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Annual Seminar*

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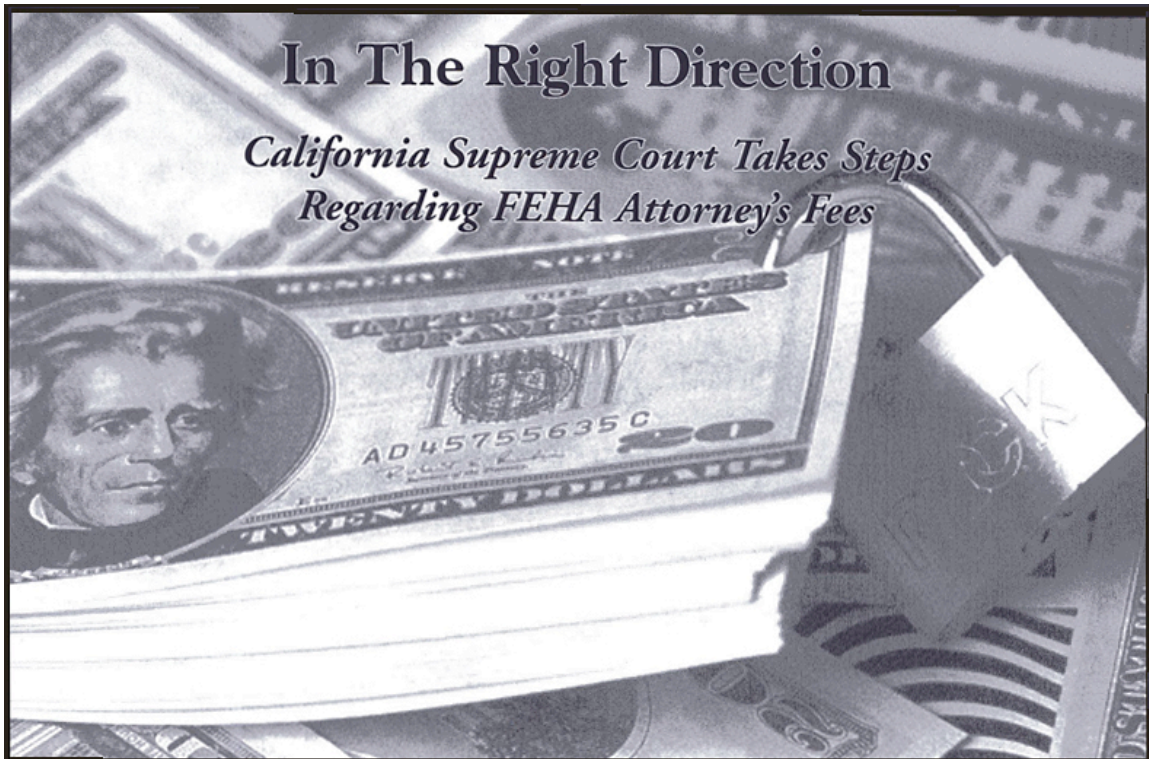
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by Robert S. Cooper

**CALIFORNIA SUPREME COURT TAKES STEP
IN THE RIGHT DIRECTION REGARDING FEHA ATTORNEY'S FEES**

As any employment law practitioner knows, claims brought against employers under the Fair Employment and Housing Act (FEHA) are often driven by the prospect of substantial attorney fees for Plaintiffs that are permitted under its one-sided attorney fees statute. (See Gov. Code §12965, (b)) It is not uncommon in FEHA cases to see a modest Plaintiff's verdict result in an attorney fee award that dwarfs the verdict in size. The recent California Supreme Court decision in *Chavez v. City of Los Angeles*, (47 Cal. 4th 970 (2010), decided January 14, 2010), involved just such a case. In *Chavez v. City of Los Angeles*, a jury verdict in the amount of a mere \$11,500 (\$1,500 in economic damages for retaliation under the FEHA and another \$10,000 in non-economic damages for emotional distress) led to a claim for attorney fees by the Plaintiff's attorney of a staggering \$870,935.50.

