S 162313

IN THE

SUPREME COURT OF CALIFORNIA

ROBERT CHAVEZ
Plaintiff, Appellant

vs.

CITY OF LOS ANGELES, *et al.*
Defendants, Respondents

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B192375
APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, CASE NO. BC324514, THE HONORABLE ROLF M. TREAU, JUDGE PRESIDING

ANSWER BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. Does California Code of Civil Procedure §1033 (a) [1] ("§1033") apply to civil rights actions brought under the Fair Employment and Housing Act[2] ("FEHA")?

2. If there is an interplay of §1033 and §12965(b)[3], should §1033 trump §12965 for the prevailing plaintiff with significant grievances and damages estimated at $25,000 or more solely because the judgment obtained in the court with jurisdiction over "unlimited" civil cases[4] could have been rendered in a court with jurisdiction over "limited" civil cases[5]?

II. INTRODUCTION

> ***"Freedom* [from discrimination] *is never voluntarily given by the oppressor; it must be demanded by the oppressed"*[6]**

Californians' right to seek, obtain and hold employment without the destructive and oppressive forces caused by unlawful discrimination, harassment

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[1] Section 1033(a) provides: "[c]osts or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a limited civil case in accordance with § 1034 where prevailing party recovers a judgment that could have been rendered in a limited civil case." (Code Civ. Proc. § 1033(a)).
[2] Government Code 12940 *et seq.*
[3] Section 12965(b) authorizes an award of attorney fees to the prevailing party in a FEHA action. (Gov. Code, § 12965, subd. (b).).
[4] Code of Civ. Proc. § 88.
[5] Code of Civ. Proc. § 85, subd. (a).
[6] The Words of Martin Luther King, Jr., Selected by Coretta Scott King, Newmarket Press, New York (1987) at p.51.

and retaliation is one of this State's most treasured freedoms.[7] The Court of Appeal's decision in this matter correctly recognized that FEHA authorizes a court in its discretion to award attorney's fees to a prevailing plaintiff in a FEHA action to encourage litigation of meritorious discrimination claims serving vital public interests. In such FEHA cases, the court's discretion to deny fees is limited to circumstances in which "special circumstances" would render an award unjust. (Stephens v. Coldwell Banker (1988)199 Cal. App. 3d 1394, 1405)

The trial court ignored this well-established standard, and instead ruled that the Code of Civil Procedure § 1033 provided it with the authority to override FEHA. The trial court exercised its broader discretion to deny attorney's fees based solely on the fact that the plaintiff obtained an award from the jury consistent with an award in a limited civil case. As discussed below, nothing in §1033 grants a court broader discretion to deny fees than what the standard that applies in FEHA cases. Thus, when the City argues that the Court of Appeal judicially "expanded" the scope of FEHA to deny the applicability of §1033, the opposite is true: the Court of Appeal simply refused to broaden §1033 to eliminate the well-established standard limiting a trial court's discretion to deny fees in a FEHA case.

In its wisdom, the Court of Appeal found that ignoring § 12965(b), after a Plaintiff successfully established a violation of Government Code § 12940, is

[7] See Stevenson v. Superior Court (1997) 16 Cal.4th 880, 891.

contrary to legislative intent. Further ignoring § 12965(b) subverts the underlying purposes of the FEHA to the statutory provisions of §1033, solely. If this becomes the reality, it will be more likely that Plaintiffs of limited means will find it difficult, if not impossible, to bring meritorious discrimination claims that serve key public interests, merely because in hindsight, the judgment could have been rendered in a court of lesser jurisdiction.

Therefore, excluding the application of §1033 to FEHA actions effectuates the rights Californians possess to seek, obtain and hold employment free of discrimination.

Also, Defendants argue that the Court of Appeal's decision expands §12965(b) by awarding attorney's fees against a party based on its failure to settle a case. The Defendants attempt to rewrite the Court of Appeal's decision with this argument. The Court of Appeal discussed the settlement posture of the parties in the present case only in connection with the parties debate on the reasonableness of the amount of attorney's fees requested by the Plaintiff, and to distinguish Plaintiff's case, factually, from the only published case on this issue, Steele v Jenson Instrument Co., (1997) 59 Cal.App.4th 326 (hereafter, "Steele"), which was relied on the trial court to deny Plaintiff's motion for attorney's fees.

A correct reading of the Court of Appeals decision shows no judicial expansion of §12965(b) based on the settlement posture of the parties.

In further support for their position that § 1033 overrides § 12965(b), the Defendants assert for five years, Chavez *unsuccessfully* (emphasis added) litigated his claims in the Los Angeles Superior Court, the Central District of the United States Court and the Ninth Circuit against the City and various individual defendants.

Again, the Defendants' position lacks merit. The undisputed procedural history in this case acknowledged that Chavez was successful. First, Chavez was successful in the Ninth Circuit. Chavez obtained a reversal, in part, from the Ninth Circuit after the District Court granted Defendants' motion for summary judgment.

Second, Chavez was successful at trial. Chavez prevailed in a 12-0 verdict on his FEHA claim of retaliation against the City and one individual defendant, and was awarded both special and compensatory damages totaling $11,500. Thus Defendants' contention that Chavez unsuccessfully litigated his claims is erroneous.

After the trial court entered judgment in favor of Chavez in October 2005, Chavez's attorneys, similar to any other attorney, who relies on the statutory assurances provided in §12965(b) filed Chavez's motion for attorney's fees.

In the months following Chavez's initial motion for attorney's fees and up to the trial court's hearing on the motion, the primary issue discussed by the trial court and the parties was the reasonableness of Chavez's attorney's fees request.

The parties obtained expert testimony on this issue and even the Defendants' expert opined that Chavez was due attorney fees up to $158,783.44.

However, the trial court ignored the arguments of the reasonableness of the attorney's fees. Instead the trial court exercised its broader discretion in § 1033 to deny Chavez's motion for attorney's fees than what the trial court is provided in Government Code §12940. The trial court's rationale for exercising its broad discretion provided by §1033 and ignoring Government Code §12940 was based on Chavez's modest damage award and <u>Steele</u>. Defendants contend that the Court of Appeals misconstrued the trial court's analysis and improperly confined the trial court's decision as resting upon the low verdict Plaintiff received.[8] But, on page 12 of the Defendants' opening brief, Defendants admit "in explaining its decision, the trial court cited to Plaintiff's low verdict...."

Additionally Defendants' contention that Plaintiff exaggerated his damages is without merit. The trial court supports the conclusion that Plaintiff did not exaggerate his damages when it stated "the court is not concerned about the fact there was no specific amount requested for general damages. That is not unusual. The question was more concerned with the issue of special damages and what relationship they played with the general damages."[9] These facts do not suggest exaggeration, in fact, they are inapposite to any suggestion of exaggeration of damages.

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[8] See page 3 of Defendants' Opening Brief
[9] Reporters' Transcript page 27, line 15-20

At the hearing on Chavez's motion for attorney's fees, the trial court raised for the first time its discretion under §1033 and denied Chavez's motion for attorney's fees. At no time before, during or after trial, did the Defendants suggest Chavez's action should have been filed as a limited jurisdiction matter. In fact, the Defendants affirmatively treated Chavez's action as an unlimited matter, as they stipulated to submission of his state court action to a federal court with jurisdiction of damages of $75,000 or more.

During the hearing Chavez's attorney requested on more than one occasion for the trial court to define the "special circumstances" that would render an award of attorney fees unjust.[10] But the trial court focused its attention on §1033 and the authority provided by § 1033. As the Court of Appeal emphasized, the trial court never considered Chavez's prevailing party's right to recover attorney fees under the FEHA and never found "special circumstances" that would render an award unjust or a finding that Chavez exaggerated his fees.

