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NO THREAT TO FEHA FEES

By Lisa Jaskol

Despite predictions by some employers' counsel that the California Supreme Court's decision in *Chavez v. City of Los Angeles* (S162313, Jan. 14, 2010) will sharply limit attorney fee awards to prevailing plaintiffs in employment discrimination cases, the decision is far less sweeping than counsel might hope. Indeed, *Chavez* preserves the essence of California's Fair Employment and Housing Act (FEHA) and its attorney fee provision.

First a little background. FEHA is "a statutory expression of the fundamental policy against employment discrimination." (*Terry Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 609.) FEHA's attorney fee provision, Government Code Section 12965(b), is a critical element of the statutory framework: "There is no doubt that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in [FEHA] and without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583.) Therefore, consistent with the statutory mandate to construe FEHA's provisions liberally to accomplish its legislative purpose (Government Code, Section 12993 (a)), courts must award attorney fees and costs to prevailing FEHA plaintiffs absent special circumstances that would render an award unjust. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.)

In *Chavez*, the plaintiff brought a FEHA action against the city of Los Angeles in an unlimited jurisdiction court. After several years of litigation, he recovered \$11,500 in damages. He then sought \$870,935.50 in attorney fees (\$435,467.75 in hourly fees enhanced with a 2.0 multiplier). Applying Code of Civil Procedure

Section 1033 (a) - which grants courts discretion to deny costs and statutory attorney fees to plaintiffs who recover damages that could have been recovered in a limited civil case (i.e., less than \$25,000) - and ignoring FEHA's attorney fee provision, the trial court denied the attorney fee request.

The Court of Appeal reversed. Without expressing any opinion about the amount of fees due to the plaintiff, the appellate court held Section 1033(a) does not apply in FEHA cases. The court reasoned that the public policies underlying Section 1033(a)

encouraging plaintiffs to pursue litigation in the appropriate forum and deterring plaintiffs from exaggerating the value of their case conflicted with the policies underlying FEHA's attorney fee provision - easing the burden on plaintiffs of limited means so they can bring meritorious suits to vindicate key public policies. The court explained that "[d]enying attorney fees to a plaintiff who prevails under FEHA solely because the plaintiff's damages are modest would be inimical to the intent of FEHA's fee provisions and would discourage attorneys from taking meritorious cases."

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The Supreme Court granted review and reversed, finding "no irreconcilable conflict between [S]ection 1033(a) and the FEHA's attorney fee provision." Importantly, however, the Court emphasized that in exercising its discretion under Section 1033, "*the trial court must give due consideration to the policies and objectives of the FEHA in general and of its attorney fee provision in particular*" and "*determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives.*" These include "FEHA's underlying policy of encouraging the assertion of meritorious FEHA claims...." It is only when denying attorney fees is consistent with FEHA's policies and objectives that "the plaintiff's failure to take advantage of the time- and cost-saving features of the limited civil case procedures may be considered a special circumstance that would render a fee award unjust."

The Supreme Court also cautioned courts, in determining whether a FEHA action should have been brought as a limited civil case, to "avoid 'hindsight bias,' which is the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred." Thus, if the plaintiff's attorney might reasonably have expected, based on the available information, to be able to present substantial evidence supporting a FEHA damage award in an amount exceeding the damages limit (now \$25,000) for a limited civil case, *or* if the plaintiff's attorney might reasonably have concluded that the action could not be fairly and effectively litigated as a limited civil case, "the trial court should not deny fees merely because, for example, the trier of fact ultimately rejected the testimony of the plaintiff's witnesses or failed to draw inferences that were reasonably supported, although not compelled, by the plaintiff's evidence."

Finally, the Supreme Court emphasized what it viewed as the particularly egregious facts before it: "[I]n light of plaintiff's minimal success and grossly inflated attorney fee request, the trial court did not abuse its discretion in denying attorney fees." Specifically, "the plaintiff's attorney fee request in the amount of \$870,935.50 for 1,851.43 attorney hours 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." In addition, the plaintiff's evidence was "seriously deficient" on the essential element of damages, and his counsel should have realized well before trial that his injury was too slight to support a damage recovery in excess of \$25,000.

In short, *Chavez* highlights the need for plaintiffs' counsel to carefully evaluate their FEHA cases before

and after filing to ensure they avoid the pitfalls described in the decision. However, *Chavez* does not constitute a wholesale revision of the law governing FEHA attorney fee awards. To the contrary, the Supreme Court reaffirmed the importance of the policies underlying FEHA and its attorney fee provision, and indeed rejected the urging of amici curiae Employers Group and California Employment Law Council to undermine the purpose FEHA's attorney fee provision by limiting fee awards to a proportion of damages. It is also worth noting that *Chavez* will not apply at all to FEHA plaintiffs who obtain injunctive relief. Accordingly, rather than fundamentally changing FEHA litigation, as some have suggested, *Chavez* is likely to have a limited impact based on its narrow holding: where a FEHA plaintiff seeks grossly inflated attorney fees despite recovery of damages that could have been obtained in a limited civil case, the trial court has discretion - exercised without "hindsight bias" - to deny attorney fees in whole or in part, but only if denying fees is consistent with the policies and objectives of FEHA and its attorney fee provision.

Lisa Jaskol is the Directing Attorney of the Appellate Law Program at Public Counsel in Los Angeles. She filed a friend-of-the-court brief in *Chavez v. City of Los Angeles* on behalf of the Los Angeles County Bar Association and California Women Lawyers and presented oral argument for the plaintiff in the California Supreme Court.