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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

VITTORIO FRONCILLO,
Plaintiff and Respondent,
v.
CONTEMPORARY SERVICES
CORPORATION,
Defendant and Appellant.

A133482, A133613
(San Francisco County
Super. Ct. No. CGC-08-483611)

Contemporary Services Corporation (CSC) appeals after entry of a judgment against it for sexual harassment in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). Plaintiff and respondent Vittorio Froncillo (Froncillo) recovered \$550 in damages. CSC contends the trial court erred in awarding Froncillo \$11,952.94 in costs and \$349,313.74 as attorney fees under Government Code section 12965, subdivision (b), because Froncillo recovered a de minimis amount that could have been recovered in a limited civil case, CSC believes the matter should have been litigated as a limited rather than unlimited civil case, and the court abused its discretion.

We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Froncillo was 20 years old when he began working for CSC, where he was employed part time for eight weeks from October 24, 2006, through December 19, 2006.

Froncillo's job consisted of "[c]rowd control, security for events, concerts, games, stuff like that."

For Froncillo's work at six events during his time at CSC, he was paid \$466.64. Froncillo claims he also worked a seventh event, for which he was not paid.

On December 19, 2006, Froncillo submitted a letter of resignation, contending he had been continuously sexually harassed by his supervisor, Cara Muhlenbruch (Muhlenbruch).

A. Froncillo's Complaint and Pretrial Proceedings

On December 30, 2008, Froncillo sued CSC, asserting that it violated several provisions of the California Fair Employment and Housing Act (FEHA) based on alleged constructive discharge, retaliation, and failure to prevent sexual harassment. (Gov. Code, §§ 12900 et seq.) The case was filed as an unlimited civil matter, with Froncillo seeking general and special damages, punitive damages, and attorney fees. (See Code Civ. Proc., § 88.)

CSC answered the complaint, denying the allegations and asserting 27 affirmative defenses.

Over the next approximately two years, the parties participated in a variety of pretrial matters, including document production, several depositions, negotiation of discovery disputes, expert witness designations, a mediation proposal, a summary judgment motion, and trial preparation such as trial briefs, jury instructions, and motions in limine.

B. Jury Trial

After roughly two days of motion in limine hearings and jury selection, a jury trial commenced on May 5, 2011, and continued over the course of 13 court days. Froncillo called 11 witnesses; CSC called one additional witness.

1. Froncillo's Testimony

Froncillo testified that, throughout his employment at CSC, he was sexually harassed by supervisor Muhlenbruch, who he believed was more than a decade older than

him. Froncillo described her as a Caucasian woman, about 5 feet 4 inches and 180 pounds, to whom he was not attracted.

a. Muhlenbruch's harassment

According to Froncillo, Muhlenbruch's harassment included sending him 35 sexually vulgar and offensive text messages. Froncillo deleted the first 31 of these messages, because they disgusted him and because he did not want his girlfriend to find them and no longer trust him.

But Froncillo saved the last four sexual text messages from Muhlenbruch, all of which he received on December 13, 2006. These messages, Froncillo asserted, were similar in vulgarity and sexual content to those he had deleted.

Froncillo showed these four text messages to his landlord and to her friend, who recommended that he seek legal counsel. In doing so, his landlord testified, Froncillo appeared distraught. Froncillo also showed the messages to the attorneys whom he ultimately retained in this case. And he showed the messages to his girlfriend.¹

Muhlenbruch's first text message of December 13, 2006, stated: "Women have special powers. They get wet without water, bleed without injury, make boneless things hard, make niggas eat without even cooking."

The second text message read: "Luv cake recipe: Spread legs. Squeeze milk jugs. Insert firm banana. Work in 'n' out till well-creamed cake is done when banana is soft."

A third text message read: "Watz wrong with yo phone? Every time call, it says subscriber you are tryin' to reach is currently suckin' dick. Please try again later."

The fourth text message stated: "Breaking news. A very dangerous dick sucka has escaped. To keep yo man, all women please put yo man dick in yo mouth until further notice."

¹ Froncillo testified that he saved these last four messages on his phone, but neither he nor his attorneys or consultants could retrieve them from the phone when they attempted starting in 2008. Froncillo had written the four messages down, however, and this writing was admitted into evidence at trial.

These messages caused arguments between Froncillo and his girlfriend and distrust in their relationship. Shortly thereafter in February 2007, they broke up.

Froncillo testified to other forms of sexual harassment by Muhlenbruch. Many times when he talked with her, she acted in a flirtatious manner. Once when he tapped her shoulder to ask a question, she responded, “Don’t touch me unless you ask me nicely, and then you can touch me wherever you want.” Froncillo asked her not to talk like that and walked away. Another time, Froncillo was talking to a woman at work and invited her to join him and his girlfriend after work. Muhlenbruch interrupted, sent the other woman to work elsewhere, and argued with her. Muhlenbruch then said to Froncillo, “Oh, why don’t you ever ask me out? Why don’t you ever want to hang out with me? You don’t think I’m hot?”

b. Froncillo’s reaction to the harassment

Froncillo testified that he told Muhlenbruch more than once not to send him sexual text messages, explaining that he had a girlfriend and it was inappropriate. Muhlenbruch nonetheless continued to send them.