Once the trial court invoked §1033, the authorization of attorney fees pursuant to §12965(b) and the substantial and vital public policy supporting §12965(b) – to make it easier for a plaintiff of limited means to bring a meritorious suit to vindicate a policy of antidiscrimination, which the Legislature considers of the greatest importance[11] – was totally obliterated.

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[10] Reporter's Transcript pages 32, lines 15-27, 33, line 12-28,
[11] Cummings v. Benco Building Services (1992) 11 Cal.App.4th 1383, 1387; Christianburg Garment Co. v. EEOC (1978) 434 U.S. 412, 420.

Simply put, § 1033 eliminated the well-established standard limiting a trial court's discretion to deny fees in a FEHA case.

Consequently, the Court of Appeal correctly opined that §1033 does not apply to FEHA actions because FEHA claims by their nature are not insignificant grievances and while these actions do not always result in large awards, this factor alone does not covert a bona fide civil rights claim into "limited" civil case.[12] The Court of Appeal correctly highlighted that discrimination cases usually must be proven with circumstantial evidence requiring expensive and time consuming discovery. The litigation of these claims typically involves summary judgment or other extensive pretrial motions.[13]

The modest damages award to Chavez did not transform his case into a "limited" civil action. Chavez's claims never could have been litigated, competently, as a "limited" civil action. Chavez's brought good faith claims of civil rights violations against the City and four individual defendants. The litigation was protracted and discovery was extensive. Chavez deposed a total of eight LAPD employees. Further there was extensive production of documents, interrogatories, special interrogatories and admissions included in the sixteen storage boxes comprising Chavez's case file, which were related to the complaint that was ultimately litigated at trial in September 2005.

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[12] The Court of Appeal's Opinion at page 7 (hereafter referenced as "Opinion" followed by the page number as the pages appear in the Appendix to the Petition for Review).
[13] Opinion at p. 7.

The public policy underlining §1033 to encourage a plaintiff to pursue litigation in the appropriate forum and to deter the plaintiff from exaggerating the value of a case[14] is inapplicable to the procedural and factual history of Chavez's case, and FEHA cases, in general. Chavez neither exaggerated his damages, as Defendants' now preposterously contend, nor did he need to exaggerate his damages to litigate his claims in a court having jurisdiction over "unlimited" matters.

There is only one logical conclusion, which can be made concerning the procedural history of Chavez's action discussed herein - Chavez fought a long, hard and protracted battle to vindicate his right to be free of unlawful, destructive, and oppressive practices in his workplace - a battle that could not have been won in a court having jurisdiction over "limited" matters. Permitting the trial court to invoke § 1033 to FEHA cases, and to Chavez's case, specifically, is fundamentally unjust and serves to destroy a vital and fundamental tenet of American jurisprudence, i.e., our legal system must be open to all who have bona fide claims, wealthy and poor, regardless of income.

Furthermore, the Court of Appeals was correct when it concluded that the trial court's discretion should not have been broader than the discretion, which is provided in §12965(b) for determination of attorney fees for a claim under FEHA for retaliation.

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[14] 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, §30, p. 576.

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiff Robert Chavez's litigation began after he alleged that his commanding officers, who were employed by Defendant City of Los Angeles, violated his civil rights guaranteed to him by California law. Plaintiff Robert Chavez exhausted his administrative remedies and thereafter, along with his wife, on May 12, 2000 filed a civil complaint for damages in Superior Court against the City of Los Angeles and his commanding officers asserting discrimination and retaliation, in violation of Government Code 12940 and in violation of Title VII; a 42 USC Section 1983 claim; intentional infliction of emotional distress, trespass, and loss of consortium claims. (AA: Vol. II at 381, 487-495). [15]

After Chavez filed his lawsuit in Superior Court, Defendants' actions caused Chavez and his family further harm. Consequently, on August 1, 2000, Chavez and his wife filed an action in federal court asserting violation of 42 USC Section 1983. (AA: Vol. II at 363, 498-508).

Before Defendants received notice of the Federal lawsuit, Defendants filed two demurrers, which were each sustained by the court with leave to amend. In response Chavez filed a First Amended Complaint on October 11, 2000, and a Second Amended Complaint on December 29, 2000. (AA: Vol. II at 356-358).

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[15] References to the Appellant's Appendix In Lieu Of Clerk's Transcript are designated as "AA" followed by the volume number and the page number.

The Chavez's Second Amended Complaint asserted FEHA claims for employment harassment and retaliation, violation of Title VII 42 USC §1983, and nuisance pursuant to Civil Code § 3479. (AA: Vol. II at 453). Defendants answered the Chavez's Second Amended Complaint on February 5, 2001. (AA: Vol. II at 356).

After discussion of the two lawsuits, the parties stipulated to submission of the state court action to the jurisdiction of the federal court. The Federal court ordered supplemental jurisdiction over Chavez's state claims. (AA: Vol. II at 363-364). Shortly thereafter, Defendants brought a motion to dismiss for failure to state a claim, which the court granted in part and denied in part. (AA: Vol. II at 363-364).

On April 6, 2001, Chavez and his wife filed a First Amended Complaint asserting the same claims included in both federal and state complaints, which included allegations to support liability against Defendants, including jurisdiction. Defendants answered the First Amended Complaint on April 19, 2001. (AA: Vol. II at 365,510).

Chavez continued to suffer harm in violation of his guaranteed rights provided by Government Code § 12940. Consequently, on September 17, 2001 the Chavez's filed a Second Amended Complaint, which was answered by Defendants on September 28, 2001. (AA: Vol. II at 366).

After Chavez took several depositions and exchanged extensive written discovery, Defendants filed a motion of summary judgment, which was granted as to all causes of action on September 16, 2002. (AA: Vol. II at 370). The Chavez's appealed the District Court's decision to grant summary judgment, resulting in the Ninth Circuit affirming in part and reversing in part the trial court's decision, and remanding the FEHA claims for retaliation and discrimination on October 22, 2004. (AA: Vol. II at 370-371). Upon remand, the court declined to accept supplemental jurisdiction over Chavez's FEHA claims. Accordingly the action was dismissed without prejudice to re-filing in state court. (AA: Vol. II at 372).

On November 15, 2004, Plaintiff Robert Chavez re-filed his previous (May 12, 2000) complaint in Superior Court against the City of Los Angeles ("City"), Los Angeles Police Department ("LAPD"), and individual defendants, Lt. Krejci, Lt. Von Lutzow, and Captain Harlan Ward (commanding officers), asserting the FEHA causes of action for discrimination and retaliation in violation of Govt. Code 12940 et seq., which survived summary judgment after the Ninth Circuit review. (AA: Vol. I at 1-21, Vol. II at 549-573). Chavez made several attempts to resolve this matter prior to trial. Additionally, neither party made a statutory offer to compromise (CCP § 998). (RT at 27:24-28, 28:1-20.)[16]

On October 14, 2005, in a 12-0 jury verdict, Chavez proved that Defendants, City of Los Angeles and Captain Harlan Ward, violated his right guaranteed him under Government Code §12940. (AA: Vol. I at 40). The jury

[16] References to the Reporter's Transcript On Appeal are designated as "RT" followed by the page number and line number.

awarded Chavez special damages in the amount of $1500 and general damages in the amount of $10,000. (AA: Vol. I at 39, 107). The Judgment on the Verdict also provided Chavez with provable and allowable costs and disbursements. (AA: Vol. I at 107). More importantly, the Defendants did not object to any of the provable and allowable costs, which totaled $13,144.26. (AA: Vol. I at 44-49).

