

# California Supreme Court: California Employers Face New Challenge In Recovering Post-Litigation Costs

By William E. Weiner and Adam Y. Siegel on May 7, 2015

On May 4, 2015, the California Supreme Court ruled that a prevailing defendant in a California Fair Employment and Housing Act (“FEHA”) lawsuit can only recover ordinary litigation costs if it demonstrates that the plaintiff’s FEHA claims were frivolous, unreasonable, or groundless. (*Williams v. Chino Valley Ind. Fire Distr.* (Cal. Sup. Ct. May 4, 2015), Case No. S213100). Prior to this ruling, a majority of California courts had ruled that a prevailing defendant in a FEHA case could recover costs as a matter of right. As such, the *Williams* case significantly changes California’s employment litigation landscape by making cost shifting even more one-sided in favor of employees.

The facts of the *Williams* case involved a nominal amount of litigation costs. The plaintiff, a firefighter, sued his employer, alleging disability discrimination in violation of the FEHA. The Court granted the employer’s Motion for Summary Judgment and awarded the employer its ordinary litigation costs, which totaled about \$5,400. The appellate court affirmed the cost award on the ground that California Code of Civil Procedure (“CCP”) section 1032 allows a prevailing party to recover its court costs as a matter of right.

On review, the California Supreme Court examined two issues. First, the High Court looked at whether the FEHA—rather than the CCP—governs cost awards in FEHA actions. On the one hand, the CCP states that “Except as otherwise expressly provided by statute, a prevailing party is entitled *as a matter of right* to recover costs in any action or proceeding.” (CCP section 1032). (emphasis added). On the other hand, the FEHA states the court, in its discretion, may award reasonable attorneys’ fees and costs to the prevailing party. (Cal. Gov. Code section 12965(b)). Thus, the issue was whether the FEHA is an express statutory exception to the CCP for cost awards. Prior to *Williams*, California appellate courts had most recently applied the CCP for cost awards. This approach was consistent with the federal standard under Title VII. Some courts explained that the rationale for awarding costs as a matter of right was that unlike attorneys’ fees, costs of suit are predictable and relatively small. Nevertheless, to protect financially distressed plaintiffs, California courts retained the right to deny or reduce a cost award to a prevailing FEHA defendant where a large award would impose undue hardship on the plaintiff.

Second, the Court asked if FEHA does in fact govern cost awards, is the standard for awarding costs to a prevailing FEHA defendant the same as awarding attorneys’ fees to a prevailing FEHA defendant? Under both FEHA and Title VII, a prevailing defendant can only recover attorneys’ fees if the court finds that the plaintiff’s FEHA claims

were frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after they clearly became so. Such a standard is extremely high and is rarely found by trial courts absent egregious circumstances.

As to the first issue, the Supreme Court concluded that the FEHA was as an express exception to the CCP cost award provision. To reach this conclusion, the Court heavily relied on the particular language of the FEHA, which states that Courts have discretion as to both attorneys' fees and costs. In doing so, the California Supreme Court distinguished the language of FEHA from the language of Title VII, which does not refer to costs at all. It is worthy to note, however, that when the FEHA was enacted in 1980, it combined the language of two predecessor statutes from the California Labor and California Health and Safety Codes. Thus, it is anything but clear whether the California legislature actually intended for the FEHA to act as an express exception to the CCP's cost provision.

After the Supreme Court determined that costs to prevailing FEHA defendants are not awarded as a matter of right under the CCP, it next concluded that the standard for recovering attorneys' fees for FEHA defendants applied to costs as well. Here, the Court once again focused on the specific statutory language, which grouped together both costs and attorneys' fees in the same sentence. The High Court also analyzed the legislative history and public policy of FEHA, which is to encourage employees injured by discrimination to seek judicial relief. The Supreme Court reasoned that applying the frivolous, unreasonable, or groundless standard to cost awards was sound public policy because the threat of large cost awards might discourage meritorious suits by plaintiffs with limited financial resources. Nevertheless, the opinion provides no actual data or evidence to support such a policy judgment.

In short, this ruling is substantial because employers now face an even greater challenge in recovering their expenses after defeating a meritless FEHA claim. Practically, this will likely further increase the number of discrimination, harassment, and retaliation lawsuits in California because employees in FEHA actions have even less financial risk when bringing questionable lawsuits.

Moving forward, employers should monitor the California Legislature to see if it takes steps to overrule this decision by statutory amendment. Additionally, trial courts might react by interpreting the frivolous, unreasonable, and groundless standard more leniently, thereby finding that more unsuccessful suits warrant defense costs and/or fees awards. Defense litigation strategy might also need adjusting. For instance, defendants in FEHA actions now have more incentive to serve offers of judgment under CCP section 998, which can operate to shift costs under a less onerous standard than the FEHA. For a greater analysis regarding recovering post-litigation costs, please contact Jackson Lewis to speak with an employment litigator.