Froncillo did not complain to anyone at CSC besides Muhlenbruch. At trial, he explained that Muhlenbruch said other CSC employees had complained about her before, and those complainers were no longer working for CSC. Froncillo concluded that if he complained about her conduct, his employment would probably be terminated too. In addition, he was unsure who to complain to about being sexually harassed by a supervisor, even though he acknowledged receiving a copy of CSC’s sexual harassment policy, which explained the procedure.

When Froncillo resigned, he gave CSC’s branch manager his resignation letter, which asserted that Muhlenbruch had sexually harassed him throughout his employment.

c. Froncillo’s emotional distress

Froncillo testified that he suffered emotional distress because of Muhlenbruch’s conduct. Most of it was “internalized” because it was strange to receive harassing messages from a supervisor, he was 20 years old and did not know how to take it, and he had never been addressed like that by an employer. He also had “sleep problems.”

Froncillo asserted that he resigned from CSC because he “didn’t want to put up with it anymore.”

When asked how long the emotional distress lasted, Froncillo testified: “I mean, I have my own business now, so I’m not really worried about anybody telling me — talking to me like that now, but I mean, it’s kind of a little bit strange working for other people with that in mind.” By this, his counsel argues, Froncillo meant he suffered emotional distress until he opened his own business and was no longer an employee of someone else, which occurred in October 2010. Indeed, Froncillo testified that he had difficulty sleeping and suffered from headaches from November 2006 until 2010, even though he never had difficulty sleeping before. He also began suffering from nervousness in November 2006, and continued to suffer some nervous tension at the time of trial. The inference Froncillo asks us to draw is that his emotional distress lasted four years from the fall of 2006, when Muhlenbruch’s harassment occurred, until October 2010, when Froncillo opened his own business.

Froncillo acknowledged that he did not seek any medical attention for these problems.

2. *CSC’s Response to Froncillo’s Harassment Claim*

According to CSC’s associate general counsel, Rafael Armijo, CSC’s policy upon receiving a complaint of sexual harassment was to interview the complaining employee. In this case, however, CSC did not attempt to interview Froncillo. Armijo offered several explanations for this at trial, testifying at different points that CSC could not ethically interview Froncillo once he obtained counsel, CSC intended to interview Froncillo but decided to wait for a formal demand letter, and CSC did not want to prompt Froncillo into perfecting his claim by asking him to be interviewed.

CSC’s investigation into Froncillo’s allegations was performed by an outside attorney, Sejal Thakkar, who interviewed Muhlenbruch in late January or early February 2007 and drafted a statement Muhlenbruch signed in April 2007. Several of the facts asserted in Muhlenbruch’s statement were known by CSC to be false, however, such as: (1) Muhlenbruch claimed that Froncillo failed to show up for work on several

occasions, while CSC's records showed only one such incident (which Froncillo disputed); (2) Muhlenbruch claimed she had never been counseled about her interactions with CSC employees, even though she was on suspension in March and April 2007 based on a sexual harassment complaint brought against her by another male employee and had been counseled in regard to complaints about being rude to other employees; and (3) Muhlenbruch stated that she "believe[d] he [Froncillo] is making these accusations towards me because I suspended him," yet CSC's associate general counsel conceded that Muhlenbruch had no authority to suspend anyone.

3. Muhlenbruch's Harassment of Other Employees

CSC's Armijo became aware in March 2007 that another male employee, Phillip Mansfield, reported that Muhlenbruch had said things that made Mansfield uncomfortable and Mansfield did not want to work with her. CSC's attorneys interviewed Mansfield, Muhlenbruch, and others, and concluded that Muhlenbruch had violated its sexual harassment policy. Armijo directed CSC's San Francisco branch manager to issue Muhlenbruch a written warning based on her behavior toward Mansfield, but no warning was ever issued. And Craig Graber – the CSC Event Manager to whom Mansfield had made his complaint – destroyed his notes on what Mansfield had told him.

There was also evidence that Muhlenbruch had harassed other employees besides Froncillo and Mansfield. Tresa Cruz, another supervisor who worked for CSC from 2004 until January 1, 2007, testified that she saw Muhlenbruch sexually harass male employees by coming on to them, using indecent sexual language with them, and "smack[ing] them on the behind."

4. Plaintiff's Closing Argument

In his closing argument, Froncillo's attorney explained how the evidence established the elements of his sexual harassment claim. As to damages, counsel suggested that the jury value Froncillo's emotional distress at the rate of "227.28 daily," calculated by multiplying Froncillo's purported hourly rate of \$9.47 by the 24 hours in a day. He noted that this would amount to \$82,957.20 for one year, but the amount to be

awarded for emotional distress was up to the jury. As to punitive damages, counsel urged that Muhlenbruch acted with malice, oppression, and fraud, and an officer, director, or managing agent of CSC knew of her conduct and approved of it.

