IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

HARRY POLLAK, Plaintiff, VS. SUSAN WILSON, in her individual capacity, *et al.*, Defendants.	Case No. 2:22-CV-49

ORDER PARTIALLY GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND EXPENSES

THIS MATTER comes before the Court on Plaintiff's *Motion for Attorneys' Fees and Expenses* (ECF No. 91) on January 9, 2025. Defendants filed their objection (ECF No. 94) on January 21, 2025, and Plaintiff replied seven days later (ECF No. 97). After reviewing the *Motion*, the filings, and the applicable law, the Court finds Plaintiff's request for costs and attorneys' fees should be **GRANTED IN PART**.

BACKGROUND

In this case, Plaintiff brought suit against Defendants for violating his First Amendment rights at a school board meeting. At the meeting, Mr. Pollak sought to call for the resignation of the school district's superintendent. The Board Chair, Defendant Susan Wilson, cut him off to say that he could not discuss "personnel matters," per the Board's policy ("Personnel Policy"), at such meetings. When Mr. Pollak filed his initial

complaint, he requested a preliminary injunction enjoining "defendants from restricting Plaintiff's free speech rights in the future" as well as nominal damages. ECF No. 1 at 5. This Court interpreted Plaintiff's complaint as a facial challenge to the Board's Personnel Policy and rejected the preliminary injunction on that basis, finding that he was unlikely to succeed on the merits. ECF No. 17 at 1, 4. The Tenth Circuit affirmed our decision. ECF No. 30.

Following that decision, Mr. Pollak sought new counsel in the form of Brett Nolan, an attorney at the Institute for Free Speech in Washington, D.C. Under the direction of Mr. Nolan and local counsel Seth Johnson, Mr. Pollak amended his complaint to both narrow and broaden his original claims, ultimately asking for relief on six different grounds. ECF No. 43. First, he challenged the Board's Personnel Policy "as applied to speakers who simply discuss or refer to public officials in their comments about school policy," alleging that it violated both his right of free speech and his right to petition. *Id.* at 11-15. He then challenged, on facial grounds, a separate Board policy that banned gossip, defamatory remarks, and abusive language ("Offensive-Speech Policy"). *Id.* at 15. He similarly alleged that the Offensive-Speech Policy violated his right of free speech and his right to petition. *Id.* at 15-17. Finally, he alleged that the Offensive-Speech Policy also violated the First Amendment for being overbroad and vague. *Id.* at 17-18. The parties went through discovery, including a week of depositions in Sheridan County, and filed cross-motions for summary judgment in the fall of 2023. ECF No. 92 at 3. We heard oral arguments on those motions in March of 2024. ECF No. 74.

In October, we filed an order and judgment in favor of Defendants on all of four of Plaintiff's claims regarding the Offensive-Speech Policy and largely in favor of Plaintiff on his claims against the Personnel Policy. ECF No. 83 at 29-30. Our holding centered on two pieces of evidence that came up during Ms. Wilson's deposition. First, Ms. Wilson stated (in contrast to the current Board Chair) that *any mention* of a school district employee's name, for any reason, was a violation of the Personnel Policy. *Id.* at 24. As a result, while we acknowledged that a general policy against speaking about employment matters was constitutional, we held that Ms. Wilson's specific interpretation of the Personnel Policy was not. Second, Ms. Wilson stated that she enforced the Policy against Mr. Pollak "not *only* because he mentioned [the superintendent's] name, but also because he was specifically making a complaint against the Superintendent." *Id.* "The constitutional issue arises from the fact that Ms. Wilson had previously *not* enforced this same rule against speakers who said *positive* things about district employees." *Id.* at 28.

On the first issue, we provided the following remedy:

> A narrow permanent injunction best addresses the First Amendment violations in this case.... Mr. Pollak has proven success on the merits, but only to the extent that the Personnel Policy is used against all speakers who refer to individual employees.

Id. at 25-26. On the second issue, we awarded Mr. Pollak nominal damages in acknowledgement of the violation of his First Amendment right. *Id.* at 29. On these grounds, we ordered that Mr. Pollak could recover attorneys' fees. *Id.* at 30.

Following our Order, Plaintiff filed this *Motion* seeking "a total recovery of $265,574.63, which reflects a reasonable number of hours multiplied by reasonable

billing rates, along with reasonable litigation expenses." ECF No. 92 at 2. Defendants object to this amount for various reasons, some of which we agree with. We will elaborate on these arguments below.

RELEVANT LAW

Title 42 U.S.C. § 1988(b) provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party… a reasonable attorney's fee as part of the costs." To be considered a prevailing party, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). Our injunction, discussed above, satisfies this requirement; therefore, we find Plaintiff to be the prevailing party here.