The trial court denied the fees claim pursuant to California Code of Civil Procedure §1033(a), which permits a court to deny costs (including attorney fees) where a verdict is less than the jurisdictional minimum for an “unlimited civil case” (\$25,000) and where the case should have been brought as a “limited civil case,” but was not. The Court of Appeal reversed that decision, finding that section 1033(a) was inapplicable to FEHA cases, however, the California Supreme Court sided with the trial court and reversed the Court of Appeal. Describing the attorney’s fees claimed as “grossly inflated,” the Supreme Court supported the trial court’s reliance on C.C.P. §1033, and agreed that this code section gave the trial court discretion to deny costs and attorney’s fees to a Plaintiff who recovered damages in a FEHA case below \$25,000, because such claims could have been litigated as a “limited civil case” due to the amount at issue.

The question presented by the case was whether the FEHA attorney fees statute “trumps” the costs statute set forth under C.C.P. §1033(a) with respect to an award of costs and attorney fees. The Supreme Court has ruled that the two statutes are not contradictory and that, notwithstanding a FEHA plaintiff’s almost absolute right to attorney’s fees if he or she prevails with a verdict of any size, C.C.P., §1033(a) provides a court with discretion to deny fees in a FEHA case where the verdict is \$25,000 or less, and where the case was *not* brought as a “limited civil case,” but could have been.

Factual Background

The *Chavez* case involved a series of separate lawsuits filed over a period of several years. The original lawsuit was filed by a police officer in the Los Angeles Police Department. The officer had been accused by the department of stealing payroll checks, but was found not to be the officer responsible following an investigation. The next year, 1997, he was transferred and he told his Captain that he was under surveillance by the department’s Internal Affairs Group. Due to concerns about possible paranoid beliefs, the Captain ordered him to be seen by the

Department's behavioral science unit. He was transferred again later in 1997. Over the next six years, Plaintiff filed four separate lawsuits against the City, the last in 2004 which included employment discrimination (disability), harassment and retaliation claims under the FEHA. After a five-day jury trial in Superior Court, the jury rejected his claim of discrimination based on a perceived mental disability, finding that the individuals accused did not perceive him as having a mental disability. However, the jury returned a verdict in his favor on the FEHA retaliation claim, awarding him a total of \$11,500 in damages (\$10,000 in emotional distress and \$1,500 in economic loss).

Plaintiff's counsel then filed a motion for costs in the amount of \$13,144.26 and a separate motion for attorney fees in the amount of \$870,935.50, including fees relating to all of the prior lawsuits. After a hearing, the trial court denied the motion for attorney fees. The court based its decision to deny fees on C.C.P. §1033(a), which it said gave the Court discretion to deny fees because the verdict was less than \$25,000 and the case could have been brought as a limited civil action.

The California Court of Appeal reversed the order denying attorney fees and determined that the trial court could not rely on C.C.P. §1033, the costs statute, in a FEHA case. Instead, the Court of Appeal found that the costs statute is inapplicable in FEHA cases. The court found that the trial court had erred in that it made no express finding of a "special circumstance" that justified denying attorney's fees to a prevailing FEHA plaintiff.

The Supreme Court agreed to review the case to determine the proper interaction of the two statutory provisions – the provision in C.C.P. §1033(a) that grants discretion to trial courts regarding attorney fees, and the attorney fees provision in the FEHA, which provides that a prevailing plaintiff should ordinarily recover attorney fees unless special circumstances would render the award unjust.

The Basis for the Supreme Court's Holding

Under California law, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. (C.C.P. §1032(b)) The litigation costs that the prevailing party may recover include attorney fees when the recovery of such fees is authorized by statute. (C.C.P. §1033.5(a) (10) (b)) However, pursuant to C.C.P. §1033(a), if a “prevailing party recovers a judgment that could have been rendered in a ‘limited civil case’ (i.e., one limited in the amount of damages at stake to \$25,000) but the action was *not* brought in a limited civil case, the trial court has discretion to determine what, if any, portion of claimed costs will be awarded.”