B. Jury's Verdict and Judgment

By a special verdict form dated and filed on May 24, 2011, the jury agreed with Froncillo that he was subjected to unwanted harassing conduct due to his gender, the harassment was severe, a reasonable person would have considered the work environment hostile or abusive, Froncillo considered the work environment hostile or abusive, Muhlenbruch was a supervisor, and the harassing conduct was a substantial factor in causing harm to Froncillo. The jury found that Froncillo's damages for emotional distress were \$550.

As to punitive damage issues, the jury further found that an agent of CSC (Muhlenbruch) engaged in conduct with malice, oppression, or fraud, but it found (by a vote of 9-3) that it was not true that one or more officers, directors, or managing agents of CSC knew of her conduct and adopted or approved it, or had advance knowledge of her unfitness and employed her with a knowing disregard of the rights of others.

Judgment was entered on the verdict on June 16, 2011, with provision for a later determination of costs and attorney fees.

C. CSC's Post Trial Motions

In August 2011, the court heard and denied CSC's motion to set aside and vacate the judgment.

D. Froncillo's Request for Costs and Attorney Fees

Froncillo sought costs as a prevailing party and attorney fees under FEHA.

1. Costs

In his cost memorandum, Froncillo sought an award of \$13,372.46.

CSC filed a motion to strike or tax those costs. It asked for an order striking the cost memorandum in its entirety or "substantially reducing" the cost award because Froncillo did not obtain a judgment in excess of the \$25,000 jurisdictional limit for

limited jurisdiction actions. (See Code Civ. Proc., §§ 94, 1033, subd. (a).) Alternatively, CSC sought an order taxing certain specific costs that Froncillo had claimed.

Froncillo responded to CSC's motion with declarations from Froncillo's attorneys and another attorney, Joseph McMonigle, opining that it was appropriate to file the case as an unlimited jurisdiction matter in light of the potential recovery and the procedural restrictions of limited jurisdiction proceedings.

A hearing on Froncillo's memorandum of costs and CSC's motion to strike or tax those costs was held on August 29, 2011. At the hearing, Froncillo withdrew his claim for costs as to messenger fees in the amount of \$1,419.52.

By written order filed on September 7, 2011, the court denied CSC's motion to strike or tax costs, except for the \$1,419.52 in messenger fees, and awarded Froncillo costs in the amount of \$11,952.94.

2. Attorney Fees

By separate motion, Froncillo sought recovery for his attorneys' fees under FEHA in the sum of \$349,313.74: \$338,907.19 for counsel fees; \$6,442.13 for expert witness fees; and \$3,964.42 for computerized legal research.

The amount of requested counsel fees was less than the amount allegedly incurred. Froncillo calculated the amount by taking the purported \$451,876.25 lodestar fee (the number of hours expended times the hourly rate) and reducing it by 25 percent to \$338,907.19 to compensate for the small verdict and for any possible errors in the time logs or unnecessary or duplicative time.

In support of the request for attorney fees, Froncillo's attorneys submitted declarations and documentation evincing the services provided, the dates of those services, the time spent on providing the services, the amount of attorney fees incurred for the work, and the cost of expert witness fees and computerized legal research. Froncillo's attorneys also explained why their hourly rate was reasonable and their tasks were reasonably necessary.

CSC filed an opposition to Froncillo's motion, contending that because Froncillo did not recover damages in excess of the \$25,000 jurisdictional threshold, the trial court

should exercise its discretion to “entirely deny the plaintiff’s attorneys any recovery of fees” or award only a “de minimis amount.” Although CSC argued that “a low four figure claim justifies only a low four figure attorneys fee award, if even that,” it did not set forth a particular amount of fees that should be awarded or any basis for calculating them. Nor did CSC identify any particular legal services that were unnecessary or any legal fees that were inappropriate, or challenge the reasonableness of the attorneys’ hourly rates or the hours expended on each task.

Froncillo again countered CSC’s arguments with declarations from his attorneys and attorney McMonigle, opining as to the propriety of filing the matter as an unlimited jurisdiction case.

A hearing on Froncillo’s motion for attorney fees took place on September 26, 2011. By written order issued on October 3, the court granted Froncillo’s motion and awarded the full \$349,313.74 requested (including the lodestar counsel fees reduced by 25 percent).

E. Appeal

CSC appealed from the judgment, the order denying its motion to vacate the judgment, and the order denying its motion to strike or tax costs (A133482). CSC filed a separate appeal from the order granting CSC’s motion for attorney fees (A133613). The two appeals were consolidated.

On May 7, 2012, this court dismissed appeal number A133482 except as to the ruling on the motion to strike or tax costs. Appeal number A133613, from the ruling on the attorney fees motion, was not affected.

II. DISCUSSION

CSC contends the trial court erred in awarding Froncillo his requested attorney fees under FEHA and similarly erred in denying CSC’s motion to strike or tax costs. We address both contentions.