Unfortunately, Chavez was unable to prove to 10 of the 12 jurors that the City and Lt. Krejci discriminated against Chavez. (AA: Vol. I at 40). There was a motion for nonsuit granted for defendant Lt. Von Lutzow. (AA: Vol. III at 865).

On October 25, 2005, Chavez filed a Notice of Motion for attorney fees pursuant to Government Code §12965(b). (AA: Vol. I at 51). Chavez sought attorney's fees in the amount of $436,602.75 for the five-year old lawsuit. (AA: Vol. I at 59, 99). Defendants challenged Chavez's motion and on November 7, 2005 through an Ex Parte Application Defendants requested a forty-five day continuance on Chavez's motion for attorney fees, the Court granted Defendants' request with an agreement that there would be interest included in the attorney fees' costs for this delay, at the rate of 10%. (RT at 18:22-24, AA: Vol. I at 121-122).

Plaintiff filed an Amended Notice of Motion for Attorney Fees on December 8, 2005, in which Plaintiff requested a multiplier to his attorney fees bringing the total fees to $881,244.50. (AA: Vol. I at 127-151).

On December 13, 2005 the trial court granted Defendants' Ex Parte Application for an Order Extending the Time for Defendants to File and Serve their Expert Witness Declaration. (AA: Vol. I at 153). Due to computer errors incurred when transferring the costs to an Excel document, the parties stipulated to allow Chavez until December 30, 2005 to amend his motion for attorney's fees and Defendants were given until January 16, 2006 to file expert declarations. (AA: Vol. I at 1530). Chavez filed Second Amended Notice of Motion for Attorney's Fees on December 30, 2005. (AA: Vol. I at 154-185).[17]

On April 3, 2006, the trial court held a hearing on Plaintiff's Second Amended Notice of Motion for Attorney's Fees in which Defendants' opposition to the motion addressed the reasonableness of fees claimed by Plaintiff and not the issue of CCP § 1033 (a). (AA: Vol. III at 733-749). In the court's tentative ruling, the trial court requested the parties to prepare an argument to explain why the trial court should not exercise its discretion under §1033. Argument was held and the matter was taken under submission. (AA: Vol. III at 864).

On May 22, 2006, the trial court denied Chavez's Second Amended Notice of Motion for Attorney's Fees in its entirety, reasoning that the court had discretion under CCP §1033(a) to deny the fees as cost under CCP § 1033.5 (a)

[17] Plaintiff's moving papers showed that a multiplier was added in the Amended Notice of Attorney Fees because of the five year litigation and the fact the case was on a contingency. Green v. Dillingham Construction,(2002) 101 Cal.App.4th 418.

(10). (AA: Vol. III at 865-868). In making its ruling, the trial court specified its reliance on Steele v. Jensen Instrument Co. (1997) 59 Cal.App.4th 326. AA, Vol. III, p. 867.

Chavez filed a timely appeal of the trial court's decision to deny him attorney fees provided by Government Code 12965(b). (AA: Vol. IV at 881-886). On February 22, 2008, the Court of Appeal reversed the trial court's decision, finding the trial court abused its discretion by applying CCP § 1033 (a) to Chavez's motion for attorney fees brought pursuant to Government Code §12965(b) solely because of Chavez's modest recovery and "sparse" evidence of special damages at trial. The trial court's order denying Chavez motion for attorney fees was reversed and remanded for re-determination of the amount of attorney fees to be awarded to Chavez, including fees and costs incurred to prosecute the appeal. (Opinion at 7, 9-10).[18]

On April 2, 2008, Defendants filed a Petition for Review, which was granted on May 14, 2008.

B. Statement of Facts

1. Chavez Suffered Retaliation At The Hands Of LAPD

Chavez career as a police officer with the LAPD began in 1989. (AA: Vol. I at 1, 4:7-8). Chavez was long recognized for his commendable service with the

[18] References to the Court of Appeal's Opinion (designated as "Opinion") followed by the page number as they appear in the Appendix to Petition for Review.

LAPD. (AA: Vol. I at 4-7). Chavez asserted that his work environment was turned upside down when LAPD wrongfully accused him of stealing payroll checks in 1996. (AA: Vol. I at 9:15-17). Chavez further alleged that even after LAPD found that he was not involved in the payroll check theft, he was still subjected to surveillance by LAPD. (AA: Vol. I at 9:17-19, 12:20).

Chavez's complaint, which was introduced at trial, revealed that in March 2000 after Chavez returned to LAPD from a leave of absence due to stress, he was subjected to hostile treatment based on a perceived disability. While Chavez was performing his duties at LAPD, co-workers called him, "Serpico" and "5150," and saying he was "going to get a bullet in the back of his head." (AA: Vol. I at 12:1-2, 15:4-10). Further, Chavez asserted that he was wrongfully prevented from returning to patrol duties by LAPD management notwithstanding LAPD's determination that he was fit for duty. (AA: Vol. I at 14:21-23). Chavez felt that his rights guaranteed to him under the Government Code 12940 were being oppressed and violated.

Consequently, on March 24, 2000, Chavez filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging discrimination and retaliation in violation of the FEHA against the City of Los Angeles. (AA: Vol. II at 487). Shortly after filing his DFEH claims, LAPD Captain Harlan Ward, Chavez's commanding officer, denied Chavez the right to perform Patrol Officer III duties and rescinded Chavez's transfer from the 77th Division to punish Chavez for his prior complaints of harassment and discrimination against the LAPD. (AA: Vol. I at 102-106).

Twelve jurors agreed with Chavez that he had been retaliated against by the City and Captain Ward in violation of Government Code §12940, *et seq.* (AA: Vol. I at 40). However, Chavez did not prevail on his FEHA discrimination claim against the City, but the jury was split in a 10-2 verdict. (AA: Vol. I at p. 40).

2. <u>Chavez's Lawsuit Was Properly Filed In A Court With Jurisdiction Over "Unlimited" Civil Cases</u>

Chavez sets forth in his complaint that as a result of defendants' conduct he suffered economic damages, severe humiliation and emotional distress. (AA: Vol. I at 21:18-21). At trial, Chavez testified that his inability to work overtime and special details impacted his family financially, and the jury received evidence of Chavez's overtime hourly pay rate including documentary evidence regarding lost overtime earnings. (AA: Vol. III at 865, 867). Further, the jury received evidence regarding Chavez's worry about his family finances due to Defendants' actions, his fear and embarrassment caused by defendants' actions, and how Chavez was demeaned by the actions of the defendants. (AA: Vol. III at 866-67).

Chavez's November 15, 2004 Complaint named the City, three individuals, and DOES 1 through 5 as defendants. (AA: Vol. I at 1-21, Vol. II at 549-573). Accordingly, Chavez deposed the three individual defendants and five other employees of the LAPD. (AA: Vol. I at 46, 49). The City's expert in its determination of the reasonableness of Chavez's attorneys' fees reviewed the contents of sixteen (16) storage boxes, which formed the basis for Chavez's 2004 Complaint and trial presentation in September 2005.. (AA: Vol. I at 193). During the litigation process, Chavez and the City requested and received extensive production of documents, interrogatories, special interrogatories and admissions. (AA: Vol. I at 140-142, 144, 146).

3. The Trial Court Ignored the Well-Established Standard – Finding a "Special Circumstance" that Would Render an Award Unjust – Instead Ruled that CCP § 1033 Overrides FEHA

At no time during or after the close of trial, neither the trial court, nor the Defendants made a motion for a Walker[19] hearing to attempt to reclassify Chavez's case as a limited jurisdiction case. (RT at 29-31, AA: Vol. III at 865-868, Vol. IV at 875-878). Further, after Plaintiff filed his motion for costs the Defendants never filed a motion to tax costs. (AA: Vol. I at 44-49).

