

SUPREME COURT COPY

Case No.  
**S 162313**

SUPREME COURT  
**FILED**

APR 23 2008

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DEPUTY

IN THE  
SUPREME COURT OF CALIFORNIA

**ROBERT CHAVEZ**

*Petitioner, Appellant and Respondent*

v.

**THE CITY OF LOS ANGELES, et al.**

*Defendant, Respondents and Petitioner*

After a Decision by the Court of Appeal, Second Appellate District,  
Division Eight, Case No. B192375  
Appeal from the Superior Court of Los Angeles County Honorable Rolf  
M. Treu, Judge Presiding  
(Superior Court No. BC 324514)

**ANSWER TO PETITION FOR REVIEW**

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CRC  
8.25(b)

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## I. INTRODUCTION

The City of Los Angeles, et al., petition for review in this successful appeal by Plaintiff/Appellant/Respondent Robert Chavez (Chavez) in an employment discrimination action pursuant to the Fair Employment and Housing Act (FEHA) challenges the Court of Appeal's decision reversing the decision of the trial court to exercise its discretion pursuant to California Code of Civil Procedure § 1033(a) and deny Chavez's motion for prevailing party statutory attorney fees under Government Code 12965 (b).

After five years of litigation, Chavez, a 16 year veteran police officer with the City of Los Angeles Police Department (LAPD), prevailed on a retaliation claim against Petitioners, the City of Los Angeles (City) and LAPD Captain Harlan Ward in a 12-0 jury verdict. The jury awarded Chavez \$1,500 for past economic loss and \$10,000 for mental suffering emotional distress.<sup>1</sup>

Ignoring Government Code 12965, which authorizes an award of attorney fees to the prevailing party in a FEHA action, the trial court reasoned that it had discretion under §1033 (a) to deny Chavez' fees in its entirety as costs under CCP §1033.5 (a) (10) (B). The trial court pointed to Chavez's modest recovery and his limited evidence of damages at trial to justify denying his motion.<sup>2</sup>

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<sup>1</sup> Appellant's Appendix (referred to as "AA"), Vol. I, pp. 1, 39-40, 107; Vol. II, p. 487.

<sup>2</sup> AA, Vol. III, Tab 28, pp. 865-869.

The Court of Appeal concluded that the trial court abused its discretion in not analyzing Chavez's motion under Government Code §12965 and in applying CCP §1033 to deny him fees. The order denying Chavez's motion for attorney fees was reversed and the matter was remanded to the trial court for a redetermination of the amount of attorney fees to be awarded to Chavez, including for fees and costs incurred to prosecute the appeal.<sup>3</sup>

## II. ISSUES PRESENTED

Respondent respectfully differs with Petitioners' statement of the issues in this matter. Respondent sets forth the issues presented here as follows:

1. Does California Code of Civil Procedure §1033 apply in actions brought under FEHA?
2. If there is an interplay of §1033 and California Government Code §12965, should §1033 trump §12965 for the prevailing plaintiff in a FEHA action with significant grievances and reasonable estimate of damages of \$25,000 or more?

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<sup>3</sup> Court of Appeal's Opinion (designated as "Opinion") pp. 7, 9, 10 as they appear in the Appendix to Petitioner's brief.

### III. WHY REVIEW SHOULD NOT BE GRANTED

A. The Court of Appeal Correctly Resolved the Issue in *Chavez* and Disposition of the Case Should Not Be Disturbed.

1. *Chavez*<sup>4</sup> was not a limited civil action notwithstanding the jury's modest monetary award.

The Court of Appeal opined that FEHA claims of discrimination are not minor grievances and simple disputes, and although FEHA actions do not always involve large sums of money, this factor does not transform bona fide civil rights claims into minor grievances. Further the Court recognized that litigation of FEHA claims by its nature is invariably expensive and time consuming, involving extensive discovery and pretrial motions.<sup>5</sup>

Applying these principles to *Chavez* the Court correctly found that Chavez's attorney could not have competently filed this civil rights action as a limited jurisdiction case. The Court, citing *Greene v. Dillingham Construction N.A., Inc.*<sup>6</sup>, 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.<sup>7</sup>

Moreover, the Court observed that even in its "final, more streamlined form" Chavez's statutory retaliation action consisted of two complex causes of

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<sup>4</sup> *Chavez v. City of Los Angeles, et al.*, 160 Cal.App.4th 410 (2008)

<sup>5</sup> Opinion, p. 7

<sup>6</sup> *Greene v. Dillingham Construction N.A., Inc.*, (2002) 101 Cal.App.4th 418, 424

<sup>7</sup> Opinion pp. 9-10

action for disability discrimination and retaliation and involved four defendants including the City of Los Angeles. The Court also highlighted the extensive discovery conducted by Chavez and the case history of five years of litigation in state, federal and appellate courts.<sup>8</sup>

Chavez's discrimination claims could not be properly prosecuted as a limited civil case against the City of Los Angeles and the individual defendants, and after five years of extensive discovery, expense and legal procedural maneuvers, it was an abuse of discretion for the trial court to find otherwise simply because of the low monetary award.