A. Attorney Fees

Froncillo sought and was awarded attorney fees under Government Code section 12965, subdivision (b), a provision of FEHA, which provides in part: “In civil

actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney fees and costs, including expert witness fees.”

An “award of reasonable attorney fees [under FEHA] accomplishes ‘the Legislature’s expressly stated purpose of [providing] “effective remedies that will eliminate . . . discriminatory practices.”’” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394, internal alterations omitted.) “ ‘[F]ee awards should,’ ” therefore, “ ‘be fully compensatory,’ ” and “ ‘an attorney fee award should ordinarily include compensation for *all the hours reasonably spent.*’ ” (*Ibid.*, quoting *Ketchum v. Moses* (2001) 24 Ca1.4th 1122, 1133, italics added.)

Attorney fees, when recoverable by statute, are recovered as part of costs. (Code Civ. Proc., § 1033.5, subd. (a)(10)(B).) Code of Civil Procedure section 1033, subdivision (a) provides that “[c]osts or any portion of claimed costs shall be as determined by the court in its discretion . . . where the prevailing party recovers a judgment that could have been rendered in a limited civil case.”

If there were any tension between Code of Civil Procedure section 1033 – granting the trial court discretion to deny or limit fees where the plaintiff has recovered less than the unlimited jurisdiction threshold – and the policy encouraging *full* recovery for attorney fees under FEHA, it was resolved in *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 (*Chavez*). Because CSC makes so much of *Chavez* in this appeal, we start with that case.

1. *Chavez*

In *Chavez*, the plaintiff brought an action against a city and three supervisors, alleging a FEHA claim for employment discrimination and harassment, and a FEHA claim for unlawful retaliation for his prior FEHA administrative complaints and state and federal court actions. The court granted a motion for nonsuit as to one of the defendants. The jury found for the other defendants on plaintiff’s FEHA claim of employment discrimination. As to the retaliation claim, the jury found that the plaintiff was entitled to \$1,500 in economic damages and \$10,000 in noneconomic damages. (*Chavez, supra*, 47

Cal.4th at p. 980.) The plaintiff then sought to recover costs of \$13,144.26 and attorney fees in the amount of \$870,935.50, including a doubling of the lodestar. (*Id.* at p. 981.) The defendants objected, contending that the plaintiff's request was inflated and attorney fees should be denied entirely or reduced to \$44,459.37. (*Ibid.*) The trial court denied the motion for attorney fees. (*Ibid.*) The Court of Appeal reversed, finding that Code of Civil Procedure section 1033 – granting the court discretion to deny fees if damages did not meet the jurisdictional threshold – did not apply in FEHA actions. (*Id.* at pp. 981-982.)

Our Supreme Court in *Chavez* therefore addressed the following question: “If, as here, a party brings an action under the FEHA that is not brought as a limited civil case and recovers an amount that could have been awarded in a limited civil case, does the trial court have discretion under section 1033(a) to deny that party's motion for attorney fees?” (*Chavez, supra*, 47 Cal.4th at p. 976.) The court's answer was in the affirmative. (*Ibid.*) The court explained: “If, based on the available information, the plaintiff's attorney might reasonably have expected to be able to present substantial evidence supporting a FEHA damages award in an amount exceeding the damages limit (now \$25,000) for a limited civil case, or if the plaintiff's attorney might reasonably have concluded that the action could not be fairly and effectively litigated as a limited civil case, the trial court should *not* deny attorney fees merely because, for example, the trier of fact ultimately rejected the testimony of the plaintiff's witnesses or failed to draw inferences that were reasonably supported, although not compelled, by the plaintiff's evidence. But if, to the contrary, the trial court is *firmly persuaded* that the plaintiff's attorney had no reasonable basis to anticipate a FEHA damages award in excess of the amount recoverable in a limited civil case, and *also* that the action could have been fairly and effectively litigated as a limited civil case, the trial court *may* deny, in whole *or in part*, the plaintiff's claim for attorney fees and other litigation costs.” (*Id.* at p. 987, italics added.)

The court then considered the trial court's ruling in the matter before it. The court observed that the plaintiff was seeking attorney fees incurred in that case and a series of

other related cases in which it sought claims for employment discrimination, harassment, and retaliation under FEHA, civil rights violations under federal law, nuisance, trespass, inverse condemnation, invasion of privacy, and loss of consortium, yet the only claim on which he succeeded in recovering any damages was the claim for retaliation based on his prior unsuccessful FEHA claims. (*Chavez, supra*, 47 Cal.4th at p. 990.) The court also acknowledged that the trial court could have reasonably found that the fee request was grossly inflated, and that the case should have been brought as a limited civil case. (*Id.* at pp. 990-991.) Under those facts, “there was no abuse of discretion in the trial court’s decision denying an attorney fee award to plaintiff.” (*Id.* at p. 991.)

