

SUPREME COURT
FILED

Case No.: S213100

SEP 20 2013

**In The Supreme Court
of the State of California**

Frank A. McGuire Clerk

Deputy

LORING WINN WILLIAMS

Petitioner and Appellant,

vs.

CHINO VALLEY INDEPENDENT FIRE DISTRICT

Respondent.

On Review From The Court Of Appeal For the Fourth Appellate District,

Division Two

Civil No.: E055755

After An Appeal From the Superior Court of San Bernardino County

The Honorable Janet M. Frangie

Case Number CIVRS801732

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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DISTRICT*

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To the Honorable Chief Justice Cantil-Sakauye and the Honorable Associate Justices of the California Supreme Court:

Respondent, Chino Valley Independent Fire District (“District”) hereby answers and opposes the petition for review submitted by Petitioner, Loring Winn Williams (“Williams”).

I. INTRODUCTION

Williams contends there is a conflict among California cases that necessitates this Court’s review. There is, however, no conflict among California cases on the precise determination in this case, that a FEHA action¹ need not be frivolous, unreasonable, or groundless for a prevailing defendant to recover ordinary litigation costs under Code of Civil Procedure section 1032.² There are several cases that address costs awarded to a prevailing FEHA defendant. Only one of them holds that a FEHA case must be frivolous, unreasonable, or groundless for a prevailing defendant to obtain costs. That case challenged a fee and costs award to a prevailing FEHA defendant under another statute, Government Code section 12965.³ A case that awards costs and *fees* under Section 12965

¹ FEHA refers to the California Fair Employment and Housing Act set forth at Government Code sections 12900 et seq.

² Referred to herein as Section 1032.

³ Referred to herein as Section 12965.

does not conflict with a case awarding costs only under Section 1032, as they do not address the same legal question.

The federal cases Williams cites also do not create a conflict in California law. Federal cases are not binding precedent in California so they cannot create a conflict among California authorities.

Finally, the statutory interpretation cases Williams cites do not advance his cause. The cases on statutory interpretation instead show that both this Court and appellate courts will recognize that the rights and obligations under each statute must be independently analyzed, even where they involve the same subject, such as the right of a prevailing party to recover costs. Despite Williams' endless attempts to create disputes where there are none,⁴ there is no conflict caused by this case that needs to be resolved by this Court.

II. QUESTION PRESENTED

Is a prevailing defendant in a FEHA action required to show the action was frivolous, unreasonable, or groundless to recover ordinary

⁴ Williams disability retired from the District in 2002. Since 2008, he has filed three lawsuits against the District, trying to get back the job from which he voluntarily retired. The first was the lawsuit dismissed after the Court of Appeal issued a peremptory writ of mandate and this Court denied review and in which the challenged costs were awarded. The second was a 2012 federal court lawsuit dismissed pursuant to the District's motion to dismiss (United States District Court, Central District of California Case No. CV12-05935-R (DTBx)). The third was another state court lawsuit, also filed in 2012 and recently dismissed on demurrer, without leave to amend (San Bernardino County Superior Court Case No. CIVRS1209897).

litigation costs under Code of Civil Procedure section 1032?

III. BRIEF FACTUAL SUMMARY

Williams sued the District for employment discrimination under FEHA. (Opinion . p. 1). The trial court partially granted Williams' motion for summary adjudication and denied the District's motion for summary judgment. (Opinion p. 2). The District filed a petition for peremptory writ of mandate in the Court of Appeal, Fourth Appellate District. (Opinion p. 2). The Court of Appeal granted the petition. (Opinion p. 2). This Court denied Williams' petition for review. (Opinion p. 2). The trial court vacated its earlier orders, entered an order granting the District's summary judgment motion, and entered judgment in favor of the District, with costs to be determined. (Opinion p. 2).

The District filed two memoranda of costs, one for costs incurred in the trial court and one for costs incurred on appeal. (Opinion p. 3). Williams filed motions to tax costs, which were heard and granted and denied, in part. (Opinion p. 3). The District was awarded costs totaling \$5,368.88. (Opinion p. 3).

IV. DISCUSSION

A. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW

Williams contends review is necessary to resolve a split in authority. Williams claims cases are split on whether a FEHA action must be

frivolous, unreasonable, or groundless, for a prevailing defendant to be awarded ordinary litigation costs. But, this split does not exist on the precise issue decided in this case, whether a FEHA action must be frivolous, unreasonable, or groundless, for a prevailing defendant to be awarded ordinary litigation costs under Code of Civil Procedure section 1032.