2. Government Code § 12965 was the proper statute to apply in Chavez.

“[T]he purpose behind the fee provision [of the Fair Employment and Housing Act] was to make it easier for a plaintiff of limited means to bring a meritorious suit to vindicate a policy the [legislature] considered of great importance.”<sup>9</sup>

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”.<sup>10</sup>

The Court of Appeal opined that §1033 does not apply in FEHA actions and the trial court should have analyzed Chavez's motion for prevailing party

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<sup>8</sup> *Id.*

<sup>9</sup> *Cummings v. Benco Building Services*, (1992)11 Cal.App.4th 1383, 1387

<sup>10</sup> *See Weeks v. Baker & McKenzie*, (1998) 63 Cal. App. 4th 1128, 1175-76

statutory fees under §12965.<sup>11</sup> The Court rested its decision on the clear, unambiguous and distinct objectives of these two cost-shifting statutes and its applicability to *Chavez*, specifically, and FEHA cases in general.

The Court cited the key objective of §1033, subdivision (a) is to encourage plaintiff to pursue litigation in the appropriate forum and to deter the plaintiff from exaggerating the value of a case. To encourage the filing of minor grievances in courts of limited jurisdiction, trial courts have discretion to deny costs to plaintiff who files an unlimited action but recovers a monetary award that could have been rendered in a limited jurisdiction, i.e., under \$25,000.<sup>12</sup>

The Court of Appeal highlighted “[a] key objective of FEHA is to preserve the civil rights of Californians to seek and maintain employment without discrimination.”<sup>13</sup> 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 to vindicate a significant public policy.”<sup>14</sup> 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.<sup>15</sup>

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<sup>11</sup> Opinion, p. 7, 9

<sup>12</sup> Opinion, p. 4, citing 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 30, p. 576 and *Steele v. Jensen Instrument Co.*, (1997) 59 Cal.App.4th 326, 330

<sup>13</sup> Opinion, p. 5, citing Government Code §§ 1290, 12921

<sup>14</sup> Opinion, p. 7

<sup>15</sup> Opinion, p. 5, citing *Cummings v. Benco Building Services*, *supra*, 11 Cal.App.4th at p. 1387

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<sup>15</sup> Opinion, p. 5, citing *Cummings v. Benco Building Services*, *supra*, 11 Cal.App.4th at p. 1387

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, thus the trial court should have analyzed Chavez's motion for attorney fees under §12965.<sup>16</sup>

It is clear that the Court of Appeal found correctly that Chavez's claims and damages did not constitute a limited jurisdiction matter and there was no finding of special circumstances to render an award of attorney fees unjust.<sup>17</sup>

Moreover, the Court 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.<sup>18</sup>

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<sup>16</sup> Opinion, pp. 7, 9

<sup>17</sup> Opinion, p. 10

<sup>18</sup> 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* (9<sup>th</sup> 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* (9<sup>th</sup> 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.

The Court of Appeal decision as it applies to *Chavez* and its disposition of the case is correct. The disposition of the matter would likely be the same regardless whether this Honorable Court grants the petition for review, thus making review unnecessary.

B. The Court Of Appeal Did Not Judicially Expand Government Code Section 12965 (b) To Award Attorney's Fees Based On The Parties Settlement Posture

1. Petitioners' misinterpret the Court of Appeal's decision.

Respectfully, Respondent disagrees that review is necessary by this Court because the Court of Appeal expanded Government Code 12965(b) by including a party's settlement posture as a predominant consideration for awarding attorney's fees.

The Court of Appeal did not conclude that a party's failure to settle a case can serve as a basis for awarding attorney fees against it. The Court, in mentioning the Petitioners' failure to settle Chavez's litigation, did so in the context with the intricacy of Chavez's litigation. The Court 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."<sup>19</sup> This Court stated, "government cannot litigate tenaciously and then be heard to complain about the time

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<sup>19</sup> Opinion, p. 10 ¶ 2

necessarily spent by the plaintiff in response."<sup>20</sup>

The Court of Appeal identified specific facts included in *Chavez* to describe the tenacity of the litigation posture employed in pursuing Chavez's rights guaranteed to him pursuant to FEHA. Specifically, Court's opinion described the litigation posture of the parties as follows: "the parties participated in five mediation sessions, and he made numerous attempts to settle the case. The City flatly resisted all settlement discussions and never made a substantive offer. 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. Under these circumstances, in which Chavez prevailed against some defendants on his FEHA retaliation claim, and in the face of a recalcitrant City, it was unjust to deny him any fees."<sup>21</sup>

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

Petitioners' position that the Court of Appeal "focused exclusively on the fact that Defendants failed to reach a settlement with Plaintiff, and was a

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<sup>20</sup> *Serrano v Unruh* (1982) 32 Cal.3d 621, 638, citing *Copeland* 631, F.2d 880, 904. *Accord, Wolf v. Frank* (5<sup>th</sup> Circuit 1977) 555 F.2d 1213, 1217 ("Obviously, the more stubborn the opposition the more time would be required....").

<sup>21</sup> Opinion, p. 10, citing *Riverside v. Rivera, supra*, 477 U.S. at pp. 575-577

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<sup>21</sup> Opinion, p. 10, citing *Riverside v. Rivera, supra*, 477 U.S. at pp. 575-577

"predominant factor in awarding attorney fees," mischaracterizes the Court of Appeal's opinion.<sup>22</sup> Further, Petitioners' 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 Appeals' opinion in *Chavez*.<sup>23</sup> 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.<sup>24</sup>

Consequently, there is no reasonable basis for concluding that the Court of Appeal judicially expanded government code 12965(b) to allow for attorney's fees award because the Petitioners failed to settle their case prior to trial. The Petitioners' request for review is unnecessary and should be denied.

Moreover, since at least 1969, this Court and the Court of Appeal unequivocally have recognized that the public policy in California is to award FEHA attorney fees if no special circumstance would render payment of attorney fees unjust. *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 89; *Stephens v. Coldwell Banker*, (1988 ) 199 Cal. App. 3d 1394, 1405

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<sup>22</sup> Petition, p. 22

<sup>23</sup> Petition, p. 23

<sup>24</sup> Opinion, p. 10 ¶ 2

2. Chavez's attorney's fee were reasonable in light of the extensive litigation.

The US Supreme Court explained in *Christianburg Garment Company v. EEOC.*<sup>25</sup> 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.<sup>26</sup> Petitioners suggest that these "equitable considerations" be ignored.

Consistent with this Court, the *Chavez* court opined that attorneys' fees can be denied where special circumstances would render an award unjust. The Court of Appeal reviewed and considered the arguments presented in both parties' briefs and listened to oral arguments on two separate occasions. After careful consideration the Appellate court 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 to CCP § 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.<sup>27</sup>

The threshold for triggering attorney fee decreases due to limited success must reflect the values underlying the award of attorneys' fees in FEHA and other civil rights cases. Such cases vindicate important public interests whose value

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<sup>25</sup> 434 US 412 (1978)

<sup>26</sup> *Cummings, supra*, 11 Cal.App.4th at p. 1386, citing *Christianburg, supra*, 434 U.S. at p. 418.

<sup>27</sup> Opinion, p. 10

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 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. 79 Cal.App.4th at 445.

There is no specific discussion that the Petitioners can point to other than the Court of Appeal mentioning the City's litigation posture, which included the failure of the City to settle with Plaintiff at various times during the litigation, causing Chavez to incur substantial attorney fees in pursuit of his civil rights as a police officer employed by the City of Los Angeles.

Contrary to Petitioner's contention, Chavez did not repeatedly lose at every turn. Chavez fought very hard to persuade a jury and received a unanimous decision establishing that his commanding officer and the City of Los Angeles retaliated against him because he engaged in protected activity.

The Appellate Court's opinion does not expand Government Code 12965(b) to allow attorney fees based on the Petitioners' settlement posture.

#### B. Depublication of *Chavez* Will Conserve Judicial Resources

Respondent has no quarrel with the Court of Appeal's decision here however, if this Court tends to grant the petition for review, a better alternative to conserve judicial resources and remove any conflict between *Chavez* and *Steele* is to order depublication of the Court of Appeal opinion.<sup>28</sup>

Clearly, *Chavez* is distinguished from *Steele* as found by the Court of Appeal and as Petitioners conceded in their Answer to Appellant's Opening Brief.<sup>29</sup> The factual and legal distinctions in *Steele*, including the presence of the

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<sup>28</sup> See California Rules of Court 976(d)(2).

<sup>29</sup> Opinion, p. 6, 10;

CCP § 998 offer in *Steele* and conspicuously absent in *Chavez* places *Chavez* and *Steele* on different footing apart from the two being FEHA cases.

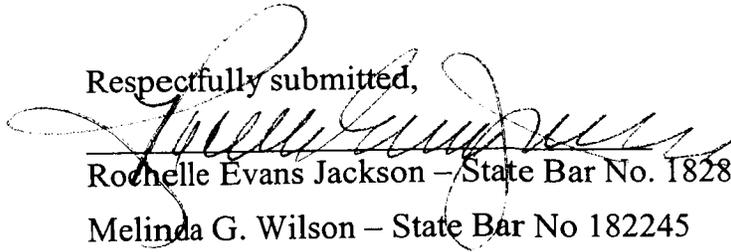
However, the Court of Appeal opined that CCP § 1033 does not apply to FEHA actions and since the trial court in *Steele*, a FEHA action, exercised its discretion under §1033 to deny the prevailing party attorney's fees, the depublication of the Court of Appeal's decision would expeditiously resolve the conflict between the two cases.

#### IV. CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Dated: 4/22/08

Respectfully submitted,

  
Rochelle Evans Jackson – State Bar No. 182860

Melinda G. Wilson – State Bar No 182245

Attorneys for Plaintiff and Appellant Robert Chavez

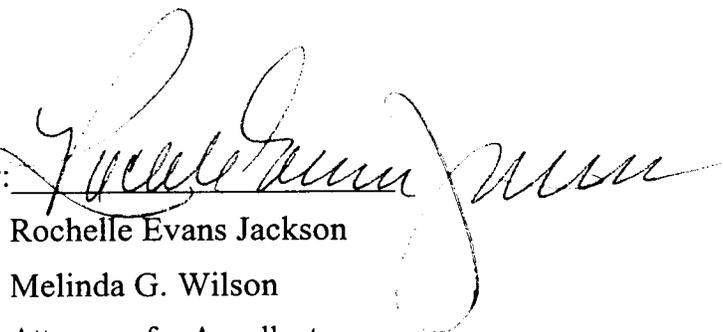
**CERTIFICATE OF COMPLIANCE**

I hereby certify the Answer to Petition for Review contains the following:

Font: Times New Roman, 13

Words: 2,945

By:



Rochelle Evans Jackson

Melinda G. Wilson

Attorneys for Appellant

PROOF OF SERVICE

CCP 1013A(3)

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<sup>th</sup> Floor, Orange, Ca 92868

On April 22, 2008 I served the foregoing document described as ANSWER TO PETITION FOR REVIEW. on the interested party or parties in this action by placing a true copy thereof, enclosed in a sealed envelope, and addressed as noted below.

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.

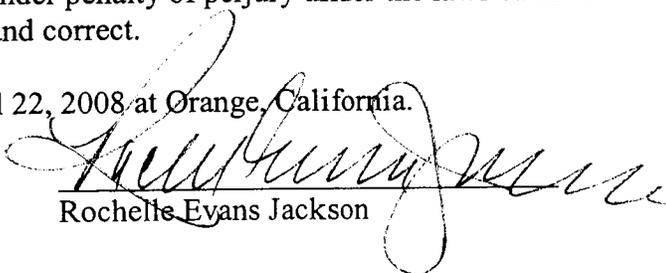
Party served at following address:

**SEE ATTACHED SERVICE LIST**

- BY MAIL I deposited such envelope in the mail at Orange, California. The envelope was mailed with postage thereon fully prepaid.
- PERSONAL SERVICE. Such envelope was delivered by Rochelle Evans Jackson by Hand to the office of the addressee.

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

Executed on April 22, 2008 at Orange, California.

  
Rochelle Evans Jackson

SERVICE LIST

Rockard John Delgadillo  
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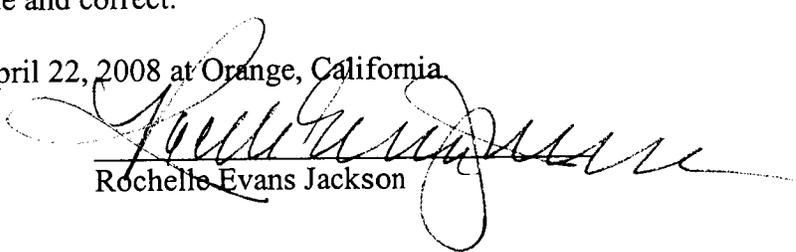
FURTHER

On April 22, 2008 I served the foregoing document described as Answer to  
Petition on the

Court of Appeal, Second Appellate District, Division 8,  
300 Spring Street  
Los Angeles, Ca 90013-1233

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

Executed on April 22, 2008 at Orange, California

  
Rochelle Evans Jackson