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AN UNEVEN PLAYING FIELD

by D. Gregory Valenza

The Fair Employment and Housing Act (FEHA) includes a simple provision awarding attorney's fees: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees . . ." Govt. Code § 12965(b). The statute's text does not distinguish between employees and employers. However, the courts do not treat employers' and employees' fee requests the same.

Prevailing plaintiffs should ordinarily recover attorney's fees "unless special circumstances would render such an award unjust." *Cummings v. Benco Bldg. Servs.*, 11 Cal. App. 4th 1383, 1387 (1992). But the opposite presumption applies to prevailing employers. The trial court abuses its discretion if it awards fees to a prevailing defendant unless the plaintiff's claim was "frivolous, unreasonable, or groundless." *Id.* The trial court is required to make written findings supporting its conclusions under the above standard. See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, 91 Cal. App. 4th 859, 868 (2001). And the court must consider the plaintiff's ability to pay in setting a fee award. See *id.* at 869 n.42.

The courts justify the differential treatment of plaintiffs and defendants on several grounds. The law's salutary intent is to encourage lawyers to represent employees in discrimination cases. Additionally, courts grant fees to plaintiffs only when the defendant has violated a law. A plaintiff who loses her

case may be wrong about discrimination, but is not a law breaker. The courts also do not wish to deter plaintiffs from pursuing arguably valid claims, ultimately deemed unmeritorious.

As a practical matter, the standards discussed above make it nearly impossible for employers to recover their fees when they win. The courts in both *Rosenman* and *Cummings* reversed the trial court's decisions awarding fees to employers. Indeed, it takes few fingers to count the number of opinions upholding fee awards in favor of defendants.

"Nearly impossible" just got a little harder after the Court of Appeal's decision in *Young v. Exxon*, 168 Cal.App.4th 1467 (2008). There, the court denied attorney's fees to a prevailing manager sued individually, even though the court deemed the plaintiff's claim legally frivolous.

Laura Young, a student, worked for Exxon at a 24-hour service station. She had a series of warnings for poor performance and attendance. One night, her relief did not show up and she shut down the station, a violation of established policy. She called the station manager, Angela Lopez, and the assistant manager on the telephone, and yelled at them about the missing relief employee. Ultimately, Exxon discharged her for the incident and prior disciplinary action.

Young sued Exxon and Lopez, claiming she was harassed on the basis of her

mental disability, and fired because of the disability and in retaliation for her previous complaints about co-workers alleged harassment. Young sued Lopez as an individual defendant for the harassment. However, she admitted at her deposition that Lopez had not personally harassed her.

The trial court granted the defendants' motion for summary judgment on all of Young's claims. Lopez then filed a motion for attorney's fees under Govt. Code Section 12965(b), quoted above. Agreeing with Lopez, the trial court determined Young's claim against her was "unreasonable, frivolous, meritless and vexatious," "without foundation" and "brought in subjective bad faith." But the court rejected Lopez's request for \$18,750 in fees, about one-quarter of the total defense fees. Instead, the court awarded Lopez just \$1.00. The trial court reasoned that Exxon paid for Lopez's defense. Therefore, an award to Lopez was "really" an award to Exxon, and Exxon had not claimed the claims against it were frivolous.

Lopez appealed, but the court of appeal affirmed. The court held the trial court acted within its discretion to reduce the award to \$1.00, even though the claims against Lopez were frivolous. In the appellate court's view, granting Exxon the fees would confer a benefit to which Exxon was not entitled. After all, Exxon did not claim the claims asserted against the corporation itself were frivolous.

The court distinguished other cases in which courts award attorney's fees even though the litigant did not actually pay

for them, such as when government attorneys represent a party in litigation.

The court also found there were few activities in the case that were unique to Lopez, in that she was a key figure in the lawsuit against Exxon. The court did not address the argument that the claims against Lopez necessarily were frivolous against Exxon as well, since Young sought to hold Exxon liable for Lopez's alleged harassment.

The court's opinion in Young essentially exempts from fee awards plaintiffs who sue individual defendants under FEHA, no matter how groundless or frivolous the case may be. That is because employers generally must pay for individually named employees' defense costs. Unless an employee is held liable for unlawful harassment or other conduct outside the course and scope of employment, Labor Code Section 2802 requires the employer to reimburse employees' defense costs. Because

Young held a fee award is inappropriate if the employer pays the individual defendant's defense costs, plaintiffs will be free to pursue claims against individual defendants without fear of an attorney's fee claim. Unfortunately, the Young opinion does not appear to consider Section 2802's effects.

The only legally viable claim against an individual defendant under FEHA is unlawful harassment. Yet, plaintiffs continue to assert retaliation and discrimination claims against individual supervisors, sometimes attempting to disguise these claims under the "harassment" label. Even a frivolous "harassment" claim against a co-worker or supervisor may adversely affect the defendant's livelihood and personal life.

Young limits, but does not eliminate, individual defendants' potential remedies when they are subjected to bad faith lawsuits. Individual defendants may seek sanctions against an attorney

or party that pursues a legally frivolous claim under Code of Civil Procedure Section 128.7. To understate matters, some courts are reluctant to grant such motions. Individuals also may sue for malicious prosecution. But filing a separate lawsuit is far more difficult, costly and time consuming than merely filing a motion for attorney's fees under a statute that expressly authorizes them.

To avoid Young's holding, employers and their lawyers may wish to revisit agreements to pay individual defendants' attorney's fees up front in cases that are obviously frivolous or brought in bad faith. But the court also made clear that Young's financial condition would not have supported a large fee award anyway. Therefore, unless the plaintiff is wealthy, employers counting on recovering attorney's fees under FEHA may find that a dollar does not buy much happiness.

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