1. **There Is No Split of Authority on the Exact Issue Determined in this Case**

Five California cases address whether a prevailing FEHA defendant is entitled to costs.⁵ They analyze whether the *Christiansburg*⁶ standard, that attorneys' fees are only awarded to a prevailing defendant in Title VII⁷ cases that are frivolous, unreasonable, or groundless, also applies to a cost award to a prevailing FEHA defendant. Of the five cases, *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383 (“*Cummings*”), is the sole case that applies the *Christiansburg* standard for awarding attorneys’ fees to an award of non-expert costs to a prevailing FEHA defendant.

⁵ Including the present case. Williams does not cite all of the prior cases in his petition for review. They were all cited in the appellate briefs.

⁶ *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412.

⁷ 42 U.S.C. section 2000e et seq.

Cummings is the earliest case. Its analysis is limited to whether *Christiansburg* applies to an award of costs and fees⁸ under Section 12965, the fee shifting statute in FEHA. *Cummings* does not address the issue decided by this case, whether *Christiansburg* applies to an award of ordinary litigation costs under Section 1032, the general statute for awarding ordinary costs to a prevailing defendant. The prevailing FEHA defendant in *Cummings* did not seek costs under Section 1032 but sought costs and attorneys' fees under Section 12965. *Cummings* does not mention Section 1032. It does not analyze, as other post-*Cummings* cases do, the interplay between Section 1032 and Section 12965 and whether Section 12965 states an express exception to the right of a prevailing defendant to obtain an award of ordinary costs. Also, in *Cummings*, the discussion of attorneys' fees and costs was not segregated and there was no independent analysis of the standard for awarding costs versus attorneys' fees to a prevailing FEHA defendant.

The post-*Cummings* cases each hold a prevailing FEHA defendant is entitled to ordinary costs; there is no requirement that the action be frivolous, unreasonable or groundless. *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 680 (“*Perez*”); *Knight v. Hayward Unified*

⁸ *Cummings* blended fees and costs together in its analysis and did not separately consider costs, as was done in this and the other appellate cases.

School District (2005) 132 Cal.App.4th 121, 134 (“*Knight*”)⁹; *Baker v. Mullholland Security & Patrol, Inc.* (2012) 204 Cal.App.4th 776, 783-784. (“*Baker*”); *Williams v. Chino Valley Independent Fire District* (2013) 218 Cal.App.4th 73, 82. (“*Williams*”). These cases reject *Cummings*’ analysis and reliance on *Christiansburg*. The *Knight* court explained: “The issue in *Christiansburg* was limited to the recovery of *attorney fees*. Costs outside of those fees were not at issue.” *Knight* at 135. The *Perez* Court also noted this defect. *Perez* at 680. *Cummings*, therefore, relied on *Christiansburg* for a proposition it did not consider or adopt and that was rejected when subsequently considered by other courts. Criticizing *Cummings* on another point, the *Perez* Court stated: “In *Cummings*, the court did not segregate the two parts of the award [fees and costs] in applying *Christiansburg*, but overturned them together. . . . [¶] We find this blending of fees and costs to be unnecessary and inappropriate.” (*Ibid.*)

The post-*Cummings* cases considered a variety of factors in determining the *Christiansburg* standard to obtain attorneys’ fees under FEHA does not apply to awarding ordinary costs recoverable to a prevailing party under Section 1032. *Perez, supra*, 111 Cal.App.4th at 675-680. Key is the statutory language. Section 1032(b) states: “Except as

⁹ *Williams* does not cite this appellate case in his petition. This case is cited in the trial court and appellate briefs.

otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” *Perez* explained that Section 12965(b) does not state an exception to Section 1032(b) as it does not expressly disallow the recovery of costs by prevailing defendants. *Perez, supra*, 111 Cal.App.4th at 678-681.¹⁰ Also key is the reason for treating attorneys’ fees differently than ordinary costs:

“The rationale for this distinction is clear. Whereas the magnitude and unpredictability of attorney’s fees would deter parties with meritorious claims from litigation, the costs of suit in the traditional sense are predictable, and, compared to the costs of attorneys’ fees, small.” [Citation.] “If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d) [Federal Rules equivalent to section 1032(b)] would have little substance remaining.”

