 Keller Allen and Mary Palmer, counsel for Mr. Reilly, ask the Court  
6 to award them \$277,120.00 in attorneys fees and \$3,982.44 in non-taxable  
7 costs. The Court finds a reasonable attorneys fee and non-taxable costs  
8 award appropriate under the circumstances because Mr. Reilly was a  
9 prevailing party on his ADA claim and WLAD wrongful-termination claim.  
10 See 42 U.S.C. § 12205 ("In any action . . . , the court or agency, in its  
11 discretion, may allow the prevailing party, . . . , a reasonable  
12 attorney's fee, including litigation expenses and costs . . . ."); RCW  
13 49.60.030(2) (allowing for recovery of the "cost of suit including  
14 reasonable attorneys' fees").

15 A prevailing party's attorneys' fees are calculated using the  
16 lodestar method, which multiplies the numbers of hours reasonably  
17 expended on the litigation by a reasonable local hourly rate for an  
18 attorney with the skill required to perform the litigation. *Moreno v.*  
19 *City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008); *Morales v. City*  
20 *of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). At first glance,  
21 calculating attorneys' fees seems a matter of rudimentary arithmetic.  
22 Yet the Court must take great care in ensuring that the number of hours  
23 claimed were reasonably expended on the litigation by considering  
24 whether the hours are excessive, redundant, or otherwise unnecessary or  
25 unreasonable in light of the issues involved, and ensure that the hourly  
26 fee is reasonable given the skill and experience of counsel in light of  
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1 the legal services at issue and results obtained. See *Pennsylvania v.*  
2 *Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986)  
3 (recognizing that the quality of counsel's representation is reflected  
4 in the reasonable hourly rate); *Morales*, 96 F.3d at 363; *Green v. Baca*,  
5 225 F.R.D. 612, 614 (C.D. Cal. 2005) (citing *Hensley v. Eckerhart*, 461  
6 U.S. 424, 433-35 (1983)). There is a strong presumption that the  
7 lodestar figure represents a reasonable fee; therefore, it is only in  
8 rare and exceptional circumstances that the Lodestar method does not  
9 adequately take into account a factor that may properly be considered in  
10 determining a reasonable fee and an enhancement above the lodestar  
11 calculation is appropriate. *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct.  
12 1662, 1673 (2010).

13 With these standards in mind, the Court applies the lodestar  
14 method. The Court finds the amount of hours claimed by both Mr. Allen  
15 (769.45 hours) and Ms. Palmer (31.25 hours) are reasonable and  
16 necessary; there was neither duplication nor improper billing methods  
17 utilized. In reaching this finding, the Court overrules Defendants'  
18 objections, ECF Nos. [308-310](#), to counsels' hours.

19 Next, Mr. Allen requests an hourly rate of \$350.00. After  
20 carefully examining the submitted declarations and the Court's award of  
21 attorney fee requests in 2009-11 (the period during which Mr. Allen and  
22 Ms. Palmer worked on this case) in other cases, the Court concludes  
23 \$350.00 is unreasonable. Typically, the fee applicant bears the burden  
24 "to produce satisfactory evidence - in addition to the attorney's own  
25 affidavits - that the requested rates are in line with those in the  
26 prevailing community. . . ." *Blum v. Stenson*, 465 U.S. 886, 895 n.11  
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1 (1984). Reasonable hourly rates are calculated according to the  
2 prevailing market rates in the relevant community for "similar work  
3 performed by attorneys of comparable skill, experience, and reputation."  
4 *Chalmers v. City of L.A.*, 796 F.2d 1205, 1210-11 (9th Cir. 1997). The  
5 relevant community is generally the forum in which the district court  
6 sits. *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). In recent  
7 years, the Court has addressed attorney fee requests in the following  
8 Eastern District of Washington cases:

- 9 • In *Riverstone Center West, LLC v. Barnes & Noble Booksellers,*  
10 *Inc.*, EDWA No. CV-08-395-EFS, ECF No. [162](#) (Dec. 15, 2010), the  
11 Court granted the following hourly attorney rates: C. Matthew  
12 Anderson, \$320.00; Beverly Anderson, \$300.00; Lynden  
13 Rasmussen, \$300.00; Ryan Yahne, \$250.00; Elizabeth Tellessen,  
14 \$200.00; Christopher Crago, \$175.00; and Collette Leland,  
15 \$170.00; and
- 16 • In *Wapato Heritage, LLC v. Sandra Evans*, EDWA No. CV-07-314-  
17 EFS, ECF No. [707](#) (Dec. 22, 2010), the Court awarded Wenatchee  
18 attorney Michael Arch the hourly rate of \$275.00.

