

LITIGATION

Court rejects fee award for supervisor who prevailed on FEHA harassment claim

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A Beverly Hills employee charged that the city and her supervisor subjected her to unlawful harassment. After the employee failed to prove her harassment claim at trial, the supervisor filed a motion for prevailing party attorneys' fees. The trial court refused to award the supervisor his fees because the employee's lawsuit had not been frivolous. The court of appeal affirmed that the frivolousness standard applies to both employees' and employers' requests for attorneys' fees under the California Fair Employment and Housing Act (FEHA).

City victorious on employee's harassment claim

Elisa Lopez worked for the Beverly Hills Parking Enforcement Department. Lopez sued the city and her supervisor, Gregory Routt, for harassment, discrimination, and retaliation based on her race and national origin in violation of the FEHA. A jury found in favor of the city and Routt on the harassment claim.

Routt filed a motion to recover \$374,760.75 in prevailing party attorneys' fees, which was half the total fees incurred by the city in its representation of both itself and Routt. The trial court denied Routt's motion, concluding he had not established that Lopez's claim was frivolous, unreasonable, or without foundation, a requirement for a prevailing defendant to obtain an attorneys' fee award under the FEHA. The court of appeal affirmed the trial court's decision.

Recovery of attorneys' fees under FEHA

The general "default" rule is that each party in a lawsuit must bear its own attorneys' fees. The exception to the rule is that a prevailing party may recover fees when recovery is authorized by statute or contract. The FEHA gives courts the discretion to award reasonable attorneys' fees and costs to a party who prevails on a discrimination claim. The purpose of that fee-shifting provision is to remedy workplace discrimination by encouraging employees to file potentially meritorious claims. Without a mechanism authorizing the award of attorneys' fees, many aggrieved employees could not afford to file discrimination lawsuits.

Under the FEHA's fee-shifting provision, a prevailing *plaintiff* should ordinarily receive an award of attorneys' fees unless special circumstances would make an award unjust. A prevailing *defendant*, however, shouldn't be awarded attorneys' fees unless the action

was frivolous or the plaintiff brought or continued the litigation without an objective basis for believing it had potential merit. Just because an employee does not prevail does not mean that the action was unreasonable or without foundation, warranting an award of fees to the defense.

The course of litigation is rarely predictable. Decisive facts may not emerge until discovery (the pretrial exchange of evidence) or trial. The law may change or be clarified in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, an employee may have an entirely reasonable basis for bringing suit. Trial courts must take all of that into consideration when they apply the frivolousness standard.

Supervisor cannot recover his attorneys' fees

Routt argued that because he is an employee and a supervisor, his request should not be subject to the same "onerous" frivolousness standard applicable to prevailing employers. He maintained that when an individual successfully defends against an FEHA harassment claim, he should be subject to the same fee-shifting standard as a prevailing employee, meaning he would be entitled to have a court exercise its discretion to award reasonable attorneys' fees, regardless of whether the employee's claims are deemed frivolous. The court of appeal rejected Routt's position.

No California court has distinguished between a prevailing employer defendant and a prevailing employee/supervisor defendant for purposes of the FEHA's fee-shifting provision. Furthermore, the purpose of the provision is to support California's policy against workplace discrimination, retaliation, and harassment by incentivizing employees of limited means to file suit. That equitable consideration is not at issue for a prevailing FEHA defendant, even if the defendant is an individual. Assessing attorneys' fees against employees in nonfrivolous cases merely because they do not ultimately prevail would have a chilling (harmful) effect on future employment discrimination actions, thereby undermining the enforcement of the FEHA.

Routt countered that there is no need to encourage employees, via the FEHA's fee-shifting provision, to file harassment claims against their coworkers because employers can be sued for the same wrong under the principle of vicarious liability. Not so, said the court.

In 2000, the California Legislature amended the FEHA to impose personal liability for harassing conduct on individual employees. The legislature concluded it was necessary to make individual employees liable for harassment under the FEHA to ensure the victim's full recovery and to deter coworker harassment. It would be absurd to conclude that lawmakers amended the FEHA

with those goals in mind yet intended to discourage employees from bringing claims against coworkers by depriving them of the FEHA's asymmetrical attorneys' fee standard.

Finally, Rouff argued that the frivolousness standard burdens individual employees who must defend against unmeritorious FEHA claims. That argument was similarly without merit. Individual defendants are able to recover their attorneys' fees and costs when they are dragged into court to defend a baseless FEHA lawsuit. Moreover, even if the lawsuit is not frivolous, a prevailing employee may seek reimbursement from his employer of the attorneys' fees and costs he incurred in defense of the unsuccessful lawsuit.

In addition, both public and private entities are generally obligated (with limited exceptions) to provide a defense for employees who are sued as a direct consequence of discharging their work duties. Accordingly, individual employees who prevail on an FEHA harassment suit have a means of recovering attorneys' fees and costs they may have incurred to defend themselves. *Lopez v. Rouff* (California Court of Appeal, 2nd Appellate District, 11/29/17).

Bottom line

The legislature included a fee-shifting provision in the FEHA to encourage potentially meritorious claims of employment discrimination. As a policy matter, the "frivolousness" standard provides an incentive to employees and their attorneys to pursue FEHA claims even if they cannot guarantee success, while simultaneously protecting employers from burdensome litigation filed without a legal or factual basis. In striking that balance,

the FEHA makes it difficult for employers to recover fees and costs. That is something you must take into account when calculating the cost of defending against employee discrimination lawsuits.

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