Chavez, therefore, teaches us: (1) a trial court has discretion to deny or reduce attorney fees and costs where, as here, a party brings an action under FEHA as an unlimited jurisdiction case and recovers an amount less than the unlimited jurisdiction threshold; and (2) that discretion is not abused if the trial court is firmly persuaded that the plaintiff’s attorney had no reasonable basis for pursuing the case as an unlimited jurisdiction matter, the plaintiff prevailed on only one of many claims, and the fee request was found to be grossly inflated.

We next discuss how these lessons apply in this case.

2. *CSC’s Limited Jurisdiction Argument*

CSC spends much of its appellate briefs arguing that the trial court should have found – as the court implicitly did in *Chavez* – that the plaintiff’s case should not have been litigated as an unlimited jurisdiction matter, and the attorney fee award should have been reduced on that ground. Specifically, CSC contends, the trial court should have decided that Froncillo’s attorneys could not have (1) reasonably expected “to be able to present substantial evidence supporting a FEHA damages award in an amount exceeding the damages limit (now \$25,000) for a limited civil case” and (2) “reasonably . . . conclude[d] that the action could not be fairly and effectively litigated as a limited civil case.” (*Chavez, supra*, 47 Cal.4th at pp. 986-987.)

To this end, CSC rebuffs the averments of Froncillo’s attorneys that, in their experience, jury awards in employment cases are large, and it distinguishes the jury

awards in other cases on which Froncillo's attorneys relied. CSC also points out that Froncillo's lawyers devoted a relatively small amount of the trial to Froncillo's emotional distress. It further argues there was insufficient evidence for punitive damages and insists that, in any event, punitive damages must usually bear a close relationship to compensatory damages. And it debates whether the restrictions imposed on limited jurisdiction cases would have made any difference in the prosecution of this case. (See also Code Civ. Proc., §§ 91, subd. (c) [withdrawing from limited jurisdiction provisions], 95 [permitting stipulation or order for additional discovery in limited jurisdiction case], 403.040 [permitting reclassification to unlimited jurisdiction case].)

CSC's arguments are unavailing. In the first place, the trial court was not compelled to conclude that Froncillo's attorneys lacked a sufficient basis for believing the case was worth enough to proceed as an unlimited jurisdiction matter. (*Chavez, supra*, 47 Cal.4th at p. 987.) As to compensatory damages, Froncillo testified that he suffered emotional distress due to Muhlenbruch's conduct, because at 20 years old he had "never been talked to like that or approached like that by a boss or someone who's supposed to be in charge" and "didn't really know how to take it." His landlord confirmed that he appeared distraught when he showed her the messages and was bothered by them. Muhlenbruch's conduct so affected Froncillo that he resigned from his employment, because he "didn't want to put up with it anymore." It was undisputed that Froncillo had sleep problems (that he had never had before) and headaches until 2010 – roughly four years after Muhlenbruch's conduct. He also had difficulties with his girlfriend due to Muhlenbruch's messages. Although the jury ended up awarding Froncillo just \$550 for his emotional distress, it would not be unreasonable to believe that a jury might award him more. Indeed, CSC acknowledged in the trial court that a plaintiff might reasonably think his case was worth more than it was, and "[e]ven a miscalculation by a factor of ten can be understood." On this basis, Froncillo's attorneys would be justified in expecting to recover as much as \$5,500 in compensatory damages.

In addition, Froncillo sought punitive damages. Although CSC disputed which punitive damages instruction should be given, it did not contend there was insufficient

evidence for such an instruction. The fact that the jury found that Muhlenbruch had acted with malice, oppression, or fraud – and three jurors found that her conduct was approved or ratified by CSC’s managing agents – provides some indication of the reasonableness of counsel’s belief that Froncillo had a viable punitive damages claim. With an emotional distress award of \$5,500, an award of punitive damages just four times that amount would have yielded a verdict over \$25,000. With an emotional distress award of merely \$2,500, a 10:1 ratio of punitive damages to emotional distress damages would have resulted in a verdict over \$25,000 too. (Accord *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1189 [\$5,000 in compensatory damages and \$50,000 in punitive damages is constitutional even when the reprehensibility factor is low, at least where the compensatory award is for purely economic damages].) Under the circumstances, it cannot be said that the trial court should have been “firmly persuaded” that Froncillo had no business pursuing his FEHA claim as an unlimited jurisdiction case. (*Chavez, supra*, 47 Cal.4th at p. 986 [“In determining whether a FEHA action should have been brought as a limited civil case, the trial court should consider FEHA’s underlying policy of encouraging the assertion of meritorious FEHA claims” as well as information known or that should have been known to the attorneys, and “exercise caution to avoid ‘hindsight bias’”].)

Furthermore, even if the court *should* have found that Froncillo’s attorneys had no basis for pursuing the matter as an unlimited jurisdiction case, it would mean only that the court had discretion under Code of Civil Procedure section 1033, subdivision (a), by which it “*may* deny, in whole or *in part*, the plaintiff’s claim for attorney fees and other litigation costs.” (*Chavez, supra*, 47 Cal.4th at p. 987, italics added.) And that is effectively what the trial court *did do* in this case, reducing Froncillo’s total (and undisputed) lodestar attorney fees by 25 percent.