19 Given the submissions in this case, as well as those reviewed by  
20 the Court in the above-referenced cases, the Court is sufficiently  
21 informed to determine the reasonableness of the requested hourly rates.  
22 Accordingly, Mr. Reilly's Conditional Motion to Order Defendants to  
23 Disclose Hourly Rates and Time Worked, wherein Mr. Reilly asked the  
24 Court to require defense counsel to disclose their hourly rates, is  
25 denied.

1 Mr. Allen is a highly-experienced employment law attorney, a Fellow  
2 of the College of Labor and Employment Lawyers in 2010, and a published  
3 author and lecturer in the field. With those credentials, the Court  
4 finds that an hourly rate of \$320.00 is justified in this district.  
5 Turning to Ms. Palmer, the Court finds that her requested rate of  
6 \$250.00 per hour is reasonable based on her reputation and experience,  
7 particularly in employment law cases. Accordingly, the Court awards Mr.  
8 Reilly's counsel \$254,036.50 in attorneys fees (Mr. Allen: \$246,224.00;  
9 Ms. Palmer: \$7,812.50). The Court also finds Mr. Reilly's non-taxable  
10 expenses of \$3,982.44 are reasonable and necessary.

11 In summary, the Court grants in part Mr. Reilly's motion for  
12 attorneys fees as set forth above.

13 **D. Conclusion**

14 For the above-given reasons, **IT IS HEREBY ORDERED:**

15 1. Mr. Reilly's Motion for Award of Reasonable Attorneys' Fees  
16 and Non-Taxable Costs, **ECF No. [284](#)**, is **GRANTED IN PART**. **Judgment** is to  
17 be entered in Mr. Reilly's favor against both Defendants<sup>1</sup> in the amount  
18 of **\$258,018.94**.

19 2. Mr. Reilly's Conditional Motion to Order Defendants to  
20 Disclose Hourly Rates and Time Worked, **ECF No. [290](#)**, is **DENIED**

21 3. **Judgment** is to be entered against both Defendants in the  
22 EEOC's favor.

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24 <sup>1</sup> For purposes of this final section of the Order, the Court refers  
25 to Cottonwood Financial Washington, LLC and Cottonwood Financial, Ltd.  
26 as "Defendants."  
27

1 4. Policy Revision: Defendants shall revise the current employee  
2 handbook's "Requests for Reasonable Accommodation" section, ECF No. [283-](#)  
3 1, as follows (necessary revisions are highlighted):

#### 4 **Introduction**

5 Job applicants and employees with disabilities are entitled to  
6 reasonable accommodation (if one exists) to enable them to  
7 perform the essential functions of their job or to enjoy the  
8 equal benefits and privileges of their job. Among other  
9 things, an accommodation that would impose an undue hardship  
10 on the employer is not reasonable. The reasonable  
11 accommodation process, including a description of key terms,  
12 is set forth below.

13 . . . .

14 A **disability** is 1) a physical, medical, mental, or  
15 psychological impairment that substantially limits a major  
16 life activity, 2) a record of such an impairment, or 3) being  
17 regarded as having such an impairment.

18 . . . .

19 **Reasonable accommodations**, which are described more fully  
20 below, are modifications or adjustments to the application  
21 process, work environment, available equipment, or to the  
22 manner or circumstances under which a position is customarily  
23 performed, that promote equal employment opportunity for an  
24 individual with a disability. Reasonable accommodation  
25 enables a qualified applicant or employee with a disability to  
26 be considered for a position or to perform its essential  
27 functions. Accommodations are not reasonable if they impose  
28 an undue hardship on the employer. Except as otherwise  
provided by state law, the elimination of an essential job  
function is not a reasonable accommodation. Also, except as  
otherwise required by state law, an employer is not required  
to provide an accommodation when someone is regarded by the  
employer as having a substantially limiting impairment or a  
record of such an impairment.

#### 29 **Process for Requesting a Reasonable Accommodation**

30 To request a reasonable accommodation, the employee should  
31 complete a Request for Reasonable Accommodation form (which is  
32 available on the portal), and submit it to his/her immediate  
33 supervisor or Human Resources. The employee may also request  
34 a reasonable accommodation by contacting his/her immediate

1 supervisor or Human Resources, who will then have the employee  
2 complete the Request for Accommodation form. If an employee  
3 requires assistance completing the form, Human Resources will  
4 provide such assistance. A representative of the employee is  
permitted to request an accommodation on the employee's  
behalf. As appropriate in this section, "employee" includes  
the employee's representative.