On November 7, 2005 the Defendants filed an Ex-Parte Application requesting an order granting a 45-day continuance on the hearing of Plaintiff's motion for attorney fees, the trial court statements regarding Plaintiff's attorney fees focused on the reasonableness of the fee request not whether, or not, Plaintiff would be awarded attorney fees. (RT at 6:22-28, 7:1, 10:27-28, 11:1-10, 12:3-19, 16:2-11). The trial court ordered production of documents from Plaintiff to Defendants' Expert or Experts on the issue of the reasonableness of Plaintiff's attorney fees request. (RT at 16:6-11, 17:18-28).

[19] Walker v. Superior Court (1991) 53 Cal. 3d 257, 262.

On April 3, 2006, the Defendants opposed Plaintiff's motion for attorney fees based on the issue of reasonableness of fees claimed by Plaintiff. Defendants did not raise the application of CCP §1033. (AA: Vol. III at 733-749). Plaintiff's expert supported his request for attorney fees and the Defendants' fee expert opined that Plaintiff should not recover attorney fees in excess of $158,783.44. Defendants' opposition papers asserted that Chavez should not recovery attorney fees in excess of $44, 450.37, if any. (AA: Vol. I at 219-221, Vol. III at 749).

On April 3, 2006 in its tentative ruling the trial court ignored the well-established standard enunciated in Stevenson and Stephens.[20] The trial court denied fees without finding a "special circumstances", which would render an award unjust. The trial court made this decision even though Chavez unanimously proved that his employment was riddled with oppressive and destructive forces of retaliation in violation of Government Code 12940 et seq. (AA: Vol. III at 864). Equally important, during the April 3, 2006 hearing held on Chavez's motion for attorney fees, Chavez's counsel highlighted for the trial court that Chavez asked for both emotional distress damages, as well as loss of wages for both overtime and for bonuses at trial. (RT at 21:24-27). Chavez's counsel stated, "[W]e asked for emotional distress, your honor, for –from March until October of the –every day that the officer had to go to work and suffer retaliation at the hands of his superiors, we asked for compensation." (RT at 25:16-20). The trial court stated,

[20] See Stevenson v. Superior Court (supra) 16 Cal. 4th 880, 891; Stephens v. Coldwell Banker (supra) 199 Cal. Ap. 3d 1394, 1405.

"[t]he court is not concerned about the fact there was no specific amount requested for general damages...That's not—that is not unusual." (RT at 27:15-17). The trial court expressed concern regarding the relationship between special damages and general damages. (RT at 27:18-20).

After oral argument, the trial court decided to deny attorney fees in its entirety, without making a finding of "special circumstances" that would render an award of attorney fees unjust. Rather, the trial court ruled that Code of Civil Procedure § 1033 overrides FEHA, which granted the trial court broader discretion to deny attorney fees, based solely on the fact that plaintiff obtained an award less than the jurisdiction of an "unlimited" civil case. (AA: Vol. III at 865-868).

IV. LEGAL ARGUMENT

A. Excluding The Application of §1033 To § 12965(b) Results In The Effectuation Of §12965 (b), Not Judicial Expansion

Statues and contracts authorizing attorney's fees are trumped by the provisions of §1033 when the trial court exercises discretion under §1033 and determines the judgment is less than the jurisdictional limits of a court of lesser jurisdiction. (Dorman v. DWLC Corp. (1995) 35 Cal.App.4th 1808, 1815)

Accordingly, the application of §1033 to a prevailing plaintiff's motion for attorney's fees brought pursuant to §12965(b) results in the obliteration of §12965(b) for the prevailing plaintiff who had a meritorious civil rights claim but happened to receive a damages award less than he or she reasonably anticipated or could have been awarded for the claim. (See e.g., Steele, *supra,* 59 Cal.App.4th 326; Galanter v. Oak Park Unified School District, 2003 Cal.App. (2003) Unpub. LEXIS 8750; Ditsch v. Peppertree Café, (2006) Cal.App. Unpub. LEXIS 6587)

The trial court in the instant case ignored §12965(b) in addressing Plaintiff's motion for attorney's fees. Once the trial court exercised its discretion under §1033, the court made no inquiry as to whether or not, there were special circumstances that would make an attorney's fee award unjust. (See Stephens v. Coldwell Banker Commercial Group, Inc., (1988) 199 Cal.App.3d 1394, 1405).

Similarly, contrary to Defendants' contention that the court of appeal in Steele "considered the complex relationship between §1033 and §12965(b)", the court of appeal in Steele just assumed §1033 trumped a prevailing party's right to recover fees under FEHA without ever questioning its applicability to a civil rights action.[21]

The Court of Appeal's holding that §1033 does not apply to FEHA actions is correct for several important reasons. First and foremost excluding the application of § 1033 serves to effectuate §12965, not judicially expand it because excluding §1033 from §12965 provides for the full force and effect of the legislative intent for §12965(b) – authorizing attorney's fees for FEHA actions to prevent and eliminate discrimination in employment and housing, and to provide aggrieved parties [including those with limited means], remedies and redress for

[21] See Opinion at p. 7.

the adverse effects of discriminatory practices. (See 1992-911 Cal. Adv. Legis. Serv. 1 (Deering))

Equally important, the Court of Appeal's decision upholds the public policy underlying the FEHA – to have a culpable defendant in a FEHA action share the costs (i.e. attorney's fees) incurred by plaintiff to advance the public interests in litigating meritorious civil rights claims and to discourage discrimination in employment and housing. (Ibid.)

Defendant's contention that the Court of Appeal judicially expanded the scope of FEHA when the Court of Appeal refused to apply § 1033 to the Chavez case is without merit. In essence, the Court of Appeal simply refused to broaden §1033 to eliminate the well-established standard limiting a trial court's discretion to deny fees in FEHA case.

1. FEHA Claims are Significant Grievances Requiring Chavez to Litigate in an "Unlimited" Civil Case

Defendants' contention that the Court of Appeal's holding expands the scope of §12965(b) by precluding courts from denying attorney's fees where a plaintiff has exaggerated the value of his claims is nothing more than a red herring. The fact is, in a FEHA action, a plaintiff does not exaggerate the value of the claim to litigate a discrimination claim, or other civil rights' claims, in a court of unlimited jurisdiction. The Plaintiff merely files an unlimited civil case because, generally speaking, the Defendants' egregious acts of discrimination and retaliation causes significant emotional harm to a person, as it did to Chavez, in excess of the parameters provided in a court of limited jurisdiction. Further as a practical matter, the discovery rights included in filing a claim in unlimited jurisdiction versus limited jurisdiction provide the plaintiff a fighting chance to prove the claim.

Section 1033 (a) is designed to encourage a plaintiff to pursue minor grievances in a court with jurisdiction over "limited" civil cases, "where simple disputes may be expeditiously and less expensively resolved". (Opinion at p. 7)

The Court of Appeal correctly opined that FEHA claims are not insignificant grievances and almost always require circumstantial evidence to prove discrimination or other FEHA claims, and such litigation is invariable expensive, time consuming, involving extensive discovery and pretrial motions. (Ibid.)

Plaintiff's attorneys do not have a crystal ball to predict the amount of damages a jury will award clients in FEHA actions and one court of appeal has squarely held that a court should not rely on hindsight to determine whether attorneys' fees should be awarded. (Greene v. Dillingham Construction, (2002) 101 Cal.App.4th 418, 426) Hindsight is the view the trial court takes when, as in the present matter, it applies §1033 to FEHA cases due solely to a damages award that could have been rendered in a limited civil case. However, as shown below, a modest damage award does not convert a bona fide FEHA action into a limited civil case.