For purposes of appeal, therefore, the question is whether CSC has affirmatively established that the trial court’s decision to award 75 percent of counsel’s fees was so arbitrary and irrational as to constitute a clear and prejudicial abuse of discretion in light of the evidence and arguments presented to the court. (See generally *State Farm Fire &*

Casualty Co. v. Pietak (2001) 90 Cal.App.4th 600, 610.) As we discuss in the next sections, CSC has not met this burden.

3. *The Trial Court Did Not Abuse Its Discretion*

The high hurdle of establishing an abuse of discretion in an award of attorney fees is well-established. As our Supreme Court has explained: “ ‘The “experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong” – meaning that it abused its discretion.’ ” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

CSC has not convinced us that the trial court was clearly wrong. Froncillo provided the court with declarations and documentation setting forth his attorneys’ hourly rates, the reasonableness of those rates, the work performed, the time it took for those tasks, the reasonableness of the tasks, and the fees and expenses incurred. The court had discretion to award the lodestar amount in its entirety. However, recognizing the small recovery in the case (and the possibility of billing errors, which Froncillo’s counsel believed did not exist), Froncillo asserted that a reasonable reduction to this lodestar would be 25 percent. In response to this assertion, CSC did not contest any particular entry on the attorneys’ time sheets, the reasonableness of their hourly rates, or the amount of time spent on any particular task. Nor did it identify any specific amount that should be deducted because of Froncillo’s low monetary recovery or CSC’s claim that the case should have been litigated as a limited jurisdiction matter. Nor did it provide the trial court with any particular amount that it thought *should* be awarded, other than a vague and unsupported reference to something in the “low four figure[s].”

In the wake of this evidence and argument (or lack thereof), the court implicitly concluded that 75 percent of counsel’s attorney fees provided a reasonable fee award in light of the circumstances of the case. CSC’s several arguments, which we address next, do not establish that this conclusion was erroneous.

4. *Chavez Does Not Compel Reversal*

Although the court in *Chavez*, *supra*, 47 Cal.4th 970, affirmed the denial of an attorney fees award, it did not compel the denial of the attorney fees award in *this* case. In *Chavez*, the trial court's denial of fees was within its discretion where it implicitly found that the plaintiff's attorney had no reasonable basis for pursuing the case as an unlimited jurisdiction matter, the plaintiff prevailed on only one of many claims in several courts and lawsuits, and the fee request was grossly inflated. Here, by contrast, Froncillo prevailed and obtained recovery on the one and only claim that was submitted to the jury, and there were no express or implied findings that Froncillo should have brought the action as a limited jurisdiction matter or the attorney fees request was grossly inflated. *Chavez* is therefore distinguishable on its facts. Moreover, *Chavez* merely held that the court's ruling was within its discretion: it did not hold that the trial court in that case was *required* to deny attorney fees under the circumstances there, let alone that the trial court in this case would have to deny attorney fees in the circumstances here.

5. *Proportionality and De Minimis Damages*

CSC repeatedly points out that the \$349,313.74 awarded for attorney fees is over 600 times the amount Froncillo recovered as damages, and claims that Froncillo never adequately explained why his attorneys should get that much. However, Froncillo *did* provide an explanation, by presenting declarations and documentation of the work performed in an amount well in excess of that figure – none of which CSC questioned as unnecessary or inflated in any particularized manner. And while the amount of damages recovered and the plaintiff's relative success is one factor in deciding an award of attorney fees, proportionality alone is not a basis for overturning it. (*See, e.g., Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 420, 427 [rule of proportionality would make it difficult for individuals with meritorious civil rights cases but small potential damages to receive redress from the courts; cases vindicating

important public interests have a value that transcends the compensatory damage award].)²

In a similar vein, CSC argues that Froncillo’s \$550 recovery was de minimis, and the court should have denied or reduced the attorney fee award on this ground. It points to a statement in *Chavez* that, “[a]lthough attorney fees need not be strictly proportionate to the damages recovered [citation], ‘[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation], the only reasonable fee is usually no fee at all.’” (*Chavez, supra*, 47 Cal.4th at p. 989.) But that statement does not apply here: Froncillo did not fail to prove “an essential element of his claim for monetary relief;” to the contrary, he proved every element of the FEHA claim he presented to the jury.³

CSC’s reliance on *Choate v. County of Orange* (2000) 86 Cal.App.4th 312 (*Choate*) is misplaced as well. There, the plaintiffs had picked a fight with some off-duty sheriff’s deputies, and then sued the deputies when the deputies got the best of them. (*Id.* at pp. 318-320.) The court nonsuited the plaintiffs’ conspiracy claims and their federal civil rights claims against two of the defendant deputies. Plaintiffs voluntarily dismissed

² CSC poses the question, “If the plaintiff here had been presented with a bill from the plaintiff’s attorneys for \$349,313.74 for what he got from this case, would anyone believe that that was a ‘reasonable’ charge for those services?” But that is not the question. The reasonableness of attorney fees does not turn on outcome alone. After all, if clients did not have to pay their attorneys solely because they had little success in the trial court, a defendant who loses at trial and is ordered to pay the plaintiff \$349,313.74 for the plaintiff’s attorney fees would arguably not have to pay its own counsel for services rendered in the loss.

