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PERSPECTIVE

High court not looking good for employers

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More bad news for California employers: The newly constituted state Supreme Court has given an unmistakable signal that it has moved to the legal left and is a pro-employee court. Anyone who has litigated an action under the Fair Employment and Housing Act (FEHA) knows that it is virtually impossible for a prevailing defendant to obtain an award of attorney fees. However, the Supreme Court has now essentially eliminated an employer's ability to recover *anything* when it prevails in a discrimination lawsuit — including costs.

The court's decision in *Williams v. Chino Valley Independent Fire District,* 2015 DJDAR 4922 (2015), expressly disapproves prior precedent and holds that a prevailing defendant under FEHA is not entitled to an award of costs as a matter of right (as in most lawsuits), but only when the employer can prove that the plaintiff's action is frivolous, unreasonable or groundless. Or as the court put it: "a prevailing *plaintiff* should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust … A prevailing *defendant*, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so."

Loring Winn Williams sued his employer, defendant Chino Valley Independent Fire District, for disability discrimination in violation of FEHA. On summary judgment, the trial court ruled in favor of the district. Without determining whether Williams' action was frivolous, unreasonable or groundless, the trial court awarded the district costs of over $5,300. The Court of Appeal affirmed, in line with other California authority interpreting FEHA, finding that Code of Civil Procedure Section 1032(b), which allows a prevailing party its court costs as a matter of right, was the governing statute.

The Supreme Court reversed. Writing for a *unanimous* court, Justice Kathryn Werdegar went through a two-part analysis to find for the employee and deny the employer costs. First, the court held that Government Code Section 12965(b) (part of the FEHA statute) expressly states: "the court, *in its discretion*, may award to the prevailing party, including the department, reasonable fees and costs, including expert witness fees." (Emphasis added).

Because the language expressly gives the court discretion, the Supreme Court concluded that the Government Code trumps Code of Civil Procedure Section 1032, which awards costs as a matter of right. Werdegar found that the Government Code "expressly excepts FEHA actions from ... [the] mandate for a cost award to the prevailing party." But in order to so rule, Werdegar had to distinguish prior Supreme court case authority that reasoned to the contrary — *Davis v. KGO-TV Inc.*, 17 Cal 4th 436 (1998), written by Justice Stanley Mosk and concurred in by Werdegar herself.

In *Davis*, the Supreme Court clearly indicated that in FEHA cases, costs should be awarded as a matter of right. Characterizing the *Davis* reasoning as only "brief dictum," Werdegar rejects it entirely, stating: "We spoke too broadly in the quoted dictum." The *Williams* opinion then rejects other appellate case law, and instead looks to federal cases which provide the trial court with discretion. After rejecting all the prior law that held that cost awards were mandatory and instead finding that the trial court is vested with "discretion," the court then turns to "the question of how that discretion should be exercised when it is the defendant who has prevailed."

What? The court went a long ways to hold that awarding costs was discretionary so as to avoid mandatory costs — so how is it that in the next step, that discretion must be severely limited — and if so, why call it discretion? Clearly the trial court's discretion is not really its discretion, because the court then held that it is an abuse of this discretion to use the discretion to award costs to defendants without an express finding that the plaintiff's action was "objectively groundless." And that is a pretty hard standard for a defendant ever to meet. Why did the court give discretion and then in the next breath take it away?

The court first looked to *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), a federal case interpreting Title VII of the 1964 Civil Rights Act, which created a more stringent standard for awards of fees to prevailing defendants than to prevailing plaintiffs. Specifically, *Christiansburg* provided that, while prevailing plaintiffs should ordinarily be awarded their reasonable fees, a prevailing defendant would not be entitled to fees "unless a court finds that [plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." The court acknowledged that California appellate decisions have declined to extend this standard to a prevailing defendant's costs in such actions, routinely awarding costs as a matter of right to prevailing defendants in FEHA actions.

However, the court took California law one step further, ruling that the discretionary award of costs to a prevailing FEHA defendant is subject to the same asymmetric standard set forth in *Christiansburg*. The court observed that FEHA's legislative history reflected a policy of "encourag[ing] persons injured by discrimination to seek judicial relief." The court rejected the district's contentions that, compared to attorney fees, the costs of a lawsuit are more predictable and relatively small and thus have a minimal effect on a plaintiff's decision to seek judicial relief. Rather, the court noted that ordinary costs could prove to be a significant deterrent, especially given the potentially limited financial resources of some employee plaintiffs. According to the court, because the statute treats "in parallel and without distinction" an award of attorney fees and costs to a prevailing party under FEHA, the *Christiansburg* asymmetrical standard applies to costs as well as fees.

Werdegar also reviewed the legislative history, and despite the clear language to the contrary, somehow concluded that the Legislature "intended that discretion to be bounded by the *Christiansburg* rule, or something very close to it." The court further expressly disapproved California appellate authority that an award of ordinary costs was not governed by the *Christiansburg* standard.

Through the decision in *Williams*, the court removes a financial disincentive for employees claiming discrimination from initiating actions through the court system. As a practical matter, however, *Williams* simply means different dynamics in settlement negotiations and a higher percentage of weak employment cases litigated through summary judgment or trial. Cases brought under FEHA frequently involve careful calculations of risk by both parties, and these calculations can mean the difference between settlement and continued costly litigation.

Before the court's decision in *Williams*, the threat of a cost award to defendants could sway this delicate financial calculus toward resolution, especially when a plaintiff's case is particularly weak. After *Williams*, there is virtually no downside for a plaintiff to take a chance on a claim that is even a shred above meritless, meaning that such employees and their lawyers have less incentive to compromise their FEHA claims. Moreover, the loss of costs as a matter of right could encourage plaintiffs to appeal cases where they might otherwise agree to walk away in exchange for a waiver of costs, further driving up the expense of litigation for California employers.

Perhaps most significantly, however, is the Supreme Court's willingness to distance itself from prior case law — even Supreme Court case law — and "interpret" legislative intent and language in a manner consistent with its vision of what the law should be. The *Williams* case signals that employee rights are a significant priority for this court.

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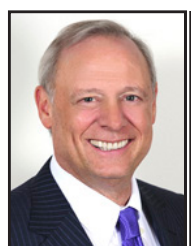
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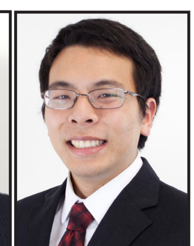
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