The Court of Appeal correctly found that Chavez's attorney could not have competently filed this civil rights action as a limited jurisdiction case. The Court of Appeals, citing Greene noted that attorneys generally have an obligation to pursue all available legal avenues for their client and it is impossible to know in advance which legal theory will ultimately prevail. (Greene v. Dillingham, *supra*, 101 Cal.App.4th 418, 424)

Moreover, the Court of Appeal observed that even in its "final, more streamlined form" Chavez's allegations of violation of Government Code §12940 consisted of two complex causes of action for disability discrimination and retaliation, which involved four defendants including the City of Los Angeles. The Court of Appeal also highlighted the extensive discovery conducted by Chavez and the case history of five years of litigation in state, federal and appellate courts to support that Chavez's FEHA claims were significant grievances requiring Chavez to litigate his claims in a court of "unlimited" jurisdiction. (Ibid.)

For these reasons, Chavez's discrimination claims could not be properly prosecuted as a "limited" civil case against the City and four commanding officers from the City because these were significant grievances against Chavez. Similarly, Chavez's modest damages award cannot miraculously transform his FEHA action into a "limited" civil case.

It is clear from the procedural history and the facts of this case that Chavez's action was not viewed by Chavez, the Defendants or the trial courts at the time of initial filing; the filing of amended complaints; discovery; pretrial motions; and trial, as a "limited" civil case. Interestingly, the trial judge did not mention his discretion provided by §1033 to deny attorney fees, until after Chavez amended his motion for attorney's fees and included a multiplier, which is permissible under the law for cases similar to Chavez. (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132.)

In good faith Chavez filed the first complaint against Defendants in 2000 as an unlimited jurisdiction matter. After several years of legal maneuvering by Respondents and after Chavez successfully appealed, in part, the federal trial court's grant of summary judgment on all of his claims, the federal case was dismissed and Chavez filed a complaint in state court on his remaining claims.

At the time of re-filing his state complaint, which controlled the present case, Chavez's good faith estimate of economic and emotional distress damages well exceeded the jurisdictional limits of the Superior Court. The November 2004 complaint alleged two FEHA causes of action, one for discrimination and the second for retaliation. Many of the facts that gave rise to Chavez's claim of discrimination also gave rise to his claim of retaliation. The factual basis for his claims was tightly interwoven and special, as well as general damages, emanated from both cause of action. Chavez alleged severe emotional distress damages in his November 2004 claim.

Moreover, if the jury were to have awarded Chavez more than $25,000 in a limited jurisdiction case, the verdict would have been reduced to $25,000. (Wozniak v. Lucutz, (2002) 102 Cal.App.4th 1031, 1039 (affirming the trial court's reduction of the jury verdict of $58,000 to the $25,000 limited jurisdiction maximum.)) Clearly, Chavez's counsel would have violated her professional responsibility to Chavez if his case had been filed as a limited jurisdiction matter.

Further, Chavez's ability to successfully litigate his meritorious claim would have been severely impaired by the discovery rights under the limited jurisdiction rules. (See CCP § 94) Chavez could have been limited to a single deposition and written discovery consisting of no more than 35 combined total of interrogatories, document production requests and admission requests. In fact, Chavez deposed in total twelve witnesses to prove his claim of retaliation and requested and responded to hundreds of combined interrogatories, requests for documents and admissions.

Given that Chavez named four defendants at the time of filing the November 2004 complaint and Chavez alleged severe emotional distress damages, no reasonable, competent attorney would have filed Chavez's case in a limited jurisdiction court.

The Court of Appeal properly determined the trial court failed to consider whether an attorney could have competently filed this civil rights action as a limited civil case. (Opinion at p. 9)

The trial court's decision to deny Chavez's motion for attorney's fees after vigorous and protracted litigation due solely to the modest damages award was fundamentally unjust.

2. Excluding Application of §1033 to §12965(b) Does Not Encourage a Plaintiff to Exaggerate Damages Nor Did Chavez Exaggerate His Damages

Defendants assert that excluding §1033 to §12965(b) results in judicial expansion of §12965(b) by precluding courts from denying attorney's fees where plaintiff has exaggerated the value of his claims. Chavez did not exaggerate the value of his claims at the time he filed his action or at any time during the litigation of his action. Further, there is no basis to conclude a plaintiff in a FEHA action will exaggerate damages to litigate a FEHA claim in an unlimited civil case if §1033 is not applicable to §12965(b).

A plaintiff in a FEHA action brings his or her claim in a court having jurisdiction over "unlimited" cases because this is the forum required to competently litigate a FEHA claim. (See, Opinion at p. 7) An allegation of an exaggerated damages claim to gain entrance into an unlimited civil case has no bearing on FEHA actions. (Ibid.)

Defendants contend, erroneously, that the trial court's ruling denying Chavez's motion for attorney's fees is correct because Chavez exaggerated his damages. Interestingly enough, Defendants did not make this argument before, at, or after trial. The Defendants now before this Court argue that the trial court's comment regarding Chavez introducing "sparse" damages evidence at trial is indicative of Chavez making an exaggerated claim for damages. The Defendants' contention is simply not true.

In oral argument on Chavez's motion for attorney's fees, the trial court acknowledged it was not concerned that Chavez did not make a request for a specific amount of general damages at trial. The trial court did not see this as unusual. The trial court expressed concern with the issue of Chavez's special damages in relationship to the general damages.

"General compensatory damages for emotional distress, by contrast, are not pecuniarily measurable, defy a fixed rule of quantification, and are awarded without proof of pecuniary loss." (Walnut Creek Manor v. FEHC, (1991) 54 Cal.3d 245, 263)

At trial, Chavez testified that his inability to work overtime and special detail impacted his family financially. The jury had evidence of Chavez's overtime hourly pay rate and documentary evidence regarding lost overtime earnings. The jury received evidence regarding Chavez's worry concerning his family finances due to defendants' actions. Chavez testified about his fear and embarrassment caused by defendants' actions. The jury had evidence that Chavez was demeaned by the Defendants.

After the close of evidence neither the trial court nor Defendants moved for a Walker hearing (see, Walker v. Superior Court (1991) 53 Cal. 3d 257, 262) to reclassify this matter as a limited jurisdiction case because no one could foresee what the jury would award Chavez. In fact, upon discussing the damage award with the two jurors who voted against the $11,500 award, Chavez's counsel learned that these two jurors wanted to give Chavez $100,000 for his emotional distress.

Moreover, because a plaintiff in a civil rights action, as here, necessarily is required to bring his action in an "unlimited" civil case to competently litigate the claim, the issues of exaggerated damages is moot for the FEHA action. Section 1033 serves no purpose other than to erode the public policy underlying §1296(b).

3 Excluding Application of §1033 to §12965(b) Avoids Erosion of the FEHA

Set forth at Govt. Code section 12920 is the broad goal of the FEHA, which states in part: "It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, creed, color, national origin, ancestry, physical handicap, medical condition, marital status sex or age." (Stevenson v. Superior Court of Los Angeles County, (1997) 16 Cal.4th 880, 891; citing and quoting Rojo v. Kliger, (1990) 52 Cal.3d 65, 72-73, fn. Omitted)

Section 12965(b) authorizes the prevailing party in a FEHA action to recover an award of attorney fees and costs. (Cummings v. Benco Building Services, (1992) 11 Cal.App.4th 1383, 1386)

The purpose, intent and language of FEHA and federal discrimination acts are virtually the same and therefore in interpreting FEHA, California courts have adopted the same methods and principles employed by federal courts in employment discrimination claims arising under federal law. (Ibid.)