Perez, supra, 111 Cal.App.4th at 681, quoting *Popeil Bros., Inc. v. Schick Electric, Inc.* (7th Cir. 1975) 516 F.2d 772, 776. *Baker* furthers this analysis by distinguishing between ordinary litigation costs which are routinely shifted to a prevailing FEHA defendant under Section 1032 without regard to *Christiansburg*, and expert witness and attorneys’ fees, which are not recoverable as a matter of right and are subject to

¹⁰ The statutory language is critical because the right to recover costs exists solely by operation of statute. *Id.* at 679-681, citing *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989.

Christiansburg when awarded under Section 12965. As the *Baker* court explained: “Like attorney’s fees, expert fees should be treated differently than ordinary litigation costs because they can be expensive and unpredictable, and could chill plaintiffs from bringing meritorious actions.” *Baker, supra*, 204 Cal.App.4th at 783-784.

As explained above, there is no split on whether *Christiansburg* applies to a prevailing FEHA defendant cost award under Section 1032 because *Cummings* did not consider that issue. But, *Baker*, and *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 265, 279, both reference a “split” in authority on whether *Christiansburg* applies to a cost award. This reference, however, generically refers to whether *Christiansburg* applies to a prevailing defendant cost award. It does not distinguish the statute under which the cost award was made or that *Cummings* was an award under Section 12965 and not under Section 1032. Even if there were a split among *Cummings*, *Perez*, and *Knight*¹¹ that does not create a split between *Williams* and *Cummings*, the latter of which is the sole case applying *Christiansburg* to an award of costs (and fees).^{12 13}

¹¹ A careful analysis shows there is not a true split.

¹² *Williams* cites both *Baker* and *Holman* for the proposition that there is a split in whether *Christiansburg* applies to a costs award to a prevailing FEHA defendant. *Williams* fails to state both cases recognize that prevailing FEHA defendants are entitled to ordinary costs under Section 1032.

Therefore, even if there is a split, there is no basis to grant review in this case that has no part in creating that split.

Ironically, although *Baker* and *Holman* claim there is a split of authority (among *Cummings*, *Knight*, and *Perez*), those exact cases - *Baker* and *Holman* - are clear examples of why there is *not* a split of authority here. *Baker* holds *Christiansburg* applies to an award of expert witness fees to a prevailing FEHA defendant under Section 12965; *Holman* holds *Christiansburg* does not apply to an award of expert witness fees to a prevailing FEHA defendant under Code of Civil Procedure section 998.¹⁴ These cases do not conflict, or create a split, because they each consider an expert fee award under a different statute. The same is true here. *Cummings* addresses costs (and fee) awards under Section 12965, while this case, *Williams*, addresses cost awards under Section 1032.

There is another reason *Baker* and *Holman* are clear examples of why there is no split that needs to be settled. *Holman* considered whether *Christiansburg* applies to an award of expert witness fees to a prevailing FEHA defendant, under both Section 12965 and Section 998. *Holman* held

¹³ In addition to the fact that these are different statutes, it is also significant because there are discretionary costs that can be awarded under Section 12965 that go above and beyond the ordinary and routine costs awarded under Section 1032. Therefore, a prevailing FEHA defendant could seek costs under Section 12965 that are not recoverable as ordinary costs under Section 1032. That issue was not addressed in *Williams*.

¹⁴ Referenced herein as Section 998.

that *Christiansburg* applies to expert witness fees awarded to a prevailing FEHA defendant under Section 12965, but does not apply when those same exact expert witness fees are awarded to a prevailing FEHA defendant under Section 998. *Baker* captured this different result depending on the statute explaining:

In *Holman v. Atlanta Pharma US, Inc.* [citation], the court concluded that a prevailing FEHA defendant could recover expert witness fees under Code of Civil Procedure section 998, without making a showing that the *Christiansburg* standard was satisfied. [Citation.] The court opined, however, that *Christiansburg* was applicable to expert witness fees awarded under Government Code section 12965 (as opposed to Code Civ. Proc., § 998) because federal courts apply the *Christiansburg* standard not only for attorneys' fees, but also for expert witness fees, to prevailing defendants in Title VII cases. [Citation.]

Baker, supra, 204 Cal.App.4th at 783. Clearly, *Holman* does not conflict with itself. The fact that *Holman* concludes the standard for allowing expert witness fees to a prevailing defendant under one statute is different than under another, exemplifies that applying different standards under different statutes does not create a conflict. *Holman* captures the critical point when it addressed its task in the case stating:

This case requires us to determine the appropriate interplay of four statutory provisions: Government Code section 12965 and Code of Civil Procedure section 998, 1032, and 1033.5.