"Reasonable fees" are determined using the lodestar approach:

> A court will generally determine what fee is reasonable by first calculating the lodestar – the total number of hours reasonably expended multiplied by a reasonable hourly rate – and then adjust the lodestar upward or downward to account for the particularities of the suit and its outcome.

Zinna v. Congrove, 680 F.3d 1236, 1242 (10th Cir. 2012).

In short, the rate must be reasonable, the number of hours must be reasonable, and the overall fee must reflect the outcome of the case. Regarding the first factor, "Hourly rates must reflect the 'prevailing market rates in the relevant community.'" *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). The requesting party bears "the burden of showing that the requested rates are in line with those prevailing in the community." *Elias v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1203 (10th Cir. 1998). The hourly rate should "reflect rates in effect at the

time the fee is being established by the court, rather than those in effect at the time the services were performed." *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). Additionally, "[A]bsent unusual circumstances," a party seeking attorneys' fees "is limited to the fee rate charged by attorneys in the local community possessing similar expertise." *Kersch v. Bd. of Cnty. Comm'rs of Natrona Cnty. Wyo.*, 851 F. Supp. 1541, 1544 (D. Wyo. 1994). In that case, we identified four criteria that were useful when determining whether to apply out-of-town rates: whether the case (1) required specialized expertise; (2) required significant financial resources; (3) raised unpopular issues; and (4) was one that local attorneys were not willing to file. *Id.*

The number of hours must also be reasonable. "The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). "[F]ee request hours that are excessive, redundant, or otherwise unnecessary" should be excluded. *Id.* Other factors to be considered are:

> (1) whether the tasks being billed would normally be billed to a paying client, (2) the number of hours spent on each task, (3) the complexity of the case, (4) the number of reasonable strategies pursued, (5) the responses necessitated by the maneuvering of the other side, and (6) potential duplication of services by multiple lawyers.

Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998) (internal quotations removed).

Finally, the overall fee must be adjusted based on the outcome of the case. "The most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar*, 506 U.S. 103 at 111 (internal quotations omitted). "There is

no doubt that a district court may reduce a lodestar calculation on the grounds that a prevailing plaintiff has achieved only partial success." *Dill v. City of Edmond*, 72 F. App'x 753, 757 (10th Cir. 2003) (internal quotations omitted).

DISCUSSION

I. Hourly Rate

Mr. Pollak is represented by two lawyers in this case, Brett Nolan of Washington, D.C., and Seth Johnson of Saratoga, Wyoming. Mr. Nolan requests a rate of $400 per hour and Mr. Johnson requests $300 per hour. ECF No. 92 at 7. Mr. Johnson and Mr. Nolan generally argue that they are requesting in-market rates, while also hinting that Mr. Nolan's national expertise merits a higher rate. They admit that the rates they request are on the higher end – they reference the 2023 Wyoming State Bar Member Survey, which shows that only 35.5 percent of Wyoming lawyers charge $300 or more per hour, and only 17.8 percent charge $350 or more. ECF No. 92-9 at 42. To support their proposal, they cite a case in which fees were awarded to the defendants, against the plaintiff's lawyers (including Mr. Johnson himself), for filing a frivolous First Amendment case that was "entirely unsubstantiated in law or fact." *Frey v. Town of Jackson*, No. 19-CV-50-F, 2020 WL 13644667, at *5 (D. Wyo. Feb. 20, 2020); *Frey v. Jackson Wyoming*, No. 19-CV-50-F, 2020 WL 13644668, at *2 (D. Wyo. June 11, 2020). In that case, we awarded the defendants' most senior lawyers $350 per hour. *Id.* at *10. Mr. Nolan and Mr. Johnson also argue that they deserve higher-end rates because Wyoming rates have increased "dramatically" since 2020, that this case "involve[d] novel and complex

issues," and that local lawyers were unwilling to take on the case. ECF No. 92 at 6-8; ECF No. 97 at 2-3.

For comparison, Defendants here cite two more recent contract cases in which plaintiffs were awarded a $250 hourly rate, based on the same 2023 Wyoming State Bar Member Survey Results that Plaintiff's counsel cites here. *Ruppert v. Merrill*, 558 P.3d 529, 539-540 (Wyo. 2024); *Hensel v. DAPCPA RPO LLC*, 534 P.3d 460, 468 (Wyo. 2023).