With respect to federal law from which the FEHA fee provision is drawn, the United States Supreme Court has been clear that it the public policy is to encourage attorneys to pursue meritorious civil rights cases. (Pennsylvania v. Delaware Valley Citizens Council, (1986) 478 U.S. 546, 565 (fee-shifting statutes are "statutory assurance" that lawyer will be paid reasonable fee regardless of damages recovered); Hensley v. Eckerhart, (1983) 461 U.S. 424, 431, 435 ("plaintiff's counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter"); (Riverside v. Rivera, (1986) 477 U.S. 561, 578 ("to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.")).

Similarly, California courts have long recognized that §12965(b) authorization of attorney fees are intended to provide "fair compensation to the attorneys involved in litigation at hand and encourage litigation of claims that in the public interest merit litigation." (Weeks v. Baker & Mckenzie, (1998) 63 Cal.App.4th 1128, 1172)

Without this mechanism to authorize the award of attorney fees, it would be frequently infeasible for private actions to enforce the important public polices of the FEHA. (Horsford v. Bd. of Trustees of California State University, (2005) 132 Cal.App.4th 359, 394 citing and quoting Flannery v.Prentice, (2001) 26 Cal.4th 572, 583, quoting from Baggett v. Gates, (1982) 32 Cal.3d 128, 142.).

It is undisputed that Chavez is the prevailing party and he litigated a meritorious claim against the Defendants. The record shows that this case was litigated over five years and the Respondents made numerous legal maneuvers, i.e. demurrers and motions, to defeat Chavez legitimate claim. If §1033 can trump §12965(b) in the present action, where even a conservative view of the hours that were required to successfully litigate Chavez's retaliation claim clearly constitutes an unlimited civil case, many attorneys including Plaintiff's counsel will be discouraged from taking civil rights claims that do not have the big price tag. The results is surely an erosion of the public policy underlying §12965(b).

Moreover, §12965(b) should not be trumped by §1033 merely due to a low damages award. "Even a modest financial recovery can serve to vindicate a substantial legal right" (Opinion at p. 7) State and federal courts have long recognized that a plaintiff who brings a discrimination suit does so in the role of a private attorney general to vindicate a policy that Congress or the Legislature deems of great importance. (Cummings V. Benco Building Services, *(supra)* 11 Cal.App. 4th at p. 1387) The purpose for the fee provisions in civil rights cases is to make it easier for a plaintiff of limited means to bring a meritorious suit to vindicate the vital public policy of antidiscrimination. (Ibid.; Christianburg Garment Co. v. EEOC (1978) 434 U.S. 412, 420)

The design of §12965 is to "ease the financial burden on a plaintiff of limited means to enable the plaintiff to find representation to sue for vindication of a significant public policy. (Opinion, p. 7) Section 12965 (b) authorizes an award of attorney fees to the prevailing party in a FEHA action and it is well established that courts award attorney fees to a prevailing plaintiff as a matter of course unless "special circumstances" render an award unjust. (Opinion, p. 5, citing Cummings v. Benco Building Services, *supra*, 11 Cal.App.4th at p. 1387)

The trial court did not make a finding as to a special circumstance in Plaintiff's case, and the Defendants' attempt to infer that Plaintiff's attorney's fees were inflated is false. The sole reason for the trial court's denial of attorney's fees was the modest damages award of $11,500.

The Court of Appeal opined that the rationale for §1033 is inapposite in statutory discrimination and civil rights actions, and although FEHA actions do not always involve large sums of money, this alone cannot convert a bona fide civil rights claim into an insignificant grievance. The Court of Appeal rested its decision on the clear, unambiguous and distinct objectives of these two cost-shifting statutes and its applicability to the instant case and FEHA cases in general. Accordingly, the Court of Appeal concluded that the trial court should have analyzed Chavez's motion for attorney's fees under §12965(b). (Opinion, pp. 7, 9)

Government Code §12965(b) "does not limit the [attorney's] fees to a percentage of the plaintiff's recovery, [and] the attorney who takes such a case can anticipate receiving full compensation for every hour spent litigating". (See Weeks v. Baker & McKenzie, *(supra)*, 63 Cal. App. 4th 1128, 1175-76)

It follows that by excluding the application of §1033 to §12965(b) will avoid the erosion of the public policy of antidiscrimination in employment and housing and serve to further the public's interests to advance these freedoms.

B. The Statutory Construction of § 1033 and § 12965(b) Cannot Be Harmonized to Achieve the Public Policy Of § 12965(b)

Defendants' correctly point out that FEHA provides a court with discretion to award reasonable attorney's fees to a prevailing party. (Gov. Code §12965(b)) However, in FEHA actions, the discretion to deny an attorney's fee award to a prevailing plaintiff is narrow. (Steele v. Jensen Instrument Co., *supra*, 59 Cal.App.4th 326, 330) Further the trial court's discretion, "'is not the equivalent of 'if it wants to' or 'if it feels like it.' Instead, in the context of the grant of not always involve large sums of money, this alone cannot convert a bona fide civil rights claim into an insignificant grievance. The Court of Appeal rested its decision on the clear, unambiguous and distinct objectives of these two cost-shifting statutes and its applicability to the instant case and FEHA cases in general. Accordingly, the Court of Appeal concluded that the trial court should have analyzed Chavez's motion for attorney's fees under §12965(b). (Opinion, pp. 7, 9)

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It is well-established that a prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances render such an award unjust." (Stephens v. Coldwell Banker, *supra* 199 Cal. App. 3d 1394, 1405)

The Court of Appeal reviewed and considered the arguments presented by the parties herein, both in the briefs, and in oral argument at two separate hearings. After careful consideration the Court of Appeal rejected "the City's invitation to imply a finding of special circumstances from the trial court's ruling who relied predominately on Chavez's minimal recovery to justify its application of § 1033(a) and held that the trial court's three page order contained no analysis of special circumstances sufficient to justify a denial of attorney fees under FEHA. (Opinion at p. 10)

The trial court denied Chavez's motion for attorney's fees without considering §12965(b). (Opinion at p. 9) The Court of Appeals was correct in finding the trial court just allowed §1033 to trump §12965(b) without considering the narrow discretion it had under §12965(b). It cannot be said that the trial court harmonized or balanced §1033 with §12965(b), as the trial court did not analyze Plaintiff's fee motion under §12965(b). (Opinion at p. 9)

1. Statutory Construction Analysis Does Not Result in §1033 and §12965(b) Being In Harmony or In Balance

It is difficult to understand Defendants' assertion that the statutory construction of §1033 and §12965(b) results in harmony and balance between the two statutes. Given the competing public policies underlying the two statutes, it is impossible to reconcile §1033 with §12965(b) because as shown above, application of §1033 to §12965(b) results in the ignorance of §12965(b).

This Court has held that literal statutory construction should not prevail if it is contrary to the legislative intent, which is apparent in the statute. (Stahl v. Wells Fargo Bank, (1998) 63 Cal.App. 4th 396, 400, citing California School Employees Assn. v. Governing Board (1994) 8 Cal.4th 333, 340)

Code of Civil Procedure Section §1032 ("§1032" provides, "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." (Code of Civ. Proc. §1032 (b)) Code of Civil Procedure § 1033.5 includes attorney's fees when authorized by statute as allowable costs. (Code of Civ. Proc. §1032 (b)) The FEHA authorizes attorney's fees to a prevailing party unless special circumstances makes the award unjust.

The broad statutory theme of §1032 can be harmonized with §12965(b) with the exception of the application of §1033 to §12965(b). Either a trial court applies §1033 and trumps §12965(b) or vice a versa. It can not be said that the legislative intent under §1032 or §12965(b) was to allow for statutory attorney's fees for FEHA claims that routinely need to be litigated in an unlimited civil case, but deny attorney's fees even though the rights are substantial but the damages were not. The outcome of §1033 and §12965(b) co-existing is paradoxical.