³ CSC argues that in federal civil rights cases, and by analogy FEHA cases, “the most critical factor is the degree of success obtained.” (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 436 [fees should not be awarded for work on unsuccessful claims].) In addition, the court must “give primary consideration to the amount of damages awarded as compared to the amount sought,” to fulfill its “‘central’ responsibility to make the assessment of what is a reasonable fee under the circumstances of the case.” (*Farrar v. Hobby* (1992) 506 U.S. 103, 114 [affirming denial of attorney fees where plaintiff obtained \$1 on one claim against one defendant instead of the \$17 million sought, and the litigation accomplished little besides moral satisfaction].) *Hensley* and *Farrar* are factually distinguishable and do not compel reversal in this case.

their negligence cause of action and conceded they lacked evidence against two defendants. The jury found two other defendants not liable for federal civil rights violations. (*Id.* at p. 320.) The jury then awarded one plaintiff \$3,380 in compensatory damages and \$1,000 in punitive damages on excessive force and battery theories and the other plaintiff \$1,089 in compensatory damages and \$250 in punitive damages for battery. (*Ibid.*) The jury exonerated the defendants on the remaining. (*Id.* at p. 320.) The plaintiffs then sought \$248,647 in attorney fees under the federal civil rights statute (42 U.S.C. § 1988) – even though at least one plaintiff had recovered nothing on his federal civil rights claims. (*Ibid.*) The trial court denied the motion (and instead awarded attorney fees to the defendants), concluding that “not even the most wildly imaginative attorney would *think* of suing on these facts.” (*Id.* at p. 321.)

The Court of Appeal in *Choate* affirmed the denial of attorney fees to the plaintiffs. The court explained: “*Sometimes . . . a reasonable fee is zero, especially where the recovery is de minimis, establishes no important precedent and does not change the relationship of the parties. . . . Where the purpose of a civil rights action is to recover private damages, . . . the court, in fixing fees, must ‘ ‘give primary consideration to the amount of damages awarded as compared to the amount sought.’ ’* [Citations.]” (*Choate, supra*, 86 Cal.App.4th at p. 324, italics added.) Applying that analysis, the court ruled there was no abuse of discretion in refusing to award attorney fees because “[t]here was sufficient basis in this record to determine that plaintiffs’ de minimis recovery merited a de minimis (zero) fee award,” nonetheless stressing that “the determination whether a victory is de minimis is generally left to the sound equitable discretion of the trial court in the first instance, ‘so as to avoid a second major litigation strictly over attorneys’ fees.’” (*Id.* at pp. 324-326.)

Choate is distinguishable from the matter before us, since the court in this case did not find that no reasonable attorney would think of bringing the case (and CSC does not make that argument either), and Froncillo prevailed on his substantive FEHA claim. Moreover, *Choate* merely affirmed that the denial of attorney fees under those facts was

not an abuse of discretion; by no means did it rule that attorney fees would *have* to be denied under those facts, let alone the facts here.

A recent decision by our colleagues in Division Two is consistent with our conclusion that CSC has failed to establish an abuse of discretion. In *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, the plaintiff obtained a judgment on her claim under the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) in the amount of \$1, and was then awarded attorney fees and costs in the amount of \$89,489.60 – nearly 90,000 times her recovery. (*Heritage Pacific Financial*, at p. 987.) On appeal, the court concluded that the record did not show an abuse of discretion in the award of attorney fees. Among other things, the trial court did not err in failing to reduce the award based on an argument that the plaintiff had achieved only limited success, since the plaintiff was completely successful in establishing the unlawfulness of the defendant’s behavior, and the lawsuit might spur the defendant to cease unlawful conduct against other consumers. (*Id.* at pp. 1006-1007.)

Here too, Froncillo was completely successful in establishing the unlawfulness of CSC’s behavior. And, while Froncillo’s victory might not have widespread effect in the marketplace, it might spur CSC and others to greater vigilance against sexual harassment. CSC has not established an abuse of discretion based on Froncillo’s degree of success, amount of damages, or the proportionality of the attorney fees award.