Under the attorney fees provision contained within the FEHA statute, Government Code §12965 (b), “.... the court, in its discretion, may award to the prevailing party reasonable attorney’s fees and costs...” The Supreme Court noted that in enacting the FEHA, the legislature sought to “safeguard the rights of all persons to seek, obtain, and hold employment without discrimination on account of various characteristics, which now include race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, and sexual orientation. [Citing Government Code §12920; and *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 891] In examining the history of the FEHA attorney fee statute, the California Supreme Court noted that based upon Federal Court precedence, (and also adopted by California courts), “a prevailing plaintiff should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a prevailing defendant may recover attorneys fees only when the plaintiff’s action was frivolous, unreasonable, without foundation, or brought in bad faith (citing *Christiansberg Garment Company v. EEOC* (1978) 434 US 412, 416-417, 421-422 [54 L. Ed. 2nd 648, 98 S.Ct. 694])

The Supreme Court determined that §1033 applied, even though FEHA claims were at issue. The Court found that contrary to the Court of Appeal analysis, there was no conflict between §1033(a) and the FEHA attorney fee provision:

“In the situation presented here, we perceive no irreconcilable conflict between §1033(a) and the FEHA’s attorney fee provision. In

exercising its discretion under §1033(a) to grant or deny litigation costs, including attorney fees, to a plaintiff who has recovered FEHA damages in an amount that could have been recovered in a limited civil case, the trial court must give due consideration to the policies and objectives of the FEHA and determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives. (*Chavez*, supra 47 Cal. 4th at 986, citing C.C.P. §403.040 [motion to reclassify pending action as limited civil case])

In reaching its conclusion, the Supreme Court cited with approval the Court of Appeal's decision in *Steele v. Jensen Instrument Co.* (1997) 59 Cal. App. 4th 326 , in which the Court of Appeal reached a similar conclusion. In *Steele*, the plaintiff in a pregnancy discrimination case brought under the FEHA received a damage award after a jury trial in the amount of \$21,078. In light of the fact that the damage award was less than the \$25,000 municipal court threshold (before the unification of the municipal and superior courts), the trial court, relying on §1033(a), denied the plaintiff her litigation costs, including attorney fees. (*Steele v. Jensen Instrument Co.*, supra at pgs. 329-330)

The C.C.P. Sect. 998 Settlement Offer Issue

It is noteworthy that although the Supreme Court relied upon the appellate decision in *Steele v. Jensen Instrument Co.*, the Court purposefully steered clear of one of the primary basis for the court's holding in *Steele*: the existence of a C.C.P. §998 settlement offer by Defendant which exceeded the amount the plaintiff recovered in damages. In *Steele*, the Court of Appeal had based its decision on *both* the fact that the verdict of \$21,078 obtained by Plaintiff was less than the \$25,000 municipal court threshold and because the verdict did not exceed the \$40,000 C.C.P. §998 offer to compromise that had been made by defendant prior to trial. Remarkably, the trial court also found that plaintiff had no costs or fees to add to the judgment of damages for purposes of §998 and so determined that plaintiff was not the prevailing party per §998, which might seem contrary to the case law interpreting §998, since fees and costs are normally added to any tort judgment to determine the "prevailing party" under this section.

The Supreme Court in *Chavez* purposefully avoided a discussion of the interplay of C.C.P. §998 with the FEHA attorney fees provision and with §1033(a). Instead, it referred to the §998 issue only in a footnote, stating that “that aspect of [the *Steele*] decision is not relevant to the issues that we address here.”