As an initial step, we feel it necessary to clarify that out-of-market fees are not merited here for several reasons. First, we disagree with Plaintiff's contention that the issues discussed in this case were novel or complex in a way that required specialized expertise not found in our state. The primary legal issues discussed here, and many of the cases cited by the Plaintiff, are those taught in standard First Amendment classes in law schools around the country: the reasonableness of restrictions in a limited public forum and viewpoint neutrality. Additionally, the analysis itself was limited: because both parties agreed that the school board meeting was a limited public forum, no discussion was needed on that topic. Much of the debate rested on the factual issue of how the Board Chair interpreted the Personnel Policy and why she enforced it. As a result, it certainly helped Mr. Pollak to have an experienced deposer as his advocate. However, once we had those facts before us, applying the law was straightforward. The most complicated legal issue of this case was how to resolve the Tenth Circuit's ruling on Plaintiff's request for a preliminary injunction with our ruling on the merits. However, the Court resolved that question largely based on our own research.

Addressing the other factors, there is no evidence that large financial resources were required for this case, nor are we convinced that local attorneys were not willing to file – a local attorney originally filed the case, and a local attorney remains attached to it. Mr. Johnson, as mentioned above, has previously filed First Amendment cases in federal court, and we have no evidence that he was resistant to doing so here.

The remaining question, therefore, is whether rates of $300/hour and $400/hour are reasonable for Wyoming and reasonable for the work performed by both lawyers here. Upon reviewing Mr. Johnson's billing statement, we find that the vast majority of his time entries did not consist of substantive legal work: he spent most of his time communicating with the client or outside counsel, appearing at hearings or depositions (though not substantively preparing for them), and reviewing the drafts of motions that Mr. Nolan had already written. ECF No. 92-6 at 1-8. In total, he appears to have spent only 1.2 hours researching or drafting motions – the typical activities that a client paying the "standard hourly rate" would expect their counsel to perform. ECF No. 92-6 at 3, 4. Because of the lack of substantive work performed by Mr. Johnson, we reduce his hourly rate to $225. This still falls comfortably within the typical hourly rates reported by the 2023 Wyoming State Bar Survey, which presumably are charged by lawyers performing substantive legal work.

We also find reason to reduce Mr. Nolan's rate. The rate he requests, $400 per hour, is beyond the highest listed category on the Wyoming Bar survey. Plaintiff's counsel also has not cited any other case where our court awarded such high rates. As previously stated, this case did not involve exceptionally novel or complex legal issues,

nor did it require specialized expertise: the facts were relatively simple, and the motions and legal arguments straightforward. Mr. Nolan himself states he based his $400 rate on "information I have received from Mr. Johnson about the Wyoming market." ECF No 92-1 at 14. Mr. Johnson, who has represented clients with First Amendment claims in federal court before, stated that "the $300 hourly rate here is his standard hourly rate for federal cases." ECF No. 92 at 10. He also stated that this rate was set based on "extensive research" into local market rates, which makes sense given that $300/hour falls within the bounds of normal pricing suggested by the Bar Survey results. *Id.* We therefore assess this to be the prevailing market rate for litigating federal cases in Wyoming, and we grant Mr. Nolan fees at the rate of $300 per hour for his time.

II. Number of Hours

Plaintiff's counsel requests fees for a total of 601.9 hours of work not including the hours related to fee litigation: 515.5 for Mr. Nolan and 86.4 for Mr. Johnson. ECF No. 92 at 11. Defendants argue that the number of hours should be reduced in several areas: (a) the amended complaint, on which Mr. Nolan spent 65.1 hours; (b) the 87.9 hours of discovery that Plaintiff's counsel spent arguing about the disclosure of Mr. Pollak's communications; (c) the duplication of fees for both of Plaintiff's attorneys at the depositions; (d) the 196.4 hours spent on summary judgment briefings, including 40 hours for oral arguments; and (e) the hours related to "internal communications" between Plaintiff's counsel as duplicative. ECF No. 95 at 4-6. The protestations of Defendants fall under a few of the factors iterated in *Robinson*: specifically, (2) the number of hours

spent on each task, (3) the complexity of the case, (4) the number of reasonable strategies pursued, and (6) potential duplication of services by multiple lawyers. 160 F.3d at 1281.

Regarding discovery, by our count Mr. Nolan spent at least 85.3 hours on motions related to withholding Mr. Pollak's Facebook-related communications, including opposing a motion to compel, filing a motion and a reply for reconsideration, and filing a motion and a reply to stay the case. ECF No. 92-4 at 4-6. While these motions were not frivolous, it is also clear that they did not help move the case towards a resolution: they were continuously unsuccessful and should not have required almost a sixth of the total pre-judgment time billed by Mr. Nolan. Expending such an extensive number of hours was "unnecessary," and we therefore reduce that quantity by half (rounded up), to 42.7 hours.