Holman, supra, 186 Cal.App.4th at 277-278.

The same is true here. Determining whether a prevailing FEHA defendant is entitled to costs under Section 1032 involves an analysis of the interplay between Section 12965 and Section 1032. This is because Section 1032(b) states: “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.” Therefore, it is necessary to determine whether Section 12965 states an express exception to Section 1032 (b), which all courts considering the issue hold it does not. See *Perez, supra*, 11 Cal.App.4th at 679 and Opinion pp. 11 & 17. It is standard for cases to consider the interplay between statutes, including to determine whether and under what standard costs are recoverable. See e.g. *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989, in which this Court upheld a Section 1032 cost award to a prevailing defendant in an action brought under the Song-Beverly Consumer Warranty Act (Civil Code section 1790 et seq. “Song-Beverly Act”), even though the Song-Beverly Act contains a cost-shifting provision that expressly allows a prevailing plaintiff to recover both costs and attorneys’ fees, but makes no mention of a prevailing defendant. This Court held that under Section 1032, costs are recoverable to the prevailing party as a matter of right, unless expressly disallowed and that while the Song-Beverly Act only provided for costs to a prevailing plaintiff, it did not expressly disallow a cost award to a prevailing defendant and therefore,

prevailing defendant costs were recoverable. *Id.* at 989-991. These cases well illustrate that a holding on the recovery of costs on one statute does not create a conflict with the holding on recovery of costs under a different statute. Rather, the interplay among statutes, is relevant to the interpretation and conclusion on each separate statute.

2. **Federal Cases Do Not Create a Split of Authority**

Federal authority may be regarded as persuasive, but California courts are not bound by or required to follow decisions of the federal district courts or the federal circuit courts of appeal. *People v. Uribe* (2011) 199 Cal.App.4th 836, 875. As the Court of Appeal explained: “However, other than binding United States Supreme Court decisions, there is a significant difference between considering federal law and precedent, which we have done, and being bound by it.” (Opinion p. 13). Because federal cases are not binding, they cannot create a “split.”¹⁵

3. **Cases on Statutory Interpretation Do Not Create a Split of Authority**

Reaching to create a split in authorities where none exists, Williams claims the cases on statutory interpretation “Demand the Settlement of the Application of this Law.” (Opinion p. 17). The law Williams argues

¹⁵ *Christiansburg* itself only analyzed an award of attorneys’ fees and had nothing to do with a cost award.

should be settled is Section 12965, specifically, whether the *Christiansburg* standard which case law clearly holds applies to attorneys' fees and expert costs awarded under that statute, also applies to costs awarded under Section 12965. (Opinion p. 19). The issue of whether *Christiansburg* applies to (non-expert) costs under Section 12965 should not be resolved by reviewing *Williams* where the costs award was under Section 1032. No case cited by *Williams* supports "settlement of the application of this law" where there is no case that conflicts with *Williams*.

V. CONCLUSION

For each of the foregoing reasons, the District respectfully requests that the petition for review be denied. There is no need to review the decision of the Court of Appeal, as there is no conflict among appellate cases on the issue addressed in this appeal pertaining to a cost award under Section 1032.

Dated: September 18, 2013

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

By: _____



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DISTRICT

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed Respondent's Answer to Petition for Review is produced using 13-point Roman type including footnotes and consists of exactly 2,513 words, exclusive of tables and this certificate, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 18, 2013

LIEBERT CASSIDY WHITMORE

By: _____



Peter J. Brown
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CERTIFICATE OF SERVICE BY MAIL

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the above-entitled cause. My business address is 550 West C Street, Suite 620, San Diego, CA 92101.

I am familiar with the practice of the firm's practice of collection and processing correspondence for mailing of packages by overnight courier service. Under that practice, it would be deposited with an overnight courier service for delivery to the addressee(s) below, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for at San Diego, California, in the ordinary course of business.

I served the foregoing **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** on interested parties in this action by placing a true copy thereof for collection and delivery by overnight courier service, in the course of ordinary business on September 19, 2013, enclosed in a sealed envelope addressed as follows:

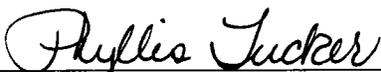
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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California.



Phyllis Tucker