"'Moreover, where two statutes appear to be in conflict, a more specific statute controls over a more general one'" (Stahl v. Wells Fargo Bank, (*supra)*, 63 Cal.App. 4th 396, 401, citing Woods v. Young, (1991) 53 Cal.3d, 324; Cumero v. Public Employment Relations Bd., (1989) 49 Cal.3d 575, 585.)

Clearly, the FEHA is a more specific statute with a greater vital public interest in comparison to §1032 et seq., and specifically §1033 (a). The public interest in Californians in being free of employment and housing discrimination must take precedent over the encouragement of plaintiffs to bring their bona fide civil rights claims in the right forum, although even this policy does not serve FEHA cases.

2. The Harmony of CCP § 998 and FEHA Actions Does Not Transcend to Harmony of §1033 and §12965(b)

There is no quarrel that the plain language of §12965(b) allows for a balance to be placed on the award of attorneys fees under the FEHA. However, Defendants' suggestion that §1033 can harmonize and balance with §12965(b) much like the balance between Code of Civil Procedure §998 ("§998") and §12965(b) is untenable.

CCP Section 998 is one of the various attorney's fee and cost-shifting statutes that was enacted to promote the encouragement of settlements. (Steele v. Jensen Instrument Co., (*supra)*, 59 Cal.App.4th 326, 329) Section 998 permits a defendant (or plaintiff) to make a statutory offer to compromise, and if the plaintiff does not accept the offer made by the defendant, and then fails to receive a more favorable award, the plaintiff cannot recover his or her costs, and shall pay the defendant's costs from the time of the offer. Under §998, "costs" includes attorney's fees. (Ibid.)

The public policies of §998 and §12965(b) are not incongruent as are the public policies of §1033 and §12965(b). "The basic premise of section 998 is that plaintiffs who reject reasonable settlement offers and then obtain less than the offer should be penalized for continuing litigation." (Meister v. Regents of University of California, (1998) 67 Cal.App.4th 437, 450)

In Marek v. Chesny, (1985) 473 U.S. 1; 105 S.Ct. 3012) the United States Supreme Court reviewed the policies behind civil rights statutes and Federal Rule of Civil Procedure, Rule 68, the federal equivalent of §998. The plaintiff in Marek sought attorney fees under 42 U.S.C. 1988 but had refused a settlement offer made pursuant to Rule 68. The Supreme Court concluded that the policy to bring meritorious civil rights suits by providing for an award of attorney fees and the public policy in favor of settlement, are not mutually exclusive. (Ibid. at 3018) The Supreme Court opined that Rule 68 is in no sense inconsistent with the civil rights statutes in a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff while technically is the prevailing party, has not received any benefits from the postoffer services of his attorney, thus the statutes are not inconsistent. (Ibid. at 3017)

The plaintiff who prevails in a FEHA action and had a §998 offer on the table from the defendant is well of aware of the risks in continuing the litigation. Clearly, the interplay between §998 and §12965(b) does not conflict or obliterate §12965(b) and the public policy underlying the FEHA, as does the application of §1033 to §12965(b), which has been shown above.

Moreover, when §1033 to applied to §12965(b) due to a low damages award, the prevailing plaintiff in a FEHA action is wrongly penalized for bringing his or her claim in the appropriate, not inappropriate, forum and there is no opportunity for the plaintiff's attorney to recover fees for any work performed. This is a direct conflict with public policy underlying §12965(b) to "encourage attorneys to take meritorious civil rights cases, even if they have low damages.

It cannot be said with veracity that §1033 and §12965(b) can be harmonized and balanced.

3. The Application of § 1033 to § 12965(b) Results In Inconsistent Trial Court Ruling

The Court of Appeal's decision serves to eliminate the inconsistent application of the trial courts' discretion under §1033 when a prevailing plaintiff brings a motion for attorney's fees pursuant to §12965(b) and has recovered a damages award that could have been rendered in a "limited" civil case.

Trial courts have been inconsistent in invoking §1033 to trump §12965(b) when a prevailing plaintiff receives a modest damages awards (i.e. $25,000 and under) and the continued discretionary application of §1033 to §12965 will result in prevailing plaintiffs experiencing the same inconsistencies.

Some courts, using hindsight, have invoked §1033 to the prevailing plaintiff's motion for attorney's fees and denied the fees without consideration of §12965(b). Other courts reject the "Monday night quarterbacking", which §1033 requires, and have granted prevailing party's attorney's fees pursuant to §12965(b) notwithstanding modest fee awards. (See e.g. Steele v. Jensen Instrument Co., (1997)59 Cal.App.4th 326; Galanter v. Oak Park Unified School District, 2003 Cal.App. (2003) Unpub. LEXIS 8750; Ditsch v. Peppertree Café, (2006) Cal.App. Unpub. LEXIS 6587).

Thus, Defendants' argument that application of §1033 to §12965(b) results in harmony and balance is unfounded. It follows that excluding the application of §1033 to §12965(b) is the only way to achieve consistent rulings on fee motions brought by prevailing plaintiffs pursuant to §12965(b), and most importantly, the full effectuation of §12965(b) and support for its underlying policies.

C. <u>**The Court Of Appeal's Decision Does Not Expand §12965(b) to Allow for Attorney's Fee Award Based on a Party's Settlement Posture**</u>

Defendants misread the Court of Appeal's decision. The Court of Appeal did not conclude that a party's failure to settle a case can serve as a basis for *awarding* (emphasis added) attorney fees against the party. Rather, the Court of Appeals discussed the five years of litigation of Plaintiff's claims, including the settlement posture of the City, to distinguish Plaintiff's case from *Steele*, and as a *consideration* (emphasis added) for Plaintiff's substantial attorney's fee request. (Opinion at p. 6, 9-10)

1. <u>Settlement was Discussed to Factually Distinguish Plaintiff's Case from Steele</u>

In discussing the trial court's reliance on <u>Steele</u> to deny Plaintiff's motion for attorney's fees, the Court of Appeal raised the City's settlement posture towards Chavez, i.e., the City never made a §998 "or any offer-to settle the case", only to show the factual distinctions between the two cases and the trial court's erroneous reliance on <u>Steele</u>. (Opinion p. 6-7)

The Court of Appeal pointed out that Chavez prevailed against his employer and an individual defendant unlike the plaintiff in Steele who prevailed only against her employer. (Ibid.)

In Steele, the jury awarded plaintiff, Loretta Steele, compensatory damages in the amount of $21,078 in her pregnancy discrimination action against her employer, Jensen Instrument Company. (Steele, *supra*, 59 Cal.App.4^{th} 326, 328) Jensen made a statutory offer of compromise ("§998") for $40,000 months before the commencement of trial, which Steele rejected. (Ibid. at 329) The trial court denied Steele her costs and attorney's fees and awarded Jensen costs. (Ibid.) Among other things, Steele appealed the costs awarded Jensen and the denial of her costs and attorney fees. (Ibid.)

Steele argued that she was entitled to an award of attorney fees and costs pursuant to Govt. Code 12965 (b) and with her attorney fees and costs added to her damages, the judgment exceeded the CCP § 998 offer. (Ibid.) The court of appeal disagreed, citing several factors, including the trial court had discretion to deny fees and costs because plaintiff did not prevail against the individual defendants, the amount of the judgment was less than the jurisdictional limit of the municipal court, and the judgment was less than the §998 offer made by plaintiff's employer. (Ibid. at 330)

The Court of Appeal found that the Steele court, like the trial court in Plaintiff's case, just assumed §12965(b) did not apply to the plaintiff's case.