We decline to reduce the award in the other areas objected to by Defendants' counsel. This case involved cross-motions for summary judgment, which often require, as they clearly did here, an extensive amount of legal research, drafting, and revision. Nor will we reduce the hours spent on the amended complaint, internal communications, or Mr. Johnson's presence at some of the depositions. None of those categories are obviously frivolous or unnecessary, and we do not see "auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

III. Lodestar Adjustment

Defendants also argue that Plaintiff's fee should be adjusted, per the lodestar calculation, to reflect the fact that Plaintiff only achieved partial success. They point out that Mr. Pollak focused on two separate claims throughout the litigation, and that

Defendants prevailed on the latter claim regarding the Offensive-Speech Policy. ECF No. 95 at 8. Plaintiff's counsel counter that they have "already removed time entries related exclusively to that claim." ECF No. 92 at 13.

"There is no doubt that a district court may reduce a lodestar calculation on the grounds that a prevailing party has achieved only partial success." *Robinson*, 160 F.3d at 1283. In fact, the Supreme Court also explicitly states that we must take the degree of success into account: "the extent of a plaintiff's success is a crucial factor that the district courts should consider carefully in determining the amount of fees to be awarded." *Hensley v. Eckerhart*, 461 U.S. 424, 438 n.14 (1983). However, we must also consider that in "many civil rights suits involve multiple claims based on a common core of facts or ... related legal theories. In such cases, it is inappropriate for a district court to evaluate the individual claims as though they were discrete and severable." *Robinson,* 160 F.3d at 1283.

Here, we agree with Defendants that, although Mr. Pollak achieved a significant victory, his success was only partial. First, Mr. Pollak's two sets of claims were discrete and severable: he asserted First Amendment challenges to two separate school board policies. The first one, against which he achieved some significant success, was the Personnel Policy that was used against him. The second, the Offensive-Speech Policy, was never used against him or even mentioned at the board meeting in question. Thus, the two sets of claims were not "based on a common core of facts." Additionally, while both were First Amendment claims, neither were they based on "related legal theories": Mr. Pollak asserted an as-applied challenge to the Personnel Policy based on past actions,

but he asserted a facial challenge to the Offensive-Speech Policy based on chilled speech in the present and future. Thus, the two claims are based on separate sets of facts and separate legal theories. The two sets of claims are clearly distinct and severable here.

Second, while Mr. Pollak's success was decisive and significant enough to win him attorneys' fees, the permanent injunction was narrower than what he asked for: an injunction against any enforcement of the Personnel Policy "as applied to individuals who want to mention, refer to, or criticize public officials while discussing school policies and procedure." ECF No. 43 at 19. Per our Order, the Policy may still be enforced against those individuals to prevent them from speaking about employment-related matters at board meetings. What we *have* declared unlawful is the enforcement of the Policy against individuals who simply mention employees' names without further mention of any employment-related matters.

Additionally, although Plaintiff's counsel state that they have removed time entries "related exclusively" to pursuing the Offensive-Speech claims (ECF No. 92 at 13), none of the time entries specify any particular claim. Most of the reported work – summary judgment briefing, hearing prep, research for the amended complaint, etc. – would logically have included work on all of the claims, including those that Plaintiff lost.

Upon reviewing Plaintiff's arguments related to both sets of claims throughout this litigation, we assess that Plaintiff achieved about 80 percent of the principal goal of his suit, and thus we reduce the overall award by 20 percent.

IV. Fees Related to Post-judgment Litigation

Finally, we award Plaintiff his full request for fees for the post-judgment stage of this proceeding. The Tenth Circuit generally allows recovery of fees for an attorney's work in seeking attorney's fees. *Cummins v. Campbell*, 44 F.3d 847, 855 (10th Cir. 1994). Additionally, Defendants' counsel does not appear to have been particularly communicative during this last stage, making the Plaintiff's job that much harder. We award the total 59.1 hours spent on the fee-related litigation – 48.5 hours by Mr. Nolan, and 10.6 hours by Mr. Johnson. At the above-mentioned prevailing market rates, that amounts to $16,935.

V. Expenses

We have reviewed Plaintiff's counsels' entries for their litigation expenses and find them reasonable. We award them the full amount of $10,999.93.

CONCLUSION

Based on the above reasoning, the filings, and the relevant law, **IT IS HEREBY ORDERED** that Plaintiff's costs and fees in the amount of $156,982.93 are reasonable, and Plaintiff's Motion is **GRANTED** for that amount. This reflects: (1) Mr. Johnson's 86.4 hours and Mr. Nolan's 472.9 hours reasonably spent pre-judgment, at the rates of $225 and $300 respectively, with a twenty percent reduction based on the degree of their success, for a total of $129,048; (2) Mr. Johnson's 10.6 hours and Mr. Nolan's 48.5 hours reasonably spent on post-judgment litigation, at the same rates mentioned above, for a total of $16,935; and (3) reasonable expenses totaling $10,999.93.

Dated this 17th day of April, 2025.

Alan B. Johnson
United States District Judge