5 Upon learning of a request for accommodation, the Company,  
6 through Human Resources, will engage in an interactive process  
7 with the employee to determine if a reasonable accommodation  
8 exists. Human Resources and the employee should consider how  
9 any job-related limitations can be overcome, discuss possible  
10 reasonable accommodations, and assess the effectiveness of  
11 each. Where more than one possible reasonable accommodation  
12 exists, the Company will consider the employee's preference in  
13 determining what accommodation it will provide. However, the  
14 Company has the discretion to choose among various reasonable  
15 accommodations that will enable the employee to perform the  
16 essential functions of the job or to enjoy the equal benefits  
17 and privileges of his/her job. Moreover, the Company is not  
18 required to provide an accommodation that imposes undue  
19 hardship on the Company. And except as otherwise provided by  
20 state law, the elimination of an essential job function is not  
21 a reasonable accommodation.

22 If an employee has any question regarding requesting an  
23 accommodation or his/her equal employment opportunity rights,  
24 he is encouraged to call Human Resources. The employee may  
25 also contact the U.S. Equal Employment Opportunity Commission  
26 to learn more information relating to an employee's equal  
27 employment opportunity rights.

28 . . . .

5. Form Revision: Defendants shall correct the typographical  
error on the "Request for Reasonable Accommodation" form: "(if one  
exist)" is to be replaced with "(if one exists)".

6. Informing employees: Within ninety days of this injunction's  
entry, Defendants' District Managers and/or Regional Managers shall a)  
review the employment handbook's "Requests for Reasonable Accommodation"  
section and form with all store employees and b) obtain documentation  
from all such employees reflecting their training on such policy.

1           7.    Notice of informing employees:   Within thirty days of the  
2 completion of the training outlined in the preceding paragraph,  
3 Defendants shall certify to the EEOC that such training was provided to  
4 all store employees.   Defendants' certification shall identify the  
5 employee's name and title and location and date of training.

6           8.    Training:   Defendants will provide four hours of EEO training  
7 (either four consecutive hours with appropriate breaks, or two two-hour  
8 blocks) to its District Managers, Regional Managers, Area Managers,  
9 Territory Managers, and Human Resources professionals.   This training  
10 shall include, at a minimum, a discussion of federal law prohibiting  
11 employment discrimination and retaliation, including the ADA and a  
12 review of Defendants' EEO and requests-for-accommodation policies.   The  
13 training shall be aimed at helping attendees understand how to define  
14 and identify employment discrimination and retaliation, identify  
15 acceptable avenues of complaint, and the appropriate ways to discuss,  
16 request, and respond to requests for reasonable accommodations.  
17 Defendants shall provide this training to these aforelisted individuals  
18 on an annual basis for three successive years, with the first of such  
19 trainings being provided no later than ninety days after this  
20 injunction's entry.   After these three years, Defendants shall provide  
21 such training on a regular basis to be determined by Defendants.

22           9.    Training reporting requirements:   Within thirty days of the  
23 completion of the training required by the preceding paragraph,  
24 Defendants shall send EEOC: 1) a copy of the training materials used, 2)  
25 the training(s)' sign-in sheet, identifying the name and job title of  
26

1 those who completed the training(s), 3) the date(s) and location(s) of  
2 training(s), and 4) the name and job title of the trainer(s).

3 10. Report of requested accommodations: Within fifteen months of  
4 this injunction's entry, Defendants shall provide to the EEOC a summary  
5 of each request for an accommodation made on a Request for Accommodation  
6 form, which was received in the twelve months following this  
7 injunction's entry, by an employee with a mental or physical impairment,  
8 including a) the employee's full name, b) the date of request, c) the  
9 nature of the physical or mental impairment, d) the nature of the  
10 requested accommodation, and e) the resolution of such request.

11 11. Posting of notice: Defendants shall immediately post for a  
12 three-year period following this injunction's entry, Defendants'  
13 proposed Notice to Employees, ECF No. [306](#) Ex. A., a) on a centrally-  
14 located bulletin board at Defendants' corporate office and Human  
15 Resource units in Irving, Texas, b) at any facility at which Defendants  
16 conduct business, and c) on Defendants' internal website.

17 12. Jurisdiction: The Court retains jurisdiction over the imposed  
18 injunctive relief for a four-year period following this injunction's  
19 entry.

20 13. Duration and termination: If Defendants have not complied  
21 with any part of this injunction, EEOC may petition the Court to enforce  
22 this injunction. If either party intends to petition the Court relating  
23 to this injunction, that party must advise the other party in writing as  
24 to their position at least thirty days before the party petitions the  
25 Court. The parties must then meet and confer in good faith to resolve  
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1 their differences.

2 **IT IS SO ORDERED.** The District Court Executive is directed to  
3 enter this Order and distribute copies to counsel.

4 **DATED** this 27th day of March 2012.

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s/Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

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28 ORDER - 13