However, while not discussed by the Steele court, the court may have applied the same analysis the United States Supreme Court applied to the plaintiff in Marek v. Chesny, *(supra)*, 473 U.S. 1, 105 S.Ct. 3012 and found Steele not to be the prevailing plaintiff, "literally" due to her recovery being lower than the §998 offer. This would make Steele clearly inapposite to Chavez's case where no §998 offer was made.

A plain reading of the Court of Appeal's discussion of Defendants' settlement posture here indicates that the Court was merely distinguishing Plaintiff's case from Steele.

2. Settlement Posture was Discussed Within the Context of the Amount of Attorney's Fees Request

The Court of Appeal opined that the attorney fees were a product, in part, of the "City's vigorous and long-continued resistance to Chavez's claim against it and its commanding officers." (Opinion at p. 10) "Government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." (Serrano v Unruh, (1982) 32 Cal.3d 621, 638, citing Copeland 631, F.2d 880, 904. Accord, Wolf v. Frank (supra) 555 F.2d 1213, 1217 ("Obviously, the more stubborn the opposition the more time would be required....").

The Court of Appeal identified specific facts in Plaintiff's case to describe the tenacity of the litigation posture employed in pursuing Chavez's civil rights.

follows: "the parties participated in five mediation sessions, and he made numerous attempts to the settle the case. The City flatly resisted all settlement discussions and never made a substantive offer. (Opinion at p. 6, 10)

The City's litigation posture forced Chavez to engage in extensive discovery and litigate the action for five years through the state and federal trial and appellate courts, incurring substantial attorney fees. The Court of Appeal opined that due to the vigorous litigation of the Defendants, (not the settlement posture of the Defendants), "it was unjust to deny him (Chavez) any fees." (Opinion, p. 10, citing Riverside v. Rivera, *supra,* 477 U.S. at pp. 575-577)

This analysis by the Court does not extend to the conclusion that the Court focused attention on Petitioners' failure to settle as the predominant factor to award attorney fees in a FEHA matter. Instead the Court simply explained that the parties "fight" for and against these important rights supported the substantial fees incurred by Chavez.

Defendants' position that the Court of Appeal "focused exclusively on the fact that Defendants failed to reach a settlement with Plaintiff, and was a "predominant factor in awarding attorney fees," mischaracterizes the Court of Appeal's opinion. (Opinion at p. 22) Further, Defendants' conclusion that the Court of Appeal's decision diminished this Court's prior interpretations of the scope of § 12965(b) and placed a party's settlement posture as a paramount factor in determining whether to award attorney fees is not supported by the Court of

Appeal's opinion. The only posture identified in the Court of Appeal's opinion was the "City's litigation posture", which contributed to the substantial attorney fees incurred in the Chavez's case. (Opinion at p. 10)

Consequently, there is no reasonable basis for concluding that the Court of Appeal judicially expanded 12965(b) to allow for attorney's fees award because the Defendants failed to settle this case prior to trial.

3. Plaintiff's Attorney's Fee Were Reasonable in Light of the Extensive Litigation.

The US Supreme Court explained in Christianburg Garment Company v. EEOC., (1978) 434 US 412 that the attorney's fee provision's purpose is to make it easier for plaintiffs with limited resources to bring meritorious suits that vindicate the legislation's important anti-discrimination goals. (Cummings, *supra*, 11 Cal.App.4th at p. 1386, citing Christianburg, supra, 434 U.S. at p. 418) Defendants suggest that these "equitable considerations" be ignored.

The Court of Appeal found ample precedent for awards of attorney fees under FEHA, based on the lodestar, to greatly exceed the amount of the verdict and noted that it would be inimical to the intent of the FEHA fee provisions and would discourage attorneys from taking meritorious cases if a prevailing plaintiff under FEHA is denied attorney fees solely because the plaintiff's damages are modest.[22]

The threshold for triggering decreases due to limited success reflects the values underlying the award of attorneys' fees in FEHA and other civil rights cases. Such cases vindicate important public interests whose value transcends the dollar amounts that attach to many civil rights claims. Fee awards ensure that neither financial imperatives nor market considerations raise an insurmountable barrier that prevents attorneys from litigating meritorious cases, and even a relatively small damages award "contributes significantly to the deterrence of civil rights violations in the future." (City of Riverside v. Rivera, *supra,* 477 U.S. 561, 575)

Consistent with those purposes, a trial court does not under California law abuse its discretion simply by awarding fees in an amount higher, even very much higher, than the damages awarded, where successful litigation causes "conduct which the FEHA was enacted to deter [to be] exposed and corrected." *Vo*, 79 Cal.App.4th at 445; see also *Weeks*, 63 Cal.App.4th at 1176, (objective of FEHA's

[22]Opinion, pp. 7-8, citing Vo v. Las Virgenes Municipal Water District. (2000) 79 Cal.App.4th 440, 442-225 [affirming attorney fees of $470,000 on a $37,500 verdict]; Riverside v. Rivera, (1986) 477 U.S. 561 [award of attorney fees of over $245,000 upheld where damages awarded just exceeded $33,000.]; *Quesada v. Thomason* (9th Cir. 1988) 850 F.2d 537, 540 [reducing fee award below lodestar simply because a damage award is small impermissibly creates an incentive for attorneys to file only those civil rights actions likely to produce large awards]; *Wilcox v. City of Reno* (9th Cir. 1994) 42 F.3d 550 [fee award of over 66,500 affirmed where damages awarded were $1.00]; see Opinion p. 8 for other cases cited by Court.

fee-shifting provision is to "ensure that the plaintiff will be fully compensated and will not have to bear the expense of litigation"). To illustrate: The jury in Vo found that the defendant was liable for harassment based on race, awarding the plaintiff $40,000 in compensatory damages, an amount later reduced by stipulation. The trial court then awarded the plaintiff $470,000 in attorneys' fees. Despite the fact that the fee award was more than ten times greater than the plaintiff's damages, the trial court concluded that the fee was justified because the defendant was excessively litigious and took a non-settlement posture, and because the award served the FEHA's objectives of exposing and deterring discrimination. (Vo, 79 Cal.App.4th at 445)

V. CONCLUSION

For the foregoing reasons, this Court should adopt the Court of Appeal's decision in this case to fully effectuate the FEHA attorney fee provision, § 12965(b), and answer in the affirmative to Issue No. 1, and in the negative to Issue No. 2, stated herein.

Dated: September 26, 2008

RESPECTFULLY SUBMITTED:

ROCHELLE EVANS JACKSON, ESQ.
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BY: ______________________
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CERTIFICATE OF WORD COUNT

Respondents' counsel of record hereby certifies, pursuant to Rule 8.504(d)(1) of the California Rules of Court, that the text of the foregoing Answer Brief on the Merits as produced using 13-point Times New Roman font (including footnotes) and contains 10,715 words, as counted by Microsoft Word word-processing system used to generate the brief.

Dated: September 26, 2008

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PROOF OF SERVICE
(VIA VARIOUS METHODS)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California and in the United States of America. I am over the age of 18, and not a party to the within action; my business address is 333 City Boulevard West, City Tower, 17^{th} Floor, Orange, Ca 92868.

On September 26, 2008 I served the foregoing document described as **PLAINTIFF/APPELLANT ROBERT CHAVEZ'S ANSWER BRIEF ON THE MERITS** on all interested parties in this action by placing true copies thereof, enclosed in a sealed envelope, and addressed as noted below.

[X] **BY Mail** – I am familiar with our firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one working day after the date of deposit for mailing in this declaration.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 26, 2008, at Orange, California.

Rochelle Evans Jackson