The Court’s Attack on Excessive Attorney Fees

Once the High Court concluded that §1033(a) was applicable to allow the court discretion to deny attorney fees and costs to a prevailing plaintiff in a FEHA case where the verdict was less than \$25,000, the Court went on to analyze whether the trial court properly denied costs and fees to the plaintiff in the *Chavez* case. The Court explained that attorney fees need not be strictly proportionate to the damages recovered: “When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.” (Citing *Farrar v. Hobby* (1992) 506 U.S. 103, 115 [121 L. Ed. 2nd 494, 113 S. Ct. 566]) The Court further noted that California law is consistent with Federal law in that “a reduced fee award is appropriate when a claimant achieves only limited success.” [citations omitted]

The Court characterized the police officer’s success in the underlying action as “modest at best” and the attorney fee request as “grossly inflated.” (*Chavez*, at pg. 976) The Court also pointed out that “a fee request that appears unreasonably inflated is a ‘special circumstance’ permitting the trial court to reduce the award or deny one altogether.” (*Chavez*, pg. 990, citing *Serrano v. Unruh* (1982) 32 Cal. 3d 621, 635 [186 Cal. Rptr. 754, 652 P. 2d 985]; accord, *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1137 [104 Cal. Rptr. 2d 377, 17 P. 3d 735]) The Court found that “[h]ere, the trial court reasonably could and presumably did conclude that plaintiff’s attorney fee request in the amount of \$870,935.50...was grossly inflated when considered in light of the single claim on which plaintiff succeeded, the amount of damages awarded on that claim, and the amount of time an attorney might reasonably expect to spend in litigating such a claim...This fact alone was sufficient,

in the trial court's discretion, to justify denying attorney fees altogether." (*Chavez, supra*, at pg. 991)

Responding to the Court of Appeal's stated rationale for awarding fees, i.e., that all FEHA cases have significant public impact, regardless of their facts or the nominal amount of the verdict, the Supreme Court noted that the plaintiff in *Chavez* did not claim that his success on a single FEHA retaliation claim had any broad impact or resulted in significant benefit to anyone other than himself. (*Chavez, supra* at p. 990)

The Ramifications of The *Chavez* Decision

As the law had stood prior to the *Chavez* decision, the FEHA attorney fees provision acted as a means for plaintiffs to obtain favorable settlements even in the least meritorious employment discrimination cases, since defendants risked paying large attorney fees awards where even nominal damages were awarded by a jury. While the *Chavez* decision did not dramatically alter the playing field in FEHA cases, the Supreme Court's decision at least gives defense practitioners in the employment law arena a few more weapons in their arsenal to limit or deny outright the attorney fees awards that create so much leverage for plaintiff's in FEHA litigation. It is now clear that if a verdict can be obtained in an amount of \$25,000 or less, it will be possible (though not automatic), to deny an attorney fee award altogether in FEHA cases.

Additionally, the language of the Supreme Court with respect to claims of inflated attorney fees was surprisingly strong, granted that this was a case with extreme facts. Nonetheless, the Court's emphasis on language from prior case law to support its finding that unreasonably inflated fee claims can amount to a "special circumstance" in a FEHA case permitting the trial court to reduce the award or deny one altogether" is welcome language and will prove useful in this usually one- sided arena.

While I had hoped that the Court would do more, by perhaps taking the opportunity to adopt the *Steele v. Jensen* court's use of the §998 statute as a further basis for denying an attorney fee award in a FEHA action, what is really required to help restore some semblance of order regarding the FEHA attorney fees issue would be for the legislature to amend the §998 statute itself. More balance could be achieved by codifying the Court of Appeal's approach in *Steele v. Jensen* and making the determination of whether a party obtained a more favorable judgment to be "exclusive of attorney fees and costs," in tort cases, including cases under the FEHA. Thus, for example, where a defendant offers \$50,000 to settle in a §998 offer and the verdict is only \$45,000, a plaintiff would not in the court's discretion be permitted to collect attorney fees. This is currently the rule in contract actions under C.C.P. §998(c), but *not* in tort actions such as FEHA cases, where a trial court is permitted to add costs and attorney fees of the plaintiff to the verdict to determine whether or not it exceeds the defendant's §998 offer. Nevertheless, the *Chavez* decision is a step in the right direction.

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