6. *Punitive Damages and Lost Text Messages*

CSC argues that five of Froncillo’s trial witnesses testified to matters relevant to punitive damages, but Froncillo did not recover punitive damages at trial. It also argues that three witnesses testified exclusively in regard to the issue of the lost text messages, but the problem of the lost text messages was the fault of Froncillo and his attorneys, not CSC. Similarly, CSC urges, the time sheets provided by Froncillo’s counsel show work on the issues of punitive damages and lost text messages. CSC thus contends that much

of the time Froncillo incurred in the case was spent on an issue on which he lost (punitive damages) and an issue that had nothing to do with CSC (lost text messages).⁴

CSC did not make these arguments in the trial court, and they are therefore waived. (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 494.) In any event, it would not have been an abuse of discretion for the trial court to reject the argument: the time spent with the punitive damage witnesses was arguably relevant to other issues in the case; and according to an expert witness at trial, the text messages disappeared because the power was off when the cell phone was in storage, so the court could have rationally concluded that counsel reasonably consulted with an expert to determine and explain the absence of the messages. CSC fails to establish an abuse of discretion on this ground.

7. *Other Reasonableness Factors*

Several factors have been identified as relevant to the calculation of a reasonable attorney fee, including the nature of the litigation, its difficulty, the amount at stake, the skill required, the time incurred, the experience and skill of counsel, the degree of success, and the importance of the litigation. (E.g., *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 168.)

In this regard, CSC insists this was an extremely simple case, it required little discovery, only minimal damages were at issue, no other relief was sought, and Froncillo had little success in recovering damages. We have already addressed CSC's arguments concerning the amount of damages, relief, and relative success. And CSC's arguments regarding the complexity of the case and degree of required discovery do not persuasively show the attorney fees award was excessive, since CSC does not explain

⁴ The significance CSC attaches to these points is unclear. In its reply brief, CSC asserts it is *not* arguing that the fee award should be adjusted downward to eliminate the time Froncillo's attorneys spent on punitive damages issues and in dealing with lost text messages. But later in the same brief, CSC argues that "[t]he time spent on the punitive damages witnesses was not necessary or useful to proving the basic liability issues in this case," and CSC should not be charged for Froncillo's counsel's efforts to fix a problem that was created by Froncillo and his attorneys. Whether waived, abandoned, or lacking in merit, CSC's argument is unavailing.

what deduction would be appropriate or what work should not have been done. Indeed, CSC does not identify one entry in the list of services that was inappropriate on this ground or one amount that was overcharged.

8. *CSC's Rubber Stamp Argument*

Lastly, CSC argues that the court did not explain at the hearing or in its written order exactly why it was granting the motion in the amount Froncillo requested (i.e. with the 25 percent reduction), and it did not specifically mention that Froncillo's damages were below the \$25,000 unlimited jurisdiction threshold and the requested attorney fees were 600 times more than he recovered. While recognizing that the court had no obligation to issue a formal statement of its reasons for the order, CSC nonetheless urges that this shows the court abrogated its responsibility in failing to consider the amount of damages awarded as compared to the amount sought and the significance of the overall relief in relation to the attorneys' hours expended. It insists "[t]here is nothing in the record to indicate that the trial court even considered whether to exercise this discretion in this case." It even goes so far as to assert that "the trial judge simply rubber-stamped [plaintiff's] fee request, without any discussion, and apparently without any analysis of whether the fee being requested actually was reasonable under the circumstances."

To obtain relief on appeal, however, CSC must do more than cast unsubstantiated aspersions on the trial court. The fundamental presumption is that the trial court knows and followed the law, and "[a]ll intendments and presumptions are indulged to support [the ruling] on matters as to which the record is silent." (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563.) Certainly, the trial court in this matter was keenly aware of the case – since it presided over the trial – and was repeatedly made aware of *Chavez* and CSC's position through the briefing and hearings on both CSC's motion to strike or tax costs and Froncillo's motion for attorney fees. Based on our review of the record, the far better inference is that the trial court carefully considered but ultimately rejected the arguments CSC had raised, rather than ignoring them or deciding not to follow the law. (See *Jones v. Union Bank of California* (2005) 127 Cal.App.4th

542, 550 [“we must assume the judgment or order [on attorney fees] is correct except where contradicted by the record”].)

CSC has failed to establish error as to the trial court’s order granting Froncillo’s attorney fees.

B. Motion to Strike or Tax Costs

Noting that the discretion to deny or limit costs under Code of Civil Procedure section 1033, subdivision (a) applies to costs besides attorney fees, CSC contends the court erred in awarding Froncillo all of the costs he requested in his cost memorandum (except as to the item his attorneys withdrew at the hearing). Specifically, CSC repeats its argument that the court did not appear to exercise its discretion, contending there is nothing in the written order or hearing transcript indicating that the court considered Froncillo’s limited success or whether costs should be denied due to his failure to “take advantage of the cost- and time-saving advantages of limited civil case procedures.” (*Chavez, supra*, 47 Cal.4th at 982.)

Again, however, CSC’s argument is misplaced. To obtain reversal on appeal, an appellant must affirmatively establish from the record that the court erred; there being no indication from the record here that the court was unaware of its discretion or refused to exercise it, CSC has failed to demonstrate error.

In the trial court, CSC had asserted objections to specific cost items, but it does not argue those points in its appellate briefs. Those arguments are accordingly waived. (*Tiernan v. Trustees of Cal. State University and Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

CSC has failed to establish error in the trial court’s award of costs